

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALL FLORIDA SAFETY INSTITUTE, LLC,

Petitioner,

vs.

Case No. 20-0179BID

FLORIDA VIRTUAL SCHOOL,

Respondent,

and

UNITED SAFETY COUNCIL, INC.,

Intervenor.

RECOMMENDED ORDER

The final hearing in this matter was conducted before Brian A. Newman, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1) and (3), Florida Statutes (2019), on March 9, 2020, in Altamonte Springs, Florida, and on March 13, 2020, by video teleconference sites in Tallahassee and Altamonte Springs, Florida.

APPEARANCES

For Petitioner: Shannan Collier Stalvey, Esquire
The Law Office of Shannan S. Collier, P.C.
100 Galleria Parkway
Atlanta, Georgia 30339

For Respondent: Samuel P. Garrison, Esquire
Bradley, Garrison & Komando, P.A.
1279 Kingsley Avenue
Orange Park, Florida 32073-4603

For Intervenor: Keith A. Graham, Esquire
Marchena & Graham, P.A.
976 Lake Baldwin Lane, Suite 101
Orlando, Florida 32814

STATEMENT OF THE ISSUE

The issue in this case is whether Florida Virtual School's intended decision to award a contract, challenged by All Florida Safety Institute, LLC, is contrary to Florida Virtual School's governing statutes, rules, policies, or the proposal specifications.

PRELIMINARY STATEMENT

This matter was initiated by Petitioner, All Florida Safety Institute, LLC's (All Florida), protest of a proposed contract award for driver education course administration to Intervenor, United Safety Council, Inc. (United Safety Council). Respondent, Florida Virtual School (Florida Virtual), issued the intent to award to United Safety Council on October 14, 2019, pursuant to RFP01-2001792B01- BWHEEL-XXXXXX (RFP).

On December 6, 2019, All Florida filed its notice of protest. Pursuant to an agreement of the parties, All Florida filed an amended notice of protest setting forth its protest grounds on December 30, 2019. A settlement conference failed to resolve the case, and Florida Virtual referred the protest to the Division of Administrative Hearings (DOAH) on January 16, 2020.

A telephonic scheduling conference was held on January 21, 2020, and the parties advised that, due to scheduling conflicts, they desired to waive the statutory requirement to commence the hearing within 30 days after an administrative law judge is assigned. On January 28, 2020, United Safety Council filed a motion to intervene which was granted by the undersigned on January 29, 2020.

The final hearing was held on March 9, 2020, in Altamonte Springs, Florida, and on March 13, 2020, by video teleconference between Tallahassee and Altamonte Springs, Florida. At the final hearing, All Florida presented testimony from Mark Allen and John Bolen, its principals, and from six employees of Florida Virtual: Kevin Locke, Martin Kelly, Nathaniel Askew, Debbie Adams, Janet Conway, and Karen Stolarenko. All Florida's Exhibits 1 through 9 were admitted into evidence. Florida Virtual offered one exhibit that was admitted into evidence. United Safety Council presented testimony from one of its principals, Larry Wilson, and offered one exhibit that was admitted into evidence.

The three-volume Transcript of the final hearing was filed with DOAH on April 2, 2020. All parties filed timely proposed recommended orders, which were duly considered in preparing this Recommended Order.¹

References to the Florida Statutes are to the 2019 version, unless otherwise indicated.

FINDINGS OF FACT

1. Florida Virtual was created by statute to develop and deliver online distance learning in the State of Florida. § 1002.37, Fla. Stat. Florida Virtual is governed by a board of trustees appointed by the Governor. § 1002.37(2), Fla. Stat.

2. Florida Virtual issued the RFP on October 14, 2019, seeking responses from qualified proposers interested in providing hands-on, "Behind the

¹ On April 20, 2020, Petitioner filed exceptions to the proposed recommended orders submitted by the other parties. These exceptions were filed at DOAH, before the Recommended Order was issued. Exceptions to proposed recommended orders are not authorized by statute or rule and have not been considered.

Wheel" driver education courses to Florida Virtual's driver education students.

3. Florida Virtual received proposals from two qualified vendors, All Florida and United Safety Council, the current Behind the Wheel course provider.

4. The RFP established the following scoring criteria:

Criteria No.	Step 1: Main Criteria Description	Weight
1.	Compliance	10%
2.	Qualifications, Experience of Team Members and References	24%
3.	Contractor Methodology	20%
4.	Demonstrated Ability to Meet or Exceed Stated Requirements and Responses to Questionnaire	25%
5.	Price Proposal	20%
6.	Acceptance of Invoice Payments via FLVS Visa Purchasing Card	1%
	TOTAL	100%

The six categories were to be scored using a 1 to 20 scale. The contract was to be awarded to the respondent that received the highest total weighted score.

5. The RFP required that the proposals be scored by the Proposal Evaluation Committee (Committee). Florida Virtual appointed four of its employees to serve on the Committee: Debbie Adams, the instructional leader over Florida Virtual's driver education program; Janet Conway, an accounting manager; Martin Kelly, the senior director of curriculum development; and Kevin Locke, the director of project management.

6. On November 14, 2019, the Committee met at a public meeting to score the proposals. The meeting was audio-recorded. Ms. Conway, Mr. Kelly, and Mr. Locke were physically present at the meeting. Ms. Adams attended the meeting remotely with an audio connection.

7. Karen Stolarenko is Florida Virtual's senior solicitation specialist. Ms. Stolarenko and her supervisor, Nathaniel Askew, facilitated the

Committee's deliberation at the public meeting as representatives of Florida Virtual's procurement department. One or more representatives of United Safety Council attended the public meeting and observed the Committee's deliberations. All Florida was aware of the public meeting but did not send a representative to attend.

8. The proposals were provided to the Committee before the meeting for review, but the scoring was done at the public meeting.

9. The evaluators' individual scores were tabulated at the conclusion of the public meeting. Ms. Adams gave All Florida the highest weighted score, but the other three evaluators all gave United Safety Council the highest weighted score. United Safety Council had the higher total weighted score of 72.40, compared to All Florida's total weighted score of 70.48. At the conclusion of the public meeting, the Committee voted unanimously to award the contract to United Safety Council as the respondent receiving the highest total weighted score.

PROTEST GROUNDS

Class A v. Class E License Requirements for Instructors

10. Section A.2(1) of the RFP includes the following minimum requirement for instructors:

Class A license with a refresher every five (5) years or retest required as a result of passing examinations and road test approved by Bureau of Driver Education prior to issuance of certificate. Must possess 3 years of experience with a Class A CDL and no conviction on record within the last five years in order to be qualified.

11. A Class A license is a commercial driver's license that is unrelated to the driver education course sought by the RFP. Although there was no testimony directly on point, Florida Virtual essentially conceded that the RFP's reference to a Class A license was an error.

12. All Florida did not protest the RFP's Class A license requirements after the RFP was issued, to argue those requirements make no sense for the services sought by the RFP. Instead, it committed in its proposal to meet all qualifications for a Class E license, the license sought by students who attend the Behind the Wheel driver education course. While this is a logical response to what appears to be an error in the RFP, it was risky because it did not comply with the letter of the RFP. United Safety Council took the safe route, responding by confirming that its instructors would meet the requirements of section A.2(1).

13. At the public meeting, before the proposals were scored, Ms. Adams (the instruction leader for Florida Virtual's driver education program) told the other evaluators that a Class A license was inapplicable to the course services sought in the RFP. No evidence was presented to prove that any evaluator scored All Florida lower because it committed to meet Class E—as opposed to Class A—license requirements for instructors.

Committee's Deliberation at the Public Meeting

14. At the conclusion of the public meeting, the evaluators were allowed to take a break and move around the room while their scores were handed to Ms. Stolarenko to be tabulated. The break was approximately 20 minutes long. This break was not recorded, but was not required to be under any governing statute, rule, policy, or RFP specification.

15. Following this break to tabulate the scores, there was an interruption of the recording of the meeting. When the audio recording resumed, Ms. Stolarenko can be heard stating:

This is Karen Stolarenko, November 14th 2019, 3:24 p.m. We are reconvening to go over the scores and rankings for the Behind the Wheel Driver Education RFP. Our network went down, and we did have our prior recording interrupted. So there will be two separate recording sessions for today's meeting. I'll do a quick—since we did have an

interruption just do a quick roll call so everybody knows who is in the room.

16. Thereafter, the evaluators can be heard on the audio recording confirming their unanimous recommendation to award the contract to United Safety Council as the highest-ranked respondent, a decision consistent with the tabulation of the evaluators' score sheets and the RFP's award specifications.

17. There is no evidence that the interruption in the audio recording was intentional or in bad faith, or that it violated any governing statute, rule, policy, or specification of the RFP. The meeting was public; there is no evidence that anyone was excluded from this portion of the meeting. All Florida could have sent one or more representatives to attend the meeting but chose not to.

Corrections to Evaluator Scoresheets

18. The evaluators were provided individual scoresheets to record their scores. The evaluators who attended the meeting in person—Mr. Locke, Mr. Kelly, and Ms. Conway—were provided paper scoresheets and pens to handwrite their scores. Ms. Adams, who attended the meeting remotely, was provided a digital scoresheet and typed her scores.

19. Mr. Kelly's scoresheet included two scores that were scratched out and rewritten. Under the category labeled "Compliance," Mr. Kelly's final rewritten score for All Florida was 19. Under the same category for United Safety Council, Mr. Kelly's final, rewritten score was 18. Mr. Kelly testified that he scratched out his original scores and replaced them with the rewritten final numbers listed above. He further testified that he could not recall why he scratched out the original scores before turning in his scorecard to Ms. Stolarenko other than that he changed his mind. Mr. Kelly's testimony was credible and is accepted here.

20. Ms. Conway testified that she initially erred in the manner in which she scored the proposals; that is, she assigned scores based upon the total weight instead of using the 1 to 20 scale she should have applied to score the respondents for each of the six categories. For example, the "Compliance" category was weighted 10 percent, and Ms. Conway mistakenly applied a 1 to 10 scale (instead of a 1 to 20 scale) when initially scoring this category. She made the same mistake for both respondents. Ms. Stolarenko brought this error to Ms. Conway's attention when she handed in her scoresheet for tabulation at the public meeting.

21. Ms. Conway testified that she corrected the error in her scoresheets without changing the intent behind her original scoring. Two of the categories required no alteration, because they were weighted 20 percent, and Ms. Conway therefore applied the correct 1 to 20 scale when she originally scored those categories.

22. Ms. Conway's testimony was credible and is accepted here. Ms. Conway did not change the intent behind her original scores when she corrected her scores to apply the correct 1 to 20 scale, and this correction did not disadvantage All Florida or provide a competitive advantage to United Safety Council in any way. In fact, Ms. Conway's correction to her score sheet was required to comply with the RFP's specifications on the evaluation of responses.

Evaluator Comment Regarding Tesla Fleet

23. All Florida committed to include new Tesla vehicles in its fleet for the Behind the Wheel student drivers' use. When this commitment was discussed by the Committee, Evaluator Mr. Kelly can be heard on the audio recording making a statement that sounds like "[w]hat a bunch of idiots." All Florida argues that this comment shows bias against it and that it caused the other evaluators to view its proposal through a negative lens. That was not proven here. Mr. Kelly testified that he did not recall making the "idiots" comment, but that it sounds like something he might have said because he recalled

thinking it was "silly to give those types of cars, that are quite expensive," to student drivers.² Mr. Kelly went on to testify that his opinion regarding All Florida's Tesla commitment had no bearing on his scoring. Mr. Kelly's testimony was credible and is accepted. Although Mr. Kelly could have chosen better words to express himself, the use of the term "idiots" in this context does not suggest that he was biased.

24. The other evaluators denied hearing Mr. Kelly's "idiots" comment; there is no evidence that this comment influenced any of the scores the other evaluators assigned to All Florida.

Qualification and Experience Scores

25. All Florida contends that the evaluators failed to consider the "real numbers" of teen drivers served by All Florida as compared to those served by United Safety Council when they scored the respondents in the category for "Qualifications, Experience of Team Members and References."

26. All Florida offered no evidence to support this protest ground. The evaluators testified at the final hearing but were not questioned on this issue. United Safety Council failed to prove that the scores assigned by the evaluators for "Qualifications, Experience of Team Members and References" were arbitrary or capricious.

United Safety Council's Proposal Irregularities

27. Section B.1 of the RFP, entitled "Respondent Questionnaire," contains 14 questions the respondents were instructed to answer in their proposals. United Safety Council's proposal included answers to questions 1 through 5 but omitted the answers to questions 6 through 14. All Florida's proposal included answers to the entire questionnaire.

28. United Safety Council's omission caught Ms. Stolarenko's attention; at the public meeting, she advised the evaluators that United Safety Council

² The audio recording of this comment from Mr. Kelly is very faint and difficult to hear. But given Mr. Kelly's testimony that it "sounds like something he might have said," the inference is that he did make the "idiots" comment.

failed to answer questions 6 through 14. Most, but not all, of the information answering questions 6 through 14 can be found elsewhere in United Safety Council's proposal. Ms. Stolarenko correctly advised the evaluators that they were to score United Safety Council's proposal based on the information contained in its proposal.

29. The RFP required the respondents to consecutively number all pages of the proposal. United Safety Council did not consecutively number all pages of the proposal.

30. All Florida does not allege that United Safety Council's proposal should have been deemed non-responsive—and thus ineligible for a contract award—due to these proposal irregularities.³ Instead, All Florida alleges that it should have received a higher score because its proposal did not contain the same deficiencies.

31. All Florida failed to prove that the evaluators' scores were arbitrary or capricious because United Safety Council received overall higher weighted scores, notwithstanding these two irregularities in its proposal.

CONCLUSIONS OF LAW

32. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(3), Fla. Stat.

33. This protest is governed by section 120.57(3)(f), which provides as follows:

³ Although bidder responsiveness has not been raised, it is worth noting that Florida Virtual reserved the right to waive minor irregularities in the proposals submitted. There is no evidence that United Safety Council obtained a competitive advantage by omitting responses to RFP questions 6 through 14 from its proposal or by not numbering its pages. As noted, most of the information responsive to these questions can be found elsewhere in United Safety Council's proposal, and the information not provided was insubstantial and minor in nature. At most, it is possible that United Safety Council's scores would have been higher had it directly answered questions 6 through 14 and numbered the pages of its proposal. Because no competitive advantage inured to United Safety Council with these two proposal irregularities, the irregularities are properly classified as "minor," and thus waivable. *Harry Pepper & Assocs., Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1978).

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.

34. The court in *Colbert v. Department of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), defined the clearly erroneous standard to mean that "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations. If, however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." (Citations omitted.)

35. An agency action is "contrary to competition" if it unreasonably interferes with the purposes of competitive procurement, which has been described in *Wester v. Belote*, 138 So. 721, 723-24 (Fla. 1931), as protecting the public against collusive contracts and to secure fair competition upon equal terms to all bidders.

36. A capricious action has been defined as an action, "which is taken without thought or reason or irrationally." *Agrico Chemical Co. v. Dep't of Env'tl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), *cert. denied*, 376 So. 2d 74 (Fla. 1979). "An arbitrary decision is one that is not supported by facts or logic[.]" *Id.* The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner involves consideration of "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 these factors to its final decision."

Adam Smith Enters. v. Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has also been formulated by the court in *Dravo Basic Materials Co. v. Department of Transportation*, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992), as follows: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious."

37. Although competitive-procurement protest proceedings are described in section 120.57(3)(f) as de novo, courts acknowledge that a different kind of de novo is contemplated than for other substantial-interest proceedings under section 120.57. Competitive-procurement protest hearings are a "form of intra-agency review[.]" in which the object is to evaluate the action taken by the agency. *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

38. All Florida is required to state with particularity the facts and law upon which its protest is based. § 120.57(3)(b), Fla. Stat. Protest grounds not raised in Petitioner's Amended Formal Written Protest have not been considered for this reason.

39. Applying these standards to this case, All Florida has failed to meet its burden of proving that Florida Virtual's intended contract award to United Safety Council is clearly erroneous, arbitrary, capricious, or contrary to competition. All Florida failed to demonstrate that Florida Virtual's intended contract award to United Safety Council is contrary to any statute, rule, policy, or RFP specification.

40. The record evidence is that All Florida's score was not lower than it would have been had it committed to the Class A license requirements for instructors. That said, All Florida did not challenge the Class A license specifications of the RFP within 72 hours of the posting of the RFP, and cannot complain about that specification now, even though that is the wrong

license reference. § 120.57(3)(b), Fla. Stat.; *Capeci Bros., Inc. v. Dep't of Transp.*, 499 So. 2d 855 (Fla. 1st DCA 1987).

41. There is no evidence that anything untoward occurred at the public meeting where the proposals were scored. There is no statute, rule, policy, or RFP specification that prohibited breaks in the meeting. When Ms. Stolarenko discovered that the recording device stopped working after the scores had been tabulated, she repeated what had occurred to ensure the recording was as accurate as possible under the circumstances. Florida Virtual's RFP standard operating procedures includes "record the meeting" in a checklist of tasks to complete for evaluation meetings. The public meeting was recorded, and thus this checklist requirement was met. The fact that the recording device malfunctioned at some point during the meeting does not violate a standard operating procedure and is not otherwise a basis to overturn the intended award. *See Carlson v. State*, 227 So. 3d 1261, 1270 (Fla. 1st DCA 2017)(affirming contract award even though recording malfunctions resulted in inaudible recordings and lost audio for private negotiation sessions).

42. There is no prohibition on correcting scores prior to tabulation. Ms. Conway corrected her scores because she used the wrong scale. Had Ms. Conway failed to make this correction, the resulting scores would have been contrary to the RFP, which required scoring in all six categories to be on a 1 to 20 scale. *See also Moore v. State, Dep't of Health & Rehab. Servs.*, 596 So. 2d 759 (Fla. 1st DCA 1992)(the failure to adhere to the bid evaluation criteria undermined the integrity of the competitive procurement process).

43. All Florida did not prove that any of the evaluators were biased. The evaluator accused of making the "idiots" comment explained that it was not a negative personal comment about All Florida, in context, and there is no evidence that the comment affected the scores assigned by any of the evaluators.

44. All Florida elicited little in the way of substantive testimony from the evaluators (all of whom testified) and asked almost no probative questions regarding the basis for any particular score. There is no evidence that any of the evaluators assigned a score without thought or reason. It is not enough for All Florida to assert that its proposal was more compliant with the RFP specifications and otherwise superior; the undersigned cannot simply rescore the proposals. Instead, it was incumbent on All Florida to prove that the scores were arbitrary and capricious to overturn the determination that United Safety Council had the best overall score. All Florida failed to meet this burden. Although the scoring margin was small, United Safety Council received the highest total weighted score and is deserving of the contract award under the RFP's specifications.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by Florida Virtual School dismissing the protest of All Florida Safety Institute, LLC.

DONE AND ENTERED this 4th day of May, 2020, in Tallahassee, Leon County, Florida.



BRIAN A. NEWMAN
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 4th day of May, 2020.

COPIES FURNISHED:

David Jeffrey D'Agata, General Counsel
Florida Virtual School
2145 Metrocenter Boulevard, Suite 100
Orlando, Florida 32835
(eServed)

Samuel P. Garrison, Esquire
Bradley, Garrison & Komando, P.A.
1279 Kingsley Avenue
Orange Park, Florida 32073-4603
(eServed)

Jessica Beecham, Board Clerk
Florida Virtual School
2145 Metrocenter Boulevard, Suite 100
Orlando, Florida 32835

Keith A. Graham, Esquire
Marchena & Graham, P.A.
976 Lake Baldwin Lane, Suite 101
Orlando, Florida 32814
(eServed)

Shannan Collier Stalvey, Esquire
The Law Office of Shannan S. Collier, P.C.
100 Galleria Parkway
Atlanta, Georgia 30339
(eServed)

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Dr. Barbara M. Jenkins, Superintendent
Orange County School Board
445 West Amelia Street
Orlando, Florida 32801-0271

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.