

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

VARIETY CHILDREN'S HOSPITAL,  
d/b/a NICKLAUS CHILDREN'S  
HOSPITAL,

Petitioner,

vs.

Case No. 17-4349BID

DEPARTMENT OF HEALTH,

Respondent,

and

A.W. HOLDINGS, LLC, d/b/a  
BENCHMARK HUMAN SERVICES,

Intervenor.

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RECOMMENDED ORDER

On August 30 and 31, 2017, a final hearing was held in Tallahassee, Florida, before Robert L. Kilbride, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the Department of Health's ("Department") intended award of the contract under Request for Proposals DOH16-028, Local Early Step ("LES") Program offices ("the RFP"), to Intervenor A.W. Holdings, LLC, d/b/a Benchmark Human Services ("Benchmark"), is contrary to the Department's governing statutes, rules, policies or the specifications of the RFP, and is clearly erroneous, contrary to competition, arbitrary or capricious.

PRELIMINARY STATEMENT

The Department issued the RFP to obtain proposals from organizations to offer services as LES Program offices for the Department's Division of Children's Medical Services covering 15 geographical regions throughout the state of Florida. Proposals were received by the Department from 16 respondents. Petitioner, Variety Children's Hospital, d/b/a Nicklaus Children's Hospital ("NCH"), the incumbent provider, and

Benchmark filed proposals for the Southernmost Coast region. Benchmark's proposal was scored the highest for the Southernmost Coast. The Department posted its intent to award contracts for all statewide regions on July 10, 2017. This included the intent to award the Southernmost Coast region to Benchmark.

NCH filed a timely notice of intent to protest on July 13, 2017, and followed with a timely formal protest on July 24, 2017, challenging the award. Benchmark subsequently filed a notice of intervention and joined these administrative proceedings.

On August 30 and 31, 2017, a final evidentiary hearing was held, attended by all parties. NCH called four witnesses: Nancy T. Humbert, executive vice president of Ambulatory Services and External Affiliations for NCH; Josepha Diaz, regional director of Ambulatory Services for NCH; Brittany Jada-Layne Padilla of NCH's Office of Sponsored Programs; and Janet Dagnesses, interim director of NCH's LES program.

The Department called five witnesses. The Department called Dawn Lynch of the Department's Bureau of Early Steps and Newborn Screening, and Diana Trahan, from the Office of Purchasing for the Department. The Department also called the three RFP evaluators, (1) Stephanie McMillon, the legislative and communications coordinator for the Department's Bureau of Early Steps; (2) Reneeka Rogers, a contract manager with the Department's Division of Disease Control and Health Protection;

and (3) Claudia Kassack, a contract manager with the Department's Division of Children's Medical Services.

Benchmark, as Intervenor, called one witness, Angie Heller, a regional director of Children's Services for Benchmark.

Prior to the hearing the parties filed a Joint Prehearing Stipulation listing agreed-upon facts, issues of law, and exhibits. Pursuant to the parties' stipulation, 14 joint exhibits were admitted at the start of the hearing. NCH Exhibits 1 through 10, 14 through 53, and 55, and Benchmark Exhibits 1 and 2, were received into evidence. NCH Exhibits 11 and 12 were admitted into evidence but only portions of each document were considered by the undersigned. NCH Exhibits 54 and 56 through 59 were received into evidence but later withdrawn.

The Department used the original proposals to the RFP submitted by NCH and Benchmark as demonstrative aids during the hearing. They were not offered or received into evidence.

Facts stipulated to in the Joint Prehearing Stipulation are cited as "Stip." followed by the designated paragraph in the Joint Prehearing Stipulation. Joint Exhibits will be referred to as "Jt. Ex." followed by assigned exhibit number, and page number when necessary. For Joint Exhibit 4, NCH's Proposal, page numbers referenced are "Page (number)" in the bottom right hand side of each page. NCH's and Benchmark's Exhibits will be referred to as "NCH Ex." and "Benchmark Ex.," respectively,

followed by the assigned exhibit number, and page number when necessary.

#### FINDINGS OF FACT

Based on the evidence presented at the hearing, and the record as a whole, the undersigned makes the following findings of material and relevant facts:

##### I. Background to This RFP

1. On or about April 21, 2017, the Department issued the RFP for organizations to serve as LES Program offices for the Department's Division of Children's Medical Services. Stip. 1 and 4.

2. The LES Program offices around the state implement the early intervention system of care for families of infants and toddlers, birth to 36 months, with a developmental disability that are determined to have a developmental delay, or who are at risk of developmental delay based on a physical, medical or mental condition. The LES program, and provider chosen, provides developmental evaluation and early intervention services in the LES service areas. Jt. 1:3.

3. Proposals were sought by the Department for 15 geographical regions or "service areas" around the state of Florida identified in the RFP. Stip. 4; Jt. Ex. 1:5. The region in dispute in this bid protest case is the Southernmost Coast

region, which includes Monroe County and a southern part of Miami-Dade County. Jt. Ex. 1.

4. Two Addendums to the RFP were issued: Addendum I on May 9, 2017, and Addendum II on May 11, 2017.

5. Addendum I answered written questions submitted by potential respondents and revised certain sections of the RFP. Jt. Ex. 2. One section revised was Section 6.2 of the RFP, entitled "Evaluation Criteria," which was modified to delete repetitive language, but made no changes to the allotted points for each evaluation criteria. Jt. Ex. 2:5.

6. Addendum II made a change to Section 7, "Subcontractors," of the RFP. Jt. Ex. 3.

7. NCH did not challenge the specifications set forth in the RFP or the two Addendums. Stip. 3.

## II. Responses to the RFP

8. The Department received proposals to the RFP from 16 respondents in early June 2017. Jt. Ex. 14.

9. NCH submitted a response for the Southernmost Region, where it is currently the incumbent LES provider for the Department. NCH had previously been awarded the contract for the same region through at least two competitive processes since 2011.

10. The former director of NCH's LES Program, Marc Welsh, who had prepared the responses to the previous solicitations,

departed from NCH in May 2017. He did not prepare NCH's proposal to this RFP. NCH Ex. 45:13; NCH Ex. 47:9. There was evidence indicating that Welsh considered NCH's response to this new RFP as only "a formality," based on his past experience.

11. The original proposal from NCH totaling 287 pages, and used as a demonstrative exhibit at the hearing, was submitted to the Department unbound. The first 22 pages of NCH's proposal were consecutively numbered. The remaining 265 pages of attachments did not have consistent numbering.

12. All of the Department's technical evaluators commented that they found NCH's proposal difficult or hard to follow and compare and cross-reference with corresponding portions of the RFP.

13. It was clear to the undersigned that the three evaluators felt that NCH's general formatting and presentation of its proposal was lacking in quality and structure. This complicated and affected their review.

14. The more persuasive evidence indicated that NCH's proposal did not always track the numbering system found in the RFP as well as Benchmark's proposal did. For example, in Section 3.0 of the RFP is the "Scope of Services." However, in NCH's proposal, Section 3.0 is entitled "Description of Staffing." Jt. Ex. 1:2; Jt. Ex. 4:12.

15. The evidence also indicated that the tasks outlined in NCH's proposal were not addressed satisfactorily or consistently in the same order they appeared in the RFP. For example, Task G. is listed in the NCH proposal's Cross Reference as being in Section 4.9 of the NCH proposal (no page number provided), and Task H is listed as being in Section 4.2 of the NCH proposal (no page number provided). Jt. Ex. 4, .3.

16. Benchmark submitted a proposal to the RFP that covered all 15 service areas, including the Southernmost Region. Stip. 5.

17. In contrast to the NCH proposal, the Department found that Benchmark's proposal was professionally bound, and the pages were consecutively numbered. It also tracked the section numbers from the RFP in a better fashion and quoted and highlighted the sections from the RFP above the relevant response. Jt. Ex. 5.

18. The Benchmark proposal included a "Staffing Plan Template (Exhibit 4)" and an "Expenditure Allocation Form (Exhibit 2)" for each of the 15 service areas. Benchmark stated in the "Executive Summary" portion of its proposal that it is "responding to all 15 Early Steps Program regions." Jt. Ex. 5, combined pp. 7-8.

19. This formatting and content met the requirement of the RFP found in Section 4.2.4, under the proposal format section, which stated:



4.2.4 Proposals must clearly indicate the Early Steps service area (or areas) of the state that the respondent is applying to operate. A proposal may be submitted for multiple service areas; however, a separate Expenditure Allocation form (Exhibit 2) and Staffing Plan form (Exhibit 4) must be submitted for each service area being applied for.

Jt. Ex. 1:18.

### III. The RFP Drafting Process

20. The RFP was drafted by personnel from the Bureau of Early Steps and Newborn Screening ("Bureau of Early Steps") with assistance from the Office of Purchasing.

21. Dawn Lynch, a 17-year employee with the Department (15 years of which have been spent in the Bureau of Early Steps), was primarily responsible for drafting the RFP on behalf of the Bureau of Early Steps and the Department.

22. Lynch took over the job of drafting the RFP in December 2016 after an initial rough draft was created by another employee who left the Department. Lynch had been a contract manager for LES contracts and is currently a program consultant and technical assistant for five LES providers.

23. Lynch worked with Diana Trahan, the purchasing manager assigned to the RFP. Trahan provided technical knowledge on the RFP process and monitored the RFP through to its conclusion and award.

24. Lynch also developed the evaluation criteria found in Section 6.2 of the RFP and the corresponding Evaluation Scoring Sheets that were used by the technical evaluators when they did their evaluations.

25. The evaluation criteria in Section 6.2 of the RFP were broken down into eight sections, each of which cross-referenced the applicable section of the RFP. Each section was assigned a maximum number of awardable points ranging from 50 points to 300 points. The total maximum points that could be awarded for the Evaluation Criteria section was 1,200.

26. The final version of Section 6.2, as revised in Addendum I to the RFP, appeared as follows:

<b>A. Evaluation Criteria</b>	<b>Maximum Points</b>
Executive Summary and Corporate Capability: Organization & Experience, Section 3.1	
Background and Organization, Section 4.3.3	100
Experience operating programs providing developmental, educational, or mental health services or programs targeting children, families or special needs populations of any age. Section 3.2.7 developmental, educational, or mental health services or programs targeting children, families or special needs populations of any age.	100
Position Summary of key administrative positions	50
Approach and Methodology, Sections 3.2 and 3.2.2	

Proposed Program Design and Description as based on Scope of Services, Section 3.2	200
Ability to provide program services per task list Section 3.2.2, Public Awareness Plan, Business Continuation Response Plan, Funding Response Plan and Provider Recruitment Plan, Section 3.2.2, s-u	300
Staffing Plan (Exhibit 4)	200
Financial Statements, Section 4.8.3	150
Expenditure Allocation, per Attachment A, (Exhibit 2)	100
<b>TOTAL MAXIMUM POINTS POSSIBLE</b>	<b>1,200</b>

27. The fifth section, entitled "Ability to provide program services per task list Section 3.2.2, Public Awareness Plan, Business Continuation Response Plan, Funding Resource Plan and Provider Recruitment Plan, Section 3.2.2, s-u," was allotted a total of 300 awardable points.

28. Section 3.2 of the RFP is the "Scope of Services" section, and Section 3.2.2 is a detailed list of tasks that a respondent would be required to perform under any resulting contract. Jt. Ex. 1:10-11. This 300-point section awarded a respondent for how well it described and would provide program services as specified in the task list of the RFP.

29. The RFP was first advertised on the vendor bidding system on April 21, 2017.

30. Normally, the Department gives 30 days for respondents to submit proposals in response to an RFP. For this RFP, the respondents had until June 2, 2017, which was just over six weeks to submit their proposals. This extended timeframe was provided to allow vendors adequate time to prepare and submit their proposals.

31. Proposals for the RFP were received by the Department on various dates before June 2, 2017. They were opened on June 2, 2017. Stip. 6.

32. After the proposals were opened, the Department's Purchasing Office first went through an evaluation checklist to determine the general responsiveness of the proposals received with the mandatory requirements found in Section 4.10 of the RFP.

33. The Department determined that both NCH and Benchmark's proposals met the responsiveness requirements.

34. After the proposals were determined to meet mandatory responsiveness requirements, the evaluators at the Department were provided a list of the respondents' names to review and were asked to review and sign conflict of interest forms, if appropriate. None of the three evaluators in this matter listed any conflict of interest with any of the respondents, including NCH and Benchmark.

35. After completing the conflict of interest forms, the proposals were reviewed between June 7 and June 27, 2017, by the

three technical evaluators selected and one financial evaluator. The evaluators were given additional review time, approximately three weeks, because there were several state regions to review.

#### IV. The Evaluators Selected

36. The evaluators chosen for the technical review of the RFP were Claudia Kassack, Stephanie McMillon, and Reneeka Rogers, all employees of the Department.<sup>1/</sup> Stip. 8.

37. The evaluators were selected by the Bureau of Early Steps and approved by the bureau chief for the Office of Purchasing, Roger Twitchell.

38. The Bureau of Early Steps based its selection of the technical evaluators on whether the evaluator had some knowledge of the Early Steps Program, balanced against a need to ensure that there were no conflicts of interest. They were required to understand programmatically what LES providers do.

39. More specifically, the Bureau of Early Steps was concerned that the chosen evaluators did not have a conflict of interest, such as working with a LES provider or having a child in the Early Steps Program.

40. Each evaluator received a PowerPoint training package, entitled "Competitive Procurement Evaluation Training".<sup>2/</sup> Evaluators were instructed to contact the Purchasing Manager if they had any questions related to the training.

41. The PowerPoint, provided to the evaluators in advance of reviewing the proposals, related generally to competitive procurements. It did not include any specific information relating to the Early Steps Program.

42. Based on the more persuasive evidence and reasonable inferences from the evidence, the undersigned concludes that prior to reviewing the NCH and Benchmark proposals in June 2017, each of the technical evaluators was familiar with, had knowledge of, or understood the LES Program sufficient to effectively score the proposals.

#### V. The Three Evaluators

43. Stephanie McMillon had been with the Department in the Bureau of Early Steps since January 13, 2017. She has a bachelor of science degree. Prior to coming to work for the Department, she had worked for the Florida Legislature and Florida A&M University. McMillon is the Bureau of Early Steps' legislative and communications director. This entails working with communications and legislative implementation and strategic plans, and project management for the Bureau of Early Steps.

44. Beginning in January 2017, and continuing through the date she began her evaluation of the proposals, she received Early Steps training--online and in-person. Her job at the Department requires that she understand the Early Steps Program to effectively communicate with the public.

45. McMillon was selected as an evaluator in February 2017. She candidly indicated on her Evaluation Team Acknowledgment Form that her knowledge of the Early Steps Program, at that point, was "very limited." NCH. Ex. 18.

46. However, by the time she actually conducted the evaluations in June 2017, her knowledge of the Early Steps Program had progressed and developed to the point where she had "quite a bit of program knowledge."<sup>3/</sup>

47. Although McMillon had not served as an evaluator on a competitive solicitation, she did perform a comparable review function using a rubric and criteria to score essays for a quality enhancement program when she was employed by Florida A&M University.<sup>4/</sup>

48. Reneeka Rogers had been employed by the Department for approximately 19 years. She has a bachelor's degree in public management and a master's degree in business administration. She is currently a contract manager with the Department's Division of Disease Control. She manages several contracts, assists in drafting the contracts, monitors the contracts, and processes contract invoices.

49. Rogers went through a three-day contract manager training that the Department provided in 2001, and has gone through one-day recertification training for contract managers every two years since then. She is also a Florida Certified

Contract Manager, which requires in-depth state training for contract managers that manage contracts valued at \$100,000 or more.

50. During her 19 years with the Department, Rogers was in the Division of Children's Medical Services for 11 years.

51. Rogers did not work in the Bureau of Early Steps, but was familiar with the Early Steps Program since her work at the Department required her to collaborate with the Bureau of Early Steps on payment issues. She had some understanding of the Early Steps Program.

52. Notably, Rogers had experience as an evaluator of competitive contracts. She had previously evaluated two other Department competitive solicitations or RFAs. She had also been a negotiator on a Department Invitation to Negotiate in 2013.

53. Claudia Kassack had been employed by the Department in the Division of Children's Medical Services for ten years, two years of which were in the Bureau of Early Steps. She is currently a contract manager program liaison for Child Protection Teams and Sexual Abuse Programs around the state.

54. Kassack has a bachelor's degree in special education and a master's degree in education administration. She is also a Florida Certified Contract Manager. She currently manages 14 contracts for the Department. She previously worked on several competitive solicitations.



55. The Department outlined the primary reasons for selecting these three evaluators. Kassack was selected, in part, based on her number of years of experience with the Early Steps state office, and because she had not worked directly or closely with a LES provider.

56. McMillon was selected, in part, because she was an employee of the Bureau of Early Steps, and not a program manager. Further, she was relatively new to the Department and had no day-to-day dealings with any particular LES provider that might adversely influence her evaluations.

57. Rogers was selected because she had been a long-time employee of the Division of Children's Medical Services and because of her years of contract management experience.

58. All three evaluators were qualified to be evaluators and, "collectively" as a team, had an adequate level of experience and knowledge in the Early Learning Program areas and services areas for which the services under the RFP were sought.

59. From the evidence and facts presented, a fair and reasonable finding is made that these three evaluators together had adequate collective experience and knowledge concerning the Early Steps Program at the time they performed their evaluations.

#### VI. The Scoring of the NCH and Benchmark Proposals

60. The evaluators were each given an "Evaluation Criteria Scoring Sheet" ("Scoring Sheet"), which was utilized for the

proposal submitted by NCH and Benchmark. The Scoring Sheet sections match and track the evaluation criteria in Section 6.2 of the RFP. Jt. Ex. 6.

61. The Scoring Sheet divided the 300 points in the RFP for Section 3.2.2 by the specific tasks they represent on the Scoring Sheet. The actual points assigned to each task were based on the importance of the tasks to the LES Program.

62. The Bureau of Early Steps, specifically its representative, Lynch, determined the point allocation, with input from others in the Bureau of Early Steps, including her supervisor.

63. The Scoring Sheet was also reviewed by the purchasing manager assigned to the RFP to verify that each specified criteria on the Scoring Sheet matched and tracked the RFP.

64. The Scoring Sheet included a total of 1,200 maximum points, matching the points reflected in Section 6.2 of the RFP. Jt. Ex. 1; Jt. Ex. 8.

65. Number 36 on the Scoring Sheet related to Section 3.2.2.ff of the RFP and had a stated value of five points. This criterion was determined only to apply to proposals for the North Dade, Northeastern, or North Central regions.

66. As a result, the evaluators were advised when they began their evaluations to give no points in this section for any region, except the three "north" regions. This resulted in the

other 12 remaining regions, including the Southernmost Coast Region, being able to score a maximum amount of 1,195 points.

67. This "not-applicable" or resulting zero score for Scoring Sheet criteria number 36 was applied across the board to all regions but the three "north" regions. As a consequence, there was no adverse impact on any respondents in the remaining 12 regions. Jt. Ex. 8.

68. Padilla, who drafted NCH's proposal with Dagnesses, testified that had the "sub-criteria" and values outlined in the Scoring Sheet been disclosed in advance, she would have provided more detail in the subsections the Department assigned a greater weight.

69. Regardless, NCH did not offer any specific examples of additional information that would have been provided, nor did NCH offer any persuasive evidence or testimony showing that any such additional information would have materially increased NCH's score or resulted in NCH receiving a higher total score than Benchmark.

70. Pointedly, and in fact, all responders were affected equally by the Department's use of the sub-criteria and points allotted to each sub-criteria, and neither party gained any sort of advantage or edge over the other.

71. The proposals were made available to the evaluators on June 7, 2017, and were returned by the evaluators to the

purchasing manager on approximately June 27, 2017, with scoring completed.

72. The technical evaluators did not collaborate in any way during the evaluation period and were not aware of each other's identity.<sup>5/</sup>

#### VII. Evaluation Process Used by the Evaluators

73. Each evaluator testified about the general process they used to evaluate the proposals by NCH and Benchmark.

74. McMillon read each proposal through twice and used the entire evaluation time period to read and score the evaluations. She felt that NCH's proposal formatting was a bit different and hard to follow, in that it made up its own cross-reference numbering.

75. Rogers read through each proposal and then scored them by referring back to the proposals, the RFP section being scored, and the Scoring Sheet. It took her three to four hours to review each proposal, depending on how well they were organized. Rogers also found the NCH proposal harder to evaluate because of its format.

76. Kassack read through each proposal, and then went back through for each scoring criteria, also referring to the RFP. She spent an hour to an hour and a half reviewing each proposal.

77. As previously mentioned, all three technical evaluators found the NCH proposal to be more difficult or hard to follow than Benchmark's.<sup>6/</sup>

78. In several respects, the information in the crosswalk prepared by NCH and used at the hearing differs from the "Cross Reference" that was in the NCH proposal, specifically the information in "Location in Proposal" column of the crosswalk. Jt. Ex. 4; NCH Ex. 8. The "Location in Proposal" column of the crosswalk generally contains more detail than the Cross-Reference, and additional details that were not provided in the NCH proposal.

79. Evaluators McMillon and Rogers scored NCH a zero on criterion 33 because they could not find the information. Jt. Ex. 8 and 10.<sup>7/</sup>

80. McMillon and Rogers both testified that after reviewing the scores again, specifically any "zero" they scored on NCH's proposal, they would not change their scores. This was due to the fact that they either could not find the information or the criterion was not adequately addressed in NCH's proposal.

81. There was no persuasive evidence presented that any of the technical evaluators did not understand the criteria of the RFP when they performed their evaluations or that their evaluations were contrary to the RFP specifications.

82. Nor was any evidence presented to show that any of the evaluators were biased for or against either NCH or Benchmark. To the contrary, the facts show that the evaluators were chosen, in part, for their lack of bias, and each evaluator completed conflict of interest forms confirming this fact.

83. The total average scores given by the evaluators for the technical review of NCH's proposal for the Southernmost Region were Kassack--910 points; McMillon--974 points; and Rogers--632 points. Stip. 9.

84. The total average scores given by the evaluators for the technical review of Benchmark's proposal for the Southernmost Region were Kassack--967 points; McMillon--969 points; and Rogers--795 points. Stip. 10.

85. The evaluation of the financial portion of the proposals was performed by Tuan Le, an employee of the Department. Le scored the financial portion of NCH's proposal a total of 150 points. Le scored a total of 90 points for the financial portion of Benchmark's proposal for the Southernmost Region. Stip. 11. His scores were added to the technical proposal scores and then averaged for a final score.

86. The final total average score given to NCH was 989. The final total average score given to Benchmark was 1,000 for the Southernmost Coast region. Jt. Ex. 14.

87. The Department posted a notice of intent to award for the RFP on July 10, 2017. The intent to award covered all 15 regions. Based on the total average scores, it listed Benchmark as the intended awardee for the Southernmost Region. Jt. Ex. 13; Stip. 12.

#### CONCLUSIONS OF LAW

##### I. General Law Applicable in Bid Protest Cases

88. The Division of Administrative Hearings has jurisdiction pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes (2017).<sup>8/</sup>

89. This bid protest is a "de novo" proceeding to determine whether the Department's notice of intent to award the contract to Benchmark is contrary to the Department's governing statutes, rules, or the RFP specifications.

90. In a bid protest involving a request for proposals, section 120.57(3)(f) provides:

[T]he burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

91. The nature of a "de novo" review in a bid protest proceeding has been explained as follows: the phrase 'de novo hearing' is used to describe a form of 'inter-agency review,' the object of which is to evaluate the action taken by the agency. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency. State Contracting & Eng'g v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

92. The burden of proof rests with Petitioner, NCH, to prove a violation of the statute by a preponderance of the evidence since it is the party opposing the proposed agency action. § 120.57(3)(f), Fla. Stat. See State Contracting & Eng'g v. Dep't of Transp., 709 So. 2d at 609.

93. The method of review of the agency's proposed action in a bid protest proceeding by the Administrative Law Judge has been succinctly summed up as follows:

The Hearing Officer need not, in effect, second guess the members of evaluation committee to determine whether he and/or other reasonable and well-informed persons might have reached a contrary result. [A] public body has wide discretion in the bidding process and its decision, when based on an honest exercise of the discretion, should not be overturned even if it may appear erroneous and even if reasonable persons may disagree. The hearing officer's sole responsibility is to ascertain whether



the agency acted fraudulently, arbitrarily, illegally, or dishonestly.

Scientific Games, Inc. v. Dittler Bros., Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991) (per curiam) (citations and quotation marks omitted).

94. The legal terms and standards found in section 120.57(3)(f), and generally related to competitive procurement, have been explained and interpreted by the courts over the years. A brief review of those cases is helpful.

95. A decision is "clearly erroneous" when, although there is evidence to support it, after review of the entire record, the tribunal is left with the definite and firm conviction that a mistake has been committed. U.S. v. U.S. Gypsum Co., 333 U.S. 354, 395 (1948).

96. An agency's action may also be found "clearly erroneous" if the agency's interpretation conflicts with the plain and ordinary intent of the law. See Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004). Conversely, an award or agency decision is not clearly erroneous if its construction falls within the permissible range of interpretations. Id.

97. "An action is arbitrary if it is not supported by logic or the necessary facts, and capricious if it is adopted without thought or reason or is irrational." Hadi v. Liberty Behavioral

Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006); Agrico Chem. Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

98. If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. Further, "[w]hether [an agency] acted arbitrarily is generally controlled by a determination of whether [the agency] complied with its own proposal criteria as outlined in the [procurement document]." Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Comm'rs, 955 So. 2d 647, 653 (Fla. 1st DCA 2007).

99. As long as the agency acted in good faith, its judgment should not be interfered with, even if reasonable persons could differ and even if the decision may seem erroneous to some persons. Volume Servs. Div. v. Canteen Corp., 369 So. 2d 391, 395 (Fla. 2d DCA 1979) (citing Culpepper v. Moore, 40 So. 2d 366 (Fla. 1949)).

100. "An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding." Wester v. Belote, 103 Fla. 976, 138 So. 721 (1931).

The objectives of competitive bidding are the following:

To protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense;

to close all avenues to favoritism and fraud in various forms; to secure the best values for the public at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the government, by affording an opportunity for an exact comparison of bids.

Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977) (per curiam)). See also Wester v. Belote, 138 So. at 982.

101. In sum, the law is clear that overturning an agency's award in a competitive procurement scenario is only permitted under persuasive, clear and narrow circumstances. This is true since judges reviewing a contract award are not permitted to second-guess or substitute their own judgment for that of the agency. See Generally Scientific Games, Inc., 586 So. 2d at 1131.

## II. Selection of the Evaluators

102. NCH contends that the Department selected technical evaluators that did not have the "necessary knowledge, training, and experience" required by section 287.057(16)(a), Florida Statutes, and that they were biased or prejudiced in their evaluations against NCH." Petition, pp. 9 and 16.

103. There is no persuasive or credible evidence in the record to prove any bias against NCH or in favor of Benchmark in the selection of the evaluators by the Department, or in the performance of the evaluations by the technical evaluators.

104. The evidence presented by the Department's witnesses showed that the Department placed a sufficient amount of emphasis on selecting evaluators that were not biased. Likewise, all of the evaluators attested to the fact that they had no conflict of interest with any of the respondents prior to beginning the evaluation of the proposals.

105. Likewise, no persuasive evidence was offered to show that any of the evaluators themselves harbored any bias for or against NCH or Benchmark when they performed their evaluations.

106. The Department was required by statute to select evaluators "to evaluate proposals . . . who collectively have experience and knowledge in the program areas and service requirements for which . . . contractual services are being sought." § 287.057(16)(a), Fla. Stat.

107. The evidence showed that each evaluator was selected based, in part, on their work experience, as well as their lack of potential bias.

108. All three technical evaluators had an adequate working knowledge of the Early Steps Program, as well as a fundamental understanding of the RFP requirements when their evaluations were performed. This was developed either through their work experience and/or training prior to starting the evaluation process.

109. Significantly, even though their work experience at the Department varied, they collectively met the statutory requirements, both in experience and knowledge of the program, as well as the day-to-day workings of contracts.

110. McMillon, who gave NCH its highest score, had the least amount of experience with the Department and arguably with Early Steps. She was relatively new to the Bureau of Early Steps when she was selected as an evaluator, but this was seen as an asset since it eliminated any chance of bias. Notably, by the time she performed the evaluations, she had gained the necessary knowledge of the Early Steps Program.

111. Kassack and Rogers were selected because of their years of contract management experience, as well as their working knowledge of the Early Steps Program.

112. Kassack had worked in the Early Steps state office, and not with LES providers, so this fulfilled the requirement of not having day-to-day contact with any LES provider. Likewise, Rogers had sufficient familiarity with the Early Steps Program, having collaboratively worked with them.

113. The evaluators each received training on how to perform an RFP evaluation through the Competitive Procurement Evaluation Training PowerPoint. There was no evidence presented to show that this training was inadequate, insufficient or that

it failed to provide sufficient instruction on how to perform an evaluation of a competitive procurement.

114. Additionally, all of the evaluators had previously participated in either a competitive procurement review process or had performed evaluations using a scoring rubric, similar to an RFP process.

115. Agencies have significant discretion in selecting teams for the purposes of evaluating competitive proposals. See, e.g., Capital Grp. Health Servs. of Fla., Inc. v. Dep't of Admin., Case No. 87-5387BID (Fla. DOAH Mar. 9, 1988); and Fin. Clearing House, Inc. v. Off. of the Comptroller, Dep't of Banking & Fin., Case No. 97-3150BID (Fla. DOAH Nov. 25, 1997).

116. The Department is entitled to exercise its discretion and take reasonable means to balance its competing concerns of appointing evaluators who collectively, as a team, have experience and program knowledge, and avoiding evaluators who may have a conflict of interest. See Fin. Clearing House, Inc., Case No. 97-3150BID, RO at 26.

117. In a competitive procurement for services under section 287.057, the statute requires the selection of a group of evaluators that "collectively" possess "experience and knowledge," without assigning a required degree of requisite experience to any particular evaluator.

118. The word "collective" was added to section 287.057 in 2002. See Ch. 2002-207, HB No. 1977, Laws of Fla.

119. Prior to 2002, each team member presumably had to have their own individual knowledge and experience in the program area, and their qualifications were tested accordingly.

120. The legislative changes to section 287.057 in 2002 reveal the following underlined additions and strike through deletions were made:

(17) For a contract in excess of the threshold amount provided in s.287.017 for CATEGORY FOUR, the agency head shall appoint:

(a) At least three persons to evaluate proposals and replies who collectively have experience and knowledge in the program areas and service requirements for which commodities or contractual services are sought.

(b) At least three persons to conduct negotiations during a competitive sealed reply procurement who collectively have experience and knowledge in negotiating contracts, contract procurement, and the program areas and service requirements for which commodities or contractual services are sought.

~~(16) For requests for proposals, a selection team of at least three employees who have experience and knowledge in the program areas and service requirements for which contractual services are sought shall be appointed by the agency head to aid in the selection of contractors for contracts of more than the threshold amount provided in s. 287.017 for CATEGORY FOUR.~~

Ch. 2002-207, HB No. 1977, Laws of Fla.

121. The Staff Analysis accompanying House Bill No. 1977 describes that the new procurement law "Provides for two kinds of teams for procurement above category four: evaluation teams and negotiation teams, and provides for a make up for each." This description and analysis behind the law supports the argument that it is the collective knowledge of the "team" that controls-- not the experience or knowledge of individual team members.

122. The undersigned concludes that with respect to competitive procurements of services, the Legislature chose to shift the focus from individual qualifications to collective or team qualifications for legitimate and valid reasons.

123. Furthermore, NCH has not identified any criteria in the proposals that it claims were improperly scored by any of the technical evaluators as a direct consequence of an alleged lack of experience in the Early Steps Program.

124. Accordingly, NCH has failed to prove that the Department's selection of evaluators was clearly erroneous, arbitrary, or capricious. To the contrary, the Department's choice of evaluators reflected a reasonable effort to ensure that evaluators, as a team, were collectively familiar with the Early Steps Program and could meaningfully evaluate the proposals, yet be free from bias.



### III. Evaluation of the Proposals

125. NCH alleges that the Department's procedure for scoring the proposals departed from the scoring criteria set forth in the RFP in two primary ways: (1) the Department's use of the Scoring Sheet that broke down the 300-point section of the "Evaluation Criteria," identified above as the "Task List" section, into 32 separately scored sub-criteria--numbered 5 through 36 on the Scoring Sheet; and (2) the Department's decision not to score criterion 36 for proposals submitted outside of the North Dade, Northeastern, and North Central service areas, ostensibly because the task specified in item 36 only applied in these service areas.

126. The Department's use of a Scoring Sheet with sub-criteria was not inconsistent with or contrary to the RFP. Nor did the use of sub-criteria introduce new specifications into the process.

127. Likewise, the use of these sub-criteria did not change the Department's representation in the RFP that the items identified in the section would be collectively worth 300 points. The sub-criteria were all fully described and outlined in the RFP itself.

128. Moreover, NCH did not establish that the Department's failure to disclose the scoring of each sub-criteria on the Score Sheet placed NCH at a competitive disadvantage. Nor did NCH

establish that NCH would have been the higher-scored proposer had the scoring of the sub-criteria been disclosed. See Anchor Towing, Inc. v. Dep't of Transp., Case No. 04-1447BID (Fla. DOAH Oct. 29, 2004) ("By not proving that the Department's scoring methodology resulted in Petitioner's proposal receiving unfair treatment or Intervenor's proposal having somehow received an unfair competitive advantage due to the scoring methodology employed, Petitioner has failed to meet its burden of proof on the issue of whether the Department's scoring methodology was arbitrary and capricious.").

129. Accordingly, NCH has failed to prove that the Department's use of the Scoring Sheet was clearly erroneous, contrary to competition, arbitrary, or capricious.

130. The Department's decision not to score criterion 36 for proposals submitted outside of the North Dade, Northeastern, and North Central service areas was also not inconsistent with the RFP. The equal application and effect of the removal of this scoring section to all competing respondents in the same regions is self-evident and avoided any negative impact.

131. Significantly, NCH did not offer any persuasive examples of what changes it would have made to its proposal had it understood that the weight of the Task List section would be five points less, nor did NCH offer any compelling evidence or testimony showing how any such changes to its proposal would have

increased NCH's score or resulted in NCH receiving a materially higher score than Benchmark.

132. Accordingly, there was nothing clearly erroneous, contrary to competition, arbitrary, or capricious about the Department's decision to assign separate scores to respondents' ability to fulfill each criteria set forth in Section 3.2.2.ff and criterion 36.

133. NCH alleges that the significant variation in the scoring between the technical evaluators indicates or suggests that the evaluation process was deficient in some way. However, variation in scoring by evaluators may be expected where, as here, the evaluators worked independently. See, e.g., Hemophilia Health Servs., Inc. v. Ag. for Health Care Admin., Case No. 05-2804BID (Fla. DOAH Dec. 2, 2005). In such circumstances, "[i]t can be expected . . . that some evaluators will generally assign lower scores than other evaluators; some evaluators will tend to assign higher scores." Id. Such variation is only problematic where it is proven that an evaluator "was inconsistent in the application of his or her own scoring approach to all proposals." Id.; see also, e.g., KMPG Consulting, Inc. v. Dep't of Rev., Case No. 02-1719BID (Fla. DOAH Sept. 26, 2002). No such evidence was presented in this case.

134. The evidence presented at the hearing demonstrates variation in scoring between the technical evaluators, with

Kassack and McMillon generally scoring proposals significantly higher than Rogers. However, NCH has not proven that any of the technical evaluators were "inconsistent in the application of [their respective] scoring approach[es]" in their evaluation of the proposals of NCH and Benchmark for the Southernmost Coast region.

135. NCH claims that the scores given to its proposal by Rogers were so unreasonably low as to be arbitrary and capricious. However, consistently low scores do not necessarily mean they were arbitrarily given. There was no persuasive evidence that Rogers or any of the evaluators arbitrarily assigned any score.

136. In short, NCH has not demonstrated that Rogers or any of the technical evaluators held NCH to a different standard than Benchmark.

137. In sum, "[i]n the absence of evidence showing fraud or misconduct, or evidence of mistake or illogical reasoning by evaluators, it is not the role of the Administrative Law Judge to second guess the evaluators to determine whether their judgments about competing proposals were reasonable or whether other well-informed persons might have reached contrary results."

Scientific Games Inc. v. Dittler Brothers Inc., 586 So. 2d at 1131, and Hemophilia Health Servs., Inc., Case No. 05-2804BID, RO at 33. NCH has not proven fraud, misconduct, mistake, or

illogical reasoning on the part of the Department's chosen evaluators.

138. Accordingly, NCH has not proven that the scoring of the NCH and Benchmark proposals, by any of the evaluators, was clearly erroneous, contrary to competition, arbitrary, or capricious.

139. NCH's challenge at the hearing to Benchmark's responsibility as a bidder was unpersuasive. A responsible bidder is a bidder "who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance."

§ 287.012(25), Fla. Stat.; American Eng'g & Dev. Corp. v. Town of Highland Beach, 20 So. 3d 1000, 1001 (Fla. 4th DCA 2009).

140. NCH did not demonstrate that Benchmark was not a responsible bidder or that Benchmark lacks the capability to perform the contract requirements.

141. In closing, several principles of public bidding law announced by the Florida Supreme Court in the frequently cited case of Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988), are worth repeating:

Initially, we note the strong judicial deference accorded an agency's decision in competitive bidding situations. A public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be

overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.

Liberty County, 421 So. 2d at 507. See also Culpepper v. Moore, 40 So. 2d 366 (Fla. 1949); William A. Berbusse, Jr., Inc. v. North Broward Hospital Dist., 117 So. 2d 550 (Fla. 2d DCA 1960).

In Liberty County, we recognized the broad discretion legislatively accorded public agencies and held that an agency's decision based upon an honest exercise of this discretion cannot be overturned absent a finding of "illegality, fraud, oppression or misconduct." Liberty County thus established the standard by which an agency's decision on competitive bids for a public contract should be measured.

Under the facts of this case and the applicable law, the undersigned concludes that the contract award to Benchmark should be upheld.

#### RECOMMENDATION

Based on the Finding of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered denying the Petition of Petitioner Variety Children's Hospital, d/b/a Nicklaus Children's Hospital, and affirming the Department of Health's Notice of Intent to Award to A.W. Holdings, LLC, d/b/a Benchmark Human Services.

DONE AND ENTERED this 31st day of October, 2017, in  
Tallahassee, Leon County, Florida.



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ROBERT L. KILBRIDE  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of October, 2017.

#### ENDNOTES

<sup>1/</sup> Mary Hilton was originally selected as an evaluator, but it was determined that her day-to-day management of one of the Department's current LES providers might cause or create a perception of bias in her evaluations. Hilton was replaced by Reneeka Rogers.

<sup>2/</sup> The training program was prepared by purchasing staff to avoid the necessity of having a public meeting where evaluators would learn each other's identity.

<sup>3/</sup> She testified that she conducted extensive research and study of the Early Learning Program beginning in February 2017 and continuing through June 2017.

<sup>4/</sup> As a practical matter, it is significant to note that her scoring of NCH was not the focus of NCH's challenge. In fact, she gave NCH the highest technical score out of all three evaluators. Additionally, she scored NCH higher than Benchmark.

<sup>5/</sup> The RFP disclosed at Timeline Section 2.4 that on June 7, 2017, the "Evaluation Team Members to begin [sic] evaluations

individually." There was no challenge by either party to this specification in the RFP.

<sup>6/</sup> A "Scoring Crosswalk" ("crosswalk") was prepared and used by NCH at the hearing. The crosswalk was helpful as a guide during the hearing. Dagnesses, one of the prime drafters of NCH's proposal, stated that the crosswalk was a guide to make things more simple than going through 200 pages. NCH Ex. 45:27. The crosswalk was not provided with NCH's original proposal, and was created exclusively for this bid protest. It was undisputed that the technical evaluators did not have it as a guide or pathway through the proposal review process. NCH Ex. 47:15. However, the need for and use of this crosswalk aide during the final hearing underscores the fact and demonstrates that NCH's proposal may have, as testified, been harder for the evaluators to follow, cross-reference, and navigate.

<sup>7/</sup> As previously mentioned, the evaluators did not have the benefit of the crosswalk when they reviewed NCH's proposal.

<sup>8/</sup> References to the Florida Statutes are to the 2017 version, unless otherwise indicated.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.