

**STATE OF FLORIDA  
DEPARTMENT OF HEALTH**

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

Petitioner,

vs.

DOH CASE NO. 2017-0212  
DOAH CASE NO. 17-4349

STATE OF FLORIDA,  
DEPARTMENT OF HEALTH,

Respondent, and

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

Intervenor.

\_\_\_\_\_ /

FINAL ORDER

A Recommended Order having been received, this matter is before the Department of Health ("Department") for the entry of a Final Order. This is a bid protest proceeding initiated by Petitioner Variety Children's Hospital d/b/a Nicklaus Children's Hospital ("NCH") in response to the Department's intent to award a contract for services to A.W. Holding, LLC d/b/a/ Benchmark Human Services ("Benchmark"). Having found that the Department's selection of Benchmark's proposal is not contrary to governing statutes, rules, policies, or specifications, the presiding Administrative Law Judge ("ALJ") Robert L. Kilbride issued a Recommended Order on October 31, 2017, recommending a Final Order be entered denying the NCH petition and affirming the Department's Notice of Intent to Award to Benchmark, following an administrative hearing. The Recommended Order is attached as Exhibit A. The Petitioner timely filed

exceptions which are attached as Exhibit B. Respondent Department filed responses to those exceptions, which are attached as Exhibit C. The Intervenor also filed a response to Petitioner's exceptions, which are attached as Exhibit D.

### **Standard for Reviewing Exceptions to Recommended Order**

In considering the exceptions to an ALJ's findings of fact, the general rule of deference is that an agency may reject or modify a finding of fact only if a challenged finding is not supported by competent, substantial evidence. Section 120.57(1)(l), Florida Statutes.

"Competent substantial evidence is such evidence that is 'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.'" *Comprehensive Medical Access, Inc. v. Office of Ins. Reg.*, 983 So. 2d 45, 46 (Fla. 1<sup>st</sup> DCA 2008)(quoting *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)).

In contrast to the ALJ's fact finding(s), an agency need not defer to his/her interpretations of statutes or administrative rules over which the agency has substantive jurisdiction. Section 120.57(1)(l), Florida Statutes. Upon review of the Recommended Order, the entire record, the exceptions filed by the Petitioner, and the responses filed by the Respondent and the Intervenor, the Department makes the following findings and conclusions.

### **RULINGS ON EXCEPTIONS**

Preliminarily, it is noted that the Department and Benchmark have prevailed in the Recommended Order. The ALJ concluded there is no basis for finding that the Department's intended award to Benchmark violated the applicable statutes, rules, policies, or the RFP, and thus recommended the bid protest petition be denied.

#### **Exception 1**

In Exception 1, NCH challenges a portion of Finding of Fact, paragraph 10, regarding a statement made by declarant Mark Welsh, a former director of NCH's Local Early Steps program. NCH contends Mr. Welsh's statement cannot support a finding of fact because it is hearsay. After carefully reviewing the Recommended Order and the arguments of the parties, I conclude the statement does not meet the hearsay definition, because the ALJ did not rely on it to prove that the Request For Proposal process was "more of a formality," as opposed to a bona fide competitive solicitation process.

Exception 1 is denied.

#### Exception 2

In Exception 2, NCH objects to Recommended Order paragraphs 51, 55, 58, 59, 108-112, and 124 because the evaluators, individually and collectively, failed to possess program experience and knowledge sufficient to meet the statutory requirements for RFP evaluation. Florida law, however, requires only that the Department appoint evaluators "who collectively have experience and knowledge in the program areas and service requirements for which [] contractual services are sought." Section 287.057(16)(a)(1), Florida Statutes. The Recommended Order findings regarding the fitness of the evaluators are supported by competent, substantial evidence and neither NCH or the Department can re-weigh that evidence. *Strickland v. Florida A&M University*, 799 So. 2d 276, 278 (Fla. 1<sup>st</sup> DCA 2001). NCH's claim that paragraphs 58 and 59 are "actually conclusions of law" is a bare claim, without argument or analysis thereon, and is therefore disregarded. Exception 2 is denied.

#### Exception 3

In Exception 3, NCH challenges the evaluators' scoring of the NCH proposal, specifically failure of the RFP to identify the relative weights of subcriteria scoring, and

the presence of Criterion 36 in the RFP. The ALJ concluded, in those two matters, that the Department's use of subcriteria was not inconsistent with or contrary to the RFP. He further stated the Department removed Criterion 36 from consideration in a fashion that avoided any negative impact on proposers. NCH could have challenged the specifications of the RFP before submitting its proposal, but did not do so until after the Recommended Order was served on the parties after final hearing. Exception 3 is denied.

Exception 4

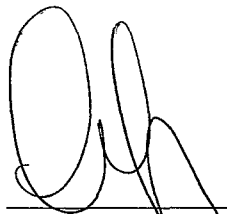
NCH objects in Exception 4 to the ALJ's recommendation that "the contract award to Benchmark should be upheld." NCH nowhere demonstrates absence of competent, substantial evidence to support this recommendation, but appears to attempt to travel on the arguments made earlier in its Exceptions. Without specific analysis in support, this exception is an attempt to re-weigh the evidence. The Department having no authority to re-weigh the evidence in this matter, *Strickland, supra*, Exception 4 is denied.

Accordingly, all exceptions being denied as set out above, the Recommended Order of October 31, 2017 is adopted and incorporated by reference.

Based on the foregoing, NCH's bid protest is dismissed, and the Department may enter into a contract with Benchmark under RFP DOH16-028 for Local Early Step program offices.

**DONE and ORDERED** this 30<sup>th</sup> day of November, 2017 in Tallahassee, Leon County, Florida.

Celeste Philip, MD, MPH  
State Surgeon General



By: \_\_\_\_\_  
Alexis Lambert  
Chief of Staff

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing FINAL ORDER has been sent by U.S. Mail, hand delivery or email to each of the above-named persons this 30<sup>th</sup> day of November, 2017.



Shannon Revels, Agency Clerk  
Florida Department of Health  
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Telephone: (850) 245-4005

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS MAY BE COMMENCED BY FILING A NOTICE OF APPEAL WITH THE CLERK OF THE DEPARTMENT OF HEALTH AND A COPY ACCOMPANIED BY THE FILING FEE WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES OR THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE MUST BE FILED WITHIN 30 DAYS OF FILING OF THIS FINAL ORDER.