

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GEO REENTRY SERVICES, LLC,

Petitioner,

vs.

Case No. 18-0613BID

DEPARTMENT OF CORRECTIONS,

Respondent,

and

GATEWAY FOUNDATION, INC., AND

THE UNLIMITED PATH, INC.,

Intervenors.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings for final hearing on March 1, 2018, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Martha Harrell Chumbler, Esquire
Benjamin E. Stearns, Esquire
Carlton, Fields, Jordan, and Burt, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302

For Respondent: Sean W. Gellis, Esquire
Kristen K. Clemons, Esquire
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

For Intervenor Gateway Foundation, Inc.:

(Gateway) Linda Loomis Shelley, Esquire
Mallory L. Harrell, Esquire
Joshua S. Smith, Esquire
Buchanan Ingersoll & Rooney, PC
101 North Monroe Street, Suite 1090
Tallahassee, Florida 32301

For Intervenor The Unlimited Path, Inc.:

David C. Ashburn, Esquire
Hayden Dempsey, Esquire
Greenberg Traurig, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Respondent, Department of Corrections' ("Department") intended decision to award contracts to Intervenor, Gateway Foundation, Inc. ("Gateway"), and The Unlimited Path, Inc. ("UPI"), for licensed in-prison substance abuse treatment services pursuant to Invitation to Negotiate FDC ITN 17-112 ("the ITN"), is contrary to the Department's governing statutes, rules, or the ITN specifications, and contrary to competition, clearly erroneous, arbitrary, or capricious.

PRELIMINARY STATEMENT

On September 21, 2016, the Department published the ITN, seeking replies from vendors to provide licensed substance abuse treatment services to inmates incarcerated by the Department. On June 15, 2017, the Department received replies from six vendors. Following the evaluation phase, the Department entered into

negotiations with four vendors: Petitioner, GEO Reentry Services, LLC ("GEO"); Gateway; UPI; and Bridges of America, Inc. On October 25, 2017, the Department issued a request for best and final offers ("RBAFO"). On November 14, 2017, Geo, Gateway, and UPI submitted their best and final offers ("BAFO"). On January 9, 2018, the Department posted its notice of intent to award Regions 1 and 2 to UPI and Regions 3 and 4 to Gateway. GEO timely filed its notice of intent to protest the awards within 72 hours of the posting of the notice of the awards.

On January 19, 2018, GEO timely filed its formal written protest and petition for administrative hearing. On February 6, 2018, the Department referred the matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing. On February 7 and 8, 2018, Gateway and UPI entered their appearances, respectively.

On February 13, 2018, the undersigned entered an Order setting this matter for final hearing on March 1, 2, and 9, 2018. On February 16, 2018, GEO filed a motion to amend the petition. On February 16, 2018, the Department filed a motion for partial dismissal of GEO's initial petition for hearing. On February 21, 2018, GEO filed a response in opposition to the motion for partial dismissal. On February 22, 2018, the undersigned entered an Order granting the motion to amend the petition and denying the motion for partial dismissal. On February 27, 2018, the

Department filed a motion for official recognition of the final order entered by the Second Judicial Circuit in Corcoran v. Delacenserie, Case No. 2017-CA-365, as well as the First District Court of Appeal docket sheet in Case No. 1D17-1247, involving the appeal of that final order. GEO opposed the motion. On February 27, 2018, the parties filed their Joint Pre-hearing Statement.

The final hearing commenced as scheduled and concluded on March 1, 2018, with all parties present. At the hearing, the undersigned denied the Department's request for official recognition. Joint Exhibits 1 through 54 were received in evidence upon stipulation of the parties. GEO presented the testimony of John Thurston. GEO's Exhibits 1 and 2 were received in evidence. The Department presented the testimony of Margaret Agerton, Mark Tallent, and Kasey Faulk. The Department's Exhibits 1, 2, 6, and 20 were received in evidence. Gateway and UPI did not present any witnesses or offer any exhibits in evidence.

The two-volume final hearing Transcript was filed at DOAH on March 9, 2018. The parties timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order.

The stipulated facts in the parties' Joint Pre-hearing Statement have been incorporated herein as indicated below.

Unless otherwise indicated, references to the Florida Statutes are to the 2017 version.

FINDINGS OF FACT

The ITN, Site Visits, and Addenda

1. The Department is a state agency responsible for the supervisory and protective care, custody, and control of all inmates incarcerated by the Department in each of its four regions.

2. As of June 30, 2016, the Department had a total inmate population of 99,119, with 62 percent (61,454) of those inmates in need of treatment for a substance abuse disorder.

3. The Department wants to strategically improve the manner in which it provides licensed substance abuse treatment services to inmates by focusing on maximizing the levels of treatment and individual inmate needs without increasing costs.

4. The Department chose to utilize a flexible competitive procurement process to achieve its goals; specifically, an invitation to negotiate method of procurement rather than an invitation to bid or request for proposals, because it wanted industry leaders to craft individual and innovative solutions to address the problem.^{1/}

5. Against this backdrop, on September 21, 2016, the Department issued the ITN, "In-Prison Substance Abuse Treatment Services," seeking replies from qualified vendors to provide

licensed substance abuse treatment services to inmates incarcerated by the Department in each of its four regions. The Department reserved the right to make separate awards to each of its four regions, or to make a statewide award to a single vendor.

6. The initial term of the contract(s) to be awarded under the ITN is five years. In addition, the Department may renew the contract(s) for up to one additional five-year term.

7. The ITN separated substance abuse treatment services into five distinct service types: Prevention Services, Outpatient Substance Abuse Treatment, Intensive Outpatient Substance Abuse Treatment, Long-term Residential Therapeutic Community, and Aftercare. Additional services were also required, including motivation/readiness classes for program participants awaiting admission to Outpatient, Intensive Outpatient, or Residential Therapeutic Community services, and an alumni support group for program participants who have completed treatment services. The ITN required that the treatment services be provided in programs licensed pursuant to Florida Administrative Code Chapter 65D-30.

8. The ITN identified the selection criteria as follows:

The focus of the negotiations will be on achieving the solution that provides the best value to the State based upon the "Selection Criteria" and satisfies the Department's primary goals as identified in this ITN. The

Selection Criteria may include, but is not limited to, the following.

Selection Criteria:

1. Respondent's articulation of their solution and the ability of the solution to meet the requirements of this ITN and provide additional innovations.
2. Respondent's experience in providing the services being procured and the skills of proposed staff relative to the proposed approach and offering.
3. Respondent's Technical Reply and Cost Reply, as they relate to satisfying the primary goals of the services identified herein.

9. All interested vendors, before submitting their replies, were required to visit various sites within the regions covered by their reply. GEO attended these site visits, which were held in October to November 2016. During the visits, the topic of the budget was discussed. All vendors were informed that the Department "did not have any new money," and that it would be operating within the existing budget.

10. Section 4.10, TAB A, of the ITN required that each vendor submit with its reply a letter from a surety company or bonding agent that documents the vendor's present ability to obtain a performance bond or irrevocable letter of credit in the amount of \$1,500,000, per region. In Section 4.8 of the ITN, Pass/Fail Mandatory Responsiveness Requirements, the Department stated it would reject any and all replies that did not meet the

pass/fail criteria. One of these criteria, Section 4.8e), specifically required each vendor to demonstrate its ability to meet the performance bond requirement. A vendor was likewise required to make this certification on Attachment IV to the ITN, Pass/Fail Requirement Certification and Non-Collusion Certification. Section 4.8e) stated as follows:

The Vendor must be able to demonstrate its ability to meet the Performance Bond requirements. Prior to execution of prospective contract, Respondent will deliver to the Department a Performance Bond or irrevocable letter of credit in the amount equal to the lesser of \$1.5 million dollars, per region, or the average annual price of the Contract (averaged from the initial five year Contract term pricing). The bond or letter of credit will be used to guarantee at least satisfactory performance by Respondent throughout the term of the Contract (including renewal years).

11. Section 5.36 of the ITN, Performance Guarantee, also provided:

The Vendor shall furnish the Department with a Performance Guarantee in the amount of \$1,500,000, per region, on an annual basis, for a time frame equal to the term of the Contract.

The form of the guarantee shall be a bond, cashier's check, or money order made payable to the Department. The guarantee shall be furnished to the Contract Manager within thirty (30) days after execution of the Contract which may result from this ITN. No payments shall be made to the Vendor until the guarantee is in place and approved by the Department in writing. Upon renewal of the Contract, the Vendor shall provide proof that

the performance guarantee has been renewed for the term of the Contract renewal.

Based upon Vendor performance after the initial year of the Contract, the Department may, at the Department's sole discretion, reduce the amount of the bond for any single year of the Contract or for the remaining contract period, including the renewal.

12. The purpose of a performance bond is to mitigate the Department's risk should a vendor fail to perform on a contract.

13. In Addendum 2, the Department identified six current contracts being replaced by the ITN, and provided links to those contracts and budgetary information on the Florida Accountability Contract Tracking System ("FACTS").^{2/}

14. The Department also provided two rounds of formal questions and answers, which are reflected in Addenda 6 and 7.

15. In Addendum 6, question 3, a vendor asked a question about cost. In response, the Department answered as follows:

Vendors are encouraged to submit a Cost Reply in such a manner as to offer the most cost effective and innovative solution for quality services and resources, as both cost efficiency and quality of services will be a consideration in determining best value.

16. In Addendum 6, question 77, a vendor asked a question about how to submit a reply. In response, the Department answered as follows:

Vendor's shall only submit one Reply, and the Reply must be clearly labeled with the Region(s) included, or that the Reply is Statewide.

17. In Addendum 7, question 2, the Department again addressed the issue of how many replies are required of a vendor who was interested in either a statewide or a regional award, through the following questions and answers:

Question 2: In the responses to vendor questions (Addendum 006), Change to No. 6- "4.9 Submission of Replies" states that "In Reply to this ITN, each Vendor shall: Submit a separate Reply for each Region (bullet item a on page 8). However, under answer #77 (p.21), it states that "Vendor's shall only submit one Reply, and the Reply must be clearly labeled with the Region(s) included, or that the Reply is Statewide."

Can you please confirm that a statewide proposal can be one, single proposal for the entire state rather than four separate proposals for each of the four regions?

Answer: Yes. If submitting for a Reply for Statewide, the Reply can be submitted as one (1) Reply. If submitting a Reply for multiple Regions such as Regions 1 and 2, a Reply must be submitted for each Region. A separate Technical Reply and Cost Reply must be included for each submission. The Cost Replies must be sealed in a separate envelope from the Technical Replies, but they can all be submitted in the same package.

Submission and Evaluation of Replies to the ITN

18. On June 15, 2017, the Department received replies to the ITN from the following six vendors: GEO, Gateway, UPI, SMA Behavioral Health Services, Inc., Village South, Inc., and Bridges of America, Inc.

19. GEO submitted five separate replies, one for each region and one for statewide.

20. Gateway submitted a single statewide reply, but indicated in the reply that it wanted to be considered for a statewide award and one or more regional awards. Gateway also included a detailed budget breakdown by region with pricing for each region. The Department's instructions to the evaluators of the replies included a note reminding them that Gateway submitted a statewide response, but that it wanted to be considered for each individual region.

21. UPI submitted three separate replies, one each for Regions 1, 2, and 3.

22. UPI made the required certifications regarding the performance guarantee and submitted a letter from a surety company evidencing its ability to obtain a performance bond in the amounts required by the ITN.

23. All of the replies were deemed to satisfy the pass/fail criteria and were then evaluated and scored.

Negotiations

24. Following the evaluation of the replies, the Department entered into the negotiation phase with GEO, Gateway, UPI, and Bridges of America, Inc. Negotiations commenced in August 2017 and continued through October 2017. The Department held a total of three negotiation sessions with each of these vendors. The

ITN provided that the scores from the evaluation phase would not carry over into negotiations and that the negotiation team was not bound by the scores.

25. The Department's negotiation team consisted of Kasey Faulk, chief of the Bureau of Procurement (lead negotiator); Patrick Mahoney, chief of the Bureau of Readiness and Community Transition; and Maggie Agerton, the assistant chief of In-Prison Substance Treatment in the Bureau of Readiness and Community Transition.

26. Ms. Faulk has a master's degree in business administration from the University of Florida. She is also a Florida-certified project management professional; Florida-certified contract negotiator; and Florida-certified contract manager. In her tenure as chief of the Bureau of Procurement, she has overseen more than 130 competitive solicitations, including at least 80 invitations to bid, at least 30 requests for proposals, and approximately 17 invitations to negotiate. She has drafted procurement procedures at two different state agencies, and helped draft revisions to Florida Administrative Code Chapter 68-1. Without objection, Ms. Faulk was accepted at hearing as an expert in the area of Florida procurement processes.

27. Ms. Agerton authored the programmatic portions of the ITN and served as an evaluator. She has a bachelor's and

master's degree in criminology. She is also a Florida-certified addiction professional and certified criminal justice addictions professional. She currently serves as contract manager for the Everglades Recovery Center ("Everglades") contract, of which GEO is the incumbent vendor.^{3/}

28. During negotiations, GEO, which had only provided services to the Department for a short time, touted its experience and devotion of resources at Everglades.

29. However, GEO was under a corrective action plan at Everglades as of May 12, 2017, because of missing information in clinical files and lack of staff supervision. Complete clinical files are very important to substance abuse treatment. Proper clinical documentation is necessary for licensure purposes and allows the Department to ensure that services are being provided in accordance with the contract.

30. By the end of October 2017, Ms. Agerton had conducted a site visit to Everglades, and although GEO had made significant progress in the area of leadership and staff, the clinical files were still a significant problem. Ms. Agerton and Ms. Faulk had concerns about GEO's current contract performance at Everglades. During the negotiation phase, GEO was aware of the Department's concerns regarding its performance at Everglades.

31. During negotiations, GEO was told by the Department that it is trying to spend its money more efficiently and in a

cost-effective manner. GEO was told by the Department that its price was outside the range of competitive replies, and GEO was encouraged to provide alternative pricing models and "sharpen its pencils."

32. During negotiations, the Department asked every vendor to identify its cost drivers. GEO did not identify the performance bond as a cost driver. However, UPI identified the performance bond as a cost driver.

33. UPI informed the Department that a performance bond would cost it \$200,000 per year regardless of whether the amount of the bond was reduced, because the cost of the bond is based on the complete value of the contract.

34. UPI requested that it be allowed to submit a cashier's check to the Department in the amount of \$1,000,000 for three regions in lieu of paying \$200,000 per year for five years to a bonding company for a performance bond.

35. At hearing, Ms. Faulk explained the process of negotiating with individual vendors, the importance of having a strategy, and the value of making individual concessions with individual vendors during negotiations.

36. UPI had performed services for the Department for over ten years, through budget cuts, and had not walked away from their contracts. Accordingly, the negotiation team considered UPI's suggestion to be a low risk. That is, the Department did

not believe there was a significant risk that UPI would abandon the contract.

37. In any event, the cashier's check proposed by UPI would benefit the Department because the Department could easily take the money and use it to recoup losses in the event of nonperformance, as opposed to a bond, which may require the Department to engage in protracted litigation with a surety company to obtain the value of the bond. The Department also saw the cashier's check as an opportunity to obtain lower pricing from UPI.

38. The negotiation team told UPI it would accept, in lieu of the performance bond, a \$1,000,000 cashier's check if UPI was awarded three regions; a \$750,000 cashier's check if UPI was awarded two regions; and a \$500,000 cashier's check if UPI was awarded one region.

39. Allowing UPI to post a cashier's check in the amount of \$750,000 for the two regions it was awarded did not provide UPI with a competitive advantage over GEO. At hearing, GEO's representative, John Thurston, who oversaw the development of GEO's reply and BAFO, and participated in the negotiations, acknowledged that GEO's cost to obtain a performance bond in the amount of \$1,500,000 would only have been \$67,500 per year.

40. During negotiations, the Department revised the scope of work. Following the negotiations, on October 25, 2017, the

Department emailed an RBAFO to those vendors who participated in the negotiations.

41. The RBAFO informed vendors that the term "Best and Final Offers" is used to provide the vendor the opportunity to clarify its response and adjust its price based on the negotiations, and that this does not preclude the Department from seeking clarification or additional information upon receipt of the BAFOs. The RBAFO further stated that the BAFO "must contain a written narrative of services to be provided inclusive of clarifications and any alternative or modifications discussed during the negotiation process." The BAFO required an executive summary, description of service delivery, a staffing matrix, and a price sheet.

42. GPR-037 (General Program Requirements) in the RBAFO addressed staffing and provided, in pertinent part:

The vendor shall ensure that all required Vendor staff positions are filled for the entire scheduled 40 hour weekly working period, and that those individuals are physically present at the work site. All positions are full-time, unless otherwise specified, inclusive of interim positions.

43. As to the price sheet, the per diem pricing "should represent the best price the Vendor is willing to offer to the Department." The RBAFO specifically addressed and allowed for vendors to provide alternative pricing models and methods. Providing alternative price offerings gives the Department more

options to solve its problem and demonstrates a vendor's understanding of the Department's needs.

44. All vendors were provided with an equal opportunity to submit BAFOs reflecting revisions to the ITN made by the Department during negotiations. The RBAFO reminded vendors to include in their BAFOs alternatives or any modification discussed during the negotiation process. GEO was aware during negotiations that it could have inquired about or proposed to negotiate different components of all aspects of its proposal. GEO was also aware that any global changes for all vendors would be included in the RBAFO, but that negotiation concessions, innovative solutions, and negotiated points with individual vendors, would not be included. In fact, GEO negotiated items that were not shared with other vendors.

The BAFOs and Negotiation Team Recommendation

45. The deadline for vendors to submit their BAFOs was November 14, 2017. The Department received BAFOs from the four vendors invited to negotiate.

46. The ITN provided that BAFOs would not be scored and the negotiation team would make a recommendation of award based on which vendor's solution presented the best value to the state, utilizing the selection criteria in the ITN.

47. Prior to submitting its BAFO, the Department responded to Gateway's inquiries about differences between what was to be

included in the BAFO and what was discussed during negotiations, specifically in the context of the ratio of Prevention Services counselors (indicated as one counselor to fifty participants in the RBAFO, but discussed during negotiations as one counselor to eighty participants). The Department instructed Gateway to use the ratios included in the RBAFO, and "provide an alternative price with the ratio your Company is proposing."

48. As allowed by the RBAFO and further clarified by the Department, Gateway's BAFO included both a base price offering and an alternative price offering, with detailed explanations of the assumptions included within each offering. Gateway's BAFO included a ratio for Prevention Services counselors from one counselor for every fifty participants (1:50), and an alternative ratio of one counselor for every eighty participants (1:80).

49. Gateway's staffing models in its BAFO also included part-time positions.

50. The members of the negotiation team reviewed the BAFOs and then made a formal recommendation of award at a public meeting held on November 17, 2017, with recorded minutes. The negotiation team recommended regional awards rather than a statewide award. It recommended an award of Regions 1 and 2 to UPI and Regions 3 and 4 to Gateway. The team recommended these vendors because it believed their solutions represented the best

value to the state based on the selection criteria identified in the ITN.

51. Ms. Faulk recommended UPI for Regions 1 and 2 because UPI was an incumbent vendor with a long history of providing satisfactory services to the Department. Additionally, she felt UPI had tremendous ideas on how to maximize treatment, their cost was affordable, and they proposed innovative solutions.

52. Ms. Faulk ultimately recommended Gateway's alternate price offering for Regions 3 and 4 because she found them very innovative and treatment-focused. She felt they had extensive experience in a correctional setting providing substance abuse treatment, and their cost was very affordable. She recommended the alternate price offering because it was an innovative solution to increase services. Gateway's alternate price offering increased the number of available treatment slots and provided staffing which the Department found acceptable and appropriate, while at the same time offering a better price.

53. Ms. Agerton recommended UPI for Regions 1 and 2 because she felt UPI brought an innovative solution in negotiations, as well as many different ideas. She felt that based on their incumbent status, they had knowledge of the Department's systems and were able to suggest improvements while remaining affordable.

54. Ms. Agerton recommended Gateway for Regions 3 and 4 because they also brought innovative solutions, particularly an

evaluator that would help with monitoring their implementation. She also felt Gateway was likewise affordable and energetic.

55. Neither Ms. Faulk nor Ms. Agerton recommended GEO for any of the regions. Ms. Faulk felt GEO's cost was significantly higher than the other vendors. She also had concerns about some of GEO's responses during the negotiation sessions, particularly with regard to the problems at Everglades. Ms. Faulk felt GEO lacked innovation, it did not understand the problems at Everglades, and it lacked an effective strategy for how not to have the problems reoccur in the future.

56. Ms. Agerton did not recommend GEO for any of the regions because she felt they were very expensive compared to the other vendors; so expensive, in fact, that their price exceeded the Department's budget. Ms. Agerton also had concerns about GEO's current contract performance at Everglades.

57. A formal recommendation memorandum was prepared by the procurement officer and routed through various levels of the Department. The memorandum included a cost analysis, which reflected the total awarded price for all four regions for the initial five-year term to be \$57,683,377.25. GEO's proposed price for all four regions for the same period was \$80,558,693.75, approximately \$22,000,000 higher than the Department's intended awards for all four regions.

58. Notably, the formal recommendation memorandum mistakenly reflected 225 prevention slots in Region 3, instead of the 320 prevention slots included in Gateway's alternative proposal; and 200 prevention slots in Region 4, instead of the 320 prevention slots included in Gateway's alternative proposal.

59. For Region 3, multiplying 320 slots times Gateway's per diem rate of \$3.89 (and by 365 days a year), results in an annual total cost of \$454,352; compared to the annual cost figure of \$319,466.25 for 225 slots reflected in the memorandum. For Region 4, multiplying 320 slots times Gateway's per diem rate of \$3.89 (and by 365 days a year), results in an annual total cost of \$454,352; compared to the annual cost figure of \$283,970 based on 200 slots. Thus, accounting for the increased prevention slots for Regions 3 and 4 results in an annual increase in cost of \$305,267.75 above the \$11,536,675.45, for a total annual cost for all four regions of \$11,841,943.20, and a five-year cost of \$59,209,716.

60. On the other hand, GEO's proposed price for all four regions for the same period was \$80,558,693.75, which divided by five results in an annual cost to the Department of \$16,111,738.70. GEO eliminated the cost of Aftercare services because the Department intends to use an Alumni Program for zero cost in lieu of Aftercare services. GEO calculated that removing

the cost to the Department of Aftercare services would result in \$1,885,790.75 less, or a total annual cost of \$14,225,948.70.

61. Thus, removing the cost of Aftercare services from GEO's proposed price for all four regions would still result in a five-year cost to the Department of \$71,129,743.50, which may exceed the amount appropriated, budgeted, and available to the Department for substance abuse treatment for Fiscal Year 2017-2018, and which far exceeds the cost of \$59,209,716 (the amount of the proposed award to Gateway and UPI for the same time period).^{4/}

62. The recommendation memorandum was approved by the Department's secretary on January 9, 2018.

GEO's Protest

63. GEO's protest raises numerous issues, none of which warrant rescission of the Department's intended award to Gateway and UPI.

Gateway's Reply to the ITN

64. GEO contends Gateway submitted only a single "statewide" reply to the ITN, and no reply for any regions, and therefore, Gateway is ineligible for a regional award.

65. The persuasive and credible evidence adduced at hearing demonstrates that Gateway's reply was properly considered as a reply for multiple regions because Gateway clearly indicated its intent to be considered for multiple regions.

66. Moreover, Gateway gained no competitive advantage over other vendors as a result of combining its statewide reply with a regional reply. In fact, the Department would have been inundated with replies if it required a vendor to reply for every conceivable combination of regions.

UPI's Performance Guarantee

67. GEO contends the Department materially deviated from the ITN and gave UPI a competitive advantage over it by allowing UPI to provide, in lieu of a performance bond, a cashier's check in the amount of \$500,000 if awarded one region; \$750,000 if awarded two regions; or \$1,000,000 if awarded three regions.

68. The persuasive and credible evidence adduced at hearing demonstrates that the Department did not materially deviate from the ITN and give UPI a competitive advantage over GEO by allowing UPI to provide, in lieu of a performance bond, a cashier's check in the amount of \$500,000 if awarded one region; \$750,000 if awarded two regions; or \$1,000,000 if awarded three regions.

69. Notably, the ITN did not require proposers to submit a performance bond or letter of credit with its reply to the ITN, and none of the vendors submitted a performance bond or letter of credit with their replies. Instead, in replying to the ITN, a vendor was only required to "demonstrate its ability to meet the Performance Bond requirements."

70. UPI satisfied the requirements of the ITN by demonstrating its ability to meet the performance bond requirements.

71. In any event, the reduction in the amount of the bond agreed to by the Department (\$750,000 in connection with the award of contracts for two regions) did not provide UPI with a competitive advantage over GEO.

72. At hearing, Mr. Thurston estimated GEO's annual cost of providing a performance bond in connection with contracts to be awarded pursuant to the ITN would be approximately \$67,500, well below the \$200,000 per year that UPI was quoted for its bond.

73. Moreover, the amount of \$67,500 is insignificant compared to the significant disparity in the annual, total prices proposed by GEO and UPI in their BAFOs for Regions 1 and 2 (GEO: \$9,299,141.50; UPI: \$6,342,203, for a difference of \$2,956,938.50 per year).

74. At hearing, Mr. Thurston acknowledged he could have raised the issue of the performance bond during negotiations. As Mr. Thurston also acknowledged at hearing, even if GEO had been able to negotiate an elimination of the performance bond amount requirement in its entirety, GEO would not have been able to offer a price that would have remedied the disparity.

Gateway's BAFO (Prevention Services Ratio)

75. GEO contends Gateway's ratio for Prevention Services counselors of 1:80, as provided in Gateway's BAFO alternative price offering, is a material deviation from the RBAFO requirements. As detailed above, this alternative offering was expressly permitted by the RBAFO and was further clarified by the Department to Gateway before its BAFO was submitted.

76. Moreover, increasing the prevention capacity to 80 per institution adds an additional 605 inmates served at any one time, resulting in the Department being able to serve more inmates for the same appropriation amount. This is precisely the type of innovative thinking the Department sought to reach its goals.

77. GEO did not submit an alternative pricing model, and it never asked the Department if the ratios for Prevention Counselors were negotiable. At hearing, GEO could not say how much it could have lowered staff levels, if at all, if it attempted to negotiate ratios. Gateway was not given a substantial advantage over GEO by increasing the prevention capacity.

78. In addition, although chapter 65D-30 does include required ratios for certain types of services, there is no maximum caseload requirement applicable to Prevention Services.

Gateway's BAFO (Part-Time Positions)

79. GEO also contends Gateway violated GPR-037 in the RBAFO because Gateway's staffing models included part-time positions. However, the Department interprets the phrase "unless otherwise specified" to mean that unless the vendor specifies a position in its reply as part time, the Department will assume that any positions referenced in the reply are full time (40 hours). GEO never asked the Department for clarification on the meaning of the phrase "unless otherwise specified." At hearing, Mr. Thurston could not say whether its BAFO would have been adjusted had GEO asked about negotiating the positions, in terms of being full time.

80. In any event, the Department currently utilizes part-time staff under the contracts being replaced by the ITN. Part-time staff may provide a more cost-effective solution than full-time staff.

Gateway's BAFO (Clerical Positions)

81. GEO also contends Gateway's alternate price offering provided for a reduction in clerical staff positions contrary to GPR-035 as set forth in Addendum 6 and the RBAFO. GPR-035 required that each vendor provide a minimum of one clerical position for up to 136 treatment slots, and one-half position for each additional 68 treatment slots.

82. In support of its position, GEO presented Exhibit 1. However, GEO's Exhibit 1 is based on incorrect assumptions, and it is unreliable and unpersuasive. First, the ratios calculated by GEO are impermissibly "rounded-up." Secondly, contrary to GEO's position, the Department only calculates an additional one-half position once the full 68 treatment slots have been achieved. GPR-035 does not require one-half positions for "up to each additional 68 slots." A plain reading of GPR-035, consistent with the Department's reasonable interpretation, is that an additional one-half position is required only after the full 68 slots have been achieved.

83. Gateway's base price offering fully complied with the staffing ratios when the ratios are calculated according to a plain reading of GPR-035, which is bolstered by the Department's practice in calculating ratios. Gateway's alternative price offering providing for a reduction in clerical positions to one full-time employee per facility was a cost-saving measure discussed with the Department and a product of negotiations.

84. Even if Gateway's alternative price offering deviated with regard to the clerical positions, given the discrepancy between GEO's and Gateway's price offerings, the deviation is so small that it is a minor irregularity and not a material deviation.

Gateway's BAFO (Pricing)

85. GEO also contends Gateway failed to provide region-specific pricing or a final, firm pricing offer of any kind for the initial term or the renewal term.

86. During negotiations and in its BAFO, Gateway reiterated that it would accept a regional or multi-regional award. Under Section 4.12 of the ITN, the Department reserved the right to seek clarification from vendors regarding their BAFOs and to reopen negotiations after receiving BAFOs. The negotiation team recommended awarding Gateway's alternate price offering for Regions 3 and 4 contingent upon clarification from Gateway that its pricing would be applicable to Regions 3 and 4. Although vendors were invited and could have attended the public meeting and heard this for themselves, none of them chose to attend. Four days later, on November 21, 2017, the Department's procurement officer reached out to Gateway's representative asking it to confirm that the pricing listed in the alternate price offering would remain the same if awarded individual regions as opposed to the entire state.

87. Gateway's representative responded that the alternate prices included in Gateway's BAFO could remain in effect with a modified administrative personnel staffing plan if Gateway was awarded more than one region. At the time of this exchange, the Department's negotiation team had already recommended Gateway for

Regions 3 and 4; so, the Department knew there would be no need to renegotiate pricing because Gateway was recommended to receive more than Region 4.

88. According to Ms. Faulk, the Department understood Gateway's response to mean that the per diem pricing provided in Gateway's BAFO would apply to Regions 3 and 4. Gateway would reduce the oversight positions to two or three positions, consistent with the smaller level of responsibilities required for two regions instead of four. This exchange occurred prior to the drafting of the award recommendation memorandum, which was dated November 28, 2017. It was not signed by Ms. Faulk until January 3, 2018, or the Secretary until January 9, 2018.

89. Gateway's per diem statewide pricing applied equally to Regions 3 and 4. Although Gateway did not provide a grand total price on its BAFO price sheet, the Department calculated the grand total price using the correct per diem unit prices provided. The ITN stated that unit prices would control in the event of a mathematical error.

90. As it pertains to the price sheet instructions, the RBAFO stated that the vendor's pricing should represent the best price the vendor is willing to offer the Department. Gateway provided both a base price offering and an alternate price offering. The base price offering's price sheet contained the required per diem prices for both the original contract term and

the renewal contract term. Under the section titled "TOTAL PRICE," Gateway appeared to sum the individual per diem prices rather than provide an actual grand total contract amount. Gateway did the same for its alternate price offering price sheet.

91. Although Gateway did not provide a grand total price on the price sheet, it included a detailed budget breakdown for both its base price offering and alternate price offering. The Department felt these breakdowns offered additional transparency into Gateway's pricing.

92. Section 4.10, Tab F, of the ITN provided that all calculations would be verified for accuracy by the Department's Bureau of Support Services staff, and that unit prices submitted by a vendor would prevail in the event a mathematical error is identified. Ms. Faulk testified the Department could calculate a grand total price by using the per diem pricing provided on the price page. She explained the Department could multiply the per diem price for each service type by the number of slots for that service, and then multiply that number by 365 days to arrive at the yearly price for a particular service. The Department could then add those prices together to obtain an annual total. She also explained these same calculations could be done for the renewal pricing.

UPI's BAFO (Clerical Positions)

93. GEO contends UPI deviated from the staffing requirements by providing fewer clerical support positions than required by the RBAFO. Specifically, GEO contends UPI had a deficit of six clerical support positions, and that if GEO knew it could reduce the staffing complement by six, it would have been worth approximately \$270,000. UPI's clerical staffing ratios deviated from GPR-035, because its ratios were calculated based on the belief that prevention slots were not "treatment" slots. The ITN and RBAFO refer to prevention slots as treatment slots.

94. Nevertheless, given the discrepancy between the prices submitted by GEO and UPI, UPI's deviations from the clerical staffing requirements are so small that they are minor irregularities and not material deviations.

UPI's BAFO (Pricing)

95. GEO also contends UPI's BAFO failed to include the Revised Price Sheet. Specifically, in paragraph 24 of its amended petition, GEO alleged: "UPI appears to have created its own form that emulated the format of the required form but provides many more spaces for additional information. Other Vendors that used the ITN required form did not have the opportunity to include this additional information."

96. Although UPI did not use the specific Revised Price Sheet form, it provided per diem prices for each level of

treatment as required by the form and additional information for the Department's consideration. GEO failed to include per diem pricing for Residential Therapeutic slots in Regions 2 and 4. GEO also modified its price sheets and submitted additional information in the form of annotations denoted by asterisk.

97. In sum, the persuasive and credible evidence adduced at hearing demonstrates that the Department appropriately determined that the proposed awards to Gateway and UPI will provide the best value to the Department based on the selection criteria. Any irregularities in Gateway's and UPI's replies and BAFOs as alleged by GEO were minor and not material deviations. The Department's intended awards to Gateway and UPI are not contrary to the Department's statutes, rules, the ITN specifications, clearly erroneous, contrary to competition, arbitrary, or capricious.

CONCLUSIONS OF LAW

98. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes.

99. GEO has standing to bring this procurement protest and both Gateway and UPI have standing to participate as intervenors.

100. Pursuant to section 120.57(3)(f), the burden of proof rests with GEO as the party opposing the proposed agency action. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). GEO must sustain its burden of

proof by a preponderance of the evidence. See Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

101. Section 120.57(3)(f) provides in part as follows:

Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, 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.

102. The phrase "de novo proceeding," as used in section 120.57(3)(f), describes a form of intra-agency review. "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, 709 So. 2d at 609.

103. A bid protest proceeding is not simply a record review of the information that was before the agency. Rather, a new evidentiary record based upon the facts established at DOAH is developed. J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127, 1132-33 (Fla. 1st DCA 2013).

104. After determining the relevant facts based on the evidence presented at hearing, the agency's intended action will

be upheld unless it is contrary to the governing statutes, the agency's rules, or the bid specifications. The agency's intended action must also remain undisturbed unless it is clearly erroneous, contrary to competition, arbitrary, or capricious.

105. The Florida Supreme Court explained the clearly erroneous standard as follows:

A finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. Such a mistake will be found to have occurred where findings are not supported by substantial evidence, are contrary to the clear weight of the evidence, or are based on an erroneous view of the law. Similarly, it has been held that a finding is clearly erroneous where it bears no rational relationship to the supporting evidentiary data, where it is based on a mistake as to the effect of the evidence, or where, although there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces the court that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.

Dorsey v. State, 868 So. 2d 1192, 1209 n.16 (Fla. 2003).

106. The contrary to competition standard precludes actions which, at a minimum: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that

contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. Care Access PSN, LLC v. Ag. for Health Care Admin., Case No. 13-4113BID, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *54 (Fla. DOAH Jan. 2, 2014); Phil's Expert Tree Serv., Inc. v. Broward Cnty. Sch. Bd., Case No. 06-4499BID, 2007 Fla. Div. Admin. Hear. LEXIS 161, at *23 (Fla. DOAH Mar. 19, 2007).

107. 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. Lib. Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). 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. J.D., 114 So. 3d at 1130. Thus, under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." Adam Smith Enters., Inc. v. Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Nevertheless,

the reviewing court must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith

consideration to those factors; and (3) has used reason rather than whim to progress from consideration of each of these factors to its final decision.

Id.

108. Under section 287.057, Florida Statutes, an agency seeking to procure contractual services may elect to use either an invitation to bid ("ITB"); a request for proposal ("RFP"); or, as here, an invitation to negotiate ("ITN"). § 287.057(1), Fla. Stat.; AT&T Corp. v. State, Dep't of Mgmt. Servs., 201 So. 3d 852, 855 (Fla. 1st DCA 2016). The ITN process is the most flexible procurement process and contemplates that not all vendors will necessarily provide the same solution to the same problem. As recognized by the First District in AT&T:

The ITN process was created as a distinctly more flexible process than the RFP or ITB process and gives an agency the means "to determine the best method for achieving a specific goal or solving a particular problem" and to identify "one or more responsive vendors with which the agency may negotiate in order to achieve the best value."

AT&T Corp., 201 So. 3d at 855 (quoting § 287.057(1)(c), Fla. Stat. (2014)).^{5/}

109. Relevant to ITNs, section 287.057(1)(c) provides, in pertinent part:

2. The invitation to negotiate must describe the questions being explored, the facts being sought, and the specific goals or problems that are the subject of the solicitation.

3. The criteria that will be used for determining the acceptability of the reply and guiding the selection of the vendors with which the agency will negotiate must be specified. The evaluation criteria must include consideration of prior relevant experience of the vendor.

4. The agency shall evaluate replies against all evaluation criteria set forth in the invitation to negotiate in order to establish a competitive range of replies reasonably susceptible of award. The agency may select one or more vendors within the competitive range with which to commence negotiations. After negotiations are conducted, the agency shall award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state, based on the selection criteria.

110. "Best Value" means "the highest overall value to the state based on factors that include, but are not limited to, price, quality, design, and workmanship." § 287.012(4), Fla. Stat.

111. Negotiations are an inherent component of the flexible ITN process. However, the Department cannot make "material changes" to the ITN during negotiations. AT&T Corp., 201 So. 3d at 858. It has long been recognized that "[a]lthough a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. State Dep't of Gen.

Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986); AT&T Corp., 201 So. 3d at 858 (concluding that revisions to statement of work that evolved during negotiation phase did not restrict competition--and recognizing that AT&T elected not to modify its initial reply).

112. Turning to the merits of the instant case, as detailed above, the Department's proposed action in awarding the contracts to Gateway and UPI, and not to GEO, is not contrary to the ITN specifications, clearly erroneous, contrary to competition, arbitrary or capricious. Any irregularities in Gateway's and UPI's replies and BAFOs as alleged by GEO were minor and not material deviations.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Corrections enter a final order dismissing the protest of GEO Reentry Services, LLC.

DONE AND ENTERED this 20th day of April, 2018, in
Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of April, 2018.

ENDNOTES

^{1/} Section 2.4 of the ITN provided that the overall goals of the Department include:

- Providing the appropriate targeted level of substance abuse services to each inmate with an identified need.
- A reduction in the substance abuse within the inmate population.
- An increase in treatment engagement among clients enrolled in services.
- A reduction in anti-social thinking among the participants enrolled in services.
- A reduction in anti-social behavior among the participant enrolled in services.

Section 2.4.1 of the ITN provided the following specific goals of the ITN:

- Establish a Contract, with transparency of service costs and better alignment of costs with services.
- Establish a Contract that allows the Vendor to bring market expertise, and an

ability to shape strategy, to lower the cost of substance abuse treatment services.

- Ensure a smooth transition/continuation of services from the current Contract(s) to a new Contract without disruption.
- Contract with a Vendor that applies clinical and operational expertise to ensure a smooth continuation of services with minimal risk.
- Ensure cost effective pricing throughout the entire term of the Contract.
- Establish a collaborative relationship with the prospective Vendor, which will maximize the extent to which the Department can achieve the objectives of this ITN.

^{2/} FACTS was created in 2011 or 2012 for the purpose of increasing transparency to taxpayers and vendors.

^{3/} Pursuant to contract, GEO currently provides substance abuse treatment services for the Department at some facilities, including Everglades. Other entities also provide substance abuse treatment services for the Department at certain facilities pursuant to contract. Some of the contracts are encompassed by the ITN. Everglades is within the scope of the ITN.

^{4/} Notably, the memorandum includes a total annual cost amount of \$1,134,693.75, for Aftercare services for all four regions, which the undersigned has not subtracted from the total annual amount of the cost of the proposed awards to Gateway and UPI.

^{5/} There is no substantive differences between the 2014 and 2017 versions of section 287.057.

COPIES FURNISHED:

Martha Harrell Chumbler, Esquire
Benjamin E. Stearns, Esquire
Carlton, Fields, Jordan, and Burt, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302
(eServed)

Sean W. Gellis, Esquire
Kristen K. Clemons, Esquire
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500
(eServed)

Linda Loomis Shelley, Esquire
Mallory L. Harrell, Esquire
Joshua S. Smith, Esquire
Buchanan Ingersoll & Rooney, PC
101 North Monroe Street, Suite 1090
Tallahassee, Florida 32301
(eServed)

David C. Ashburn, Esquire
Hayden Dempsey, Esquire
Greenberg Traurig, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32301
(eServed)

Kenneth S. Steely, General Counsel
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500
(eServed)

Julie L. Jones, Secretary
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500
(eServed)

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.