

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PEDIATRIC SERVICES OF AMERICA,
INC., a/k/a PSA HEALTHCARE, A
FOREIGN CORPORATION ORGANIZED
UNDER THE LAWS OF GEORGIA,

Petitioner,

vs.

Case No. 18-2671BID

ESCAMBIA COUNTY SCHOOL DISTRICT,

***AMENDED AS TO LANGUAGE
ONLY**

Respondent.

_____ /

AMENDED RECOMMENDED ORDER

Pursuant to notice, a final formal administrative hearing was conducted in this case on June 28 and 29, 2018, in Pensacola, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Linda Wade, Board Certified
Trial Lawyer
14 North Palafox Street
Pensacola, Florida 32502

For Respondent: Joseph L. Hammons, Esquire
The Hammons Law Firm, P.A.
17 West Cervantes Street
Pensacola, Florida 32501-3125

STATEMENT OF THE ISSUE

The issue in this case is whether the agency action taken by Respondent, Escambia County School District (the "District"),

concerning the award of a contract pursuant to bid was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On April 12, 2018, the District issued Request for Proposal ("RFP") No. 181001. A single agenda item was added to the RFP on April 19, 2018. Upon consideration of the responses to the RFP, the District awarded a contract to Aloa Care Group ("Aloa"). Pediatric Services of America, Inc., a/k/a PSA Healthcare, a foreign corporation organized under the laws of Georgia ("PSA"), timely filed a Notice of Intent, protesting the intended decision. This proceeding ensued.

At the final hearing, PSA called seven witnesses: Tracy Parker, area director for PSA; Jodi Kendrick, owner of Aloa; and the following District employees: Martha Hanna, health services coordinator; Teri Szafran, director of Exceptional Student Education; Laura Colo, director of the Title I program; Bradley Mostert, senior auditor; and John Dombroskie, purchasing director. The following PSA Exhibits were admitted into evidence: 1 through 36, 39, 41 through 43, 56 through 62, and 66. The District did not call any additional witnesses. Its Exhibits 4 through 7 were admitted. (All hearsay evidence was admitted subject to corroboration by competent, non-hearsay evidence. To the extent that evidence did not supplement or

explain non-hearsay evidence, such evidence will not be solely used as a basis for any finding herein.)

The parties advised the undersigned that a transcript of the final hearing would be ordered. By rule, parties are allowed 10 days from the date the transcript is filed at DOAH to submit proposed recommended orders. The Transcript was filed on July 5, 2018. Each party timely submitted a proposed recommended order and both parties' submissions were given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The District is responsible for issuing and processing all RFPs or other contract offers concerning contracted work for the school district.

2. Early in calendar year 2018, the District determined that changes in federal law would require all healthcare services provided to students in the District schools be done pursuant to a competitive bid. The District prepared RFP No. 181001, and it was issued on April 12, 2018. An evaluation committee was formed to review any responses to the RFP. The committee consisted of: Martha Hanna, Laura Colo, Teri Szafran, and Bradley Mostert. John Dombroskie served as the chair of the review committee and also performed the calculation of program costs associated with each responsive bid.

3. There were two responses to the RFP: one by the then-current provider of healthcare services, PSA; one by Aloa. The responses were to be reviewed independently by each individual committee member and then discussed at a meeting of the committee held on April 30, 2018. Based on the committee's findings, the bid was awarded to Aloa.

PEDIATRIC SERVICES OF AMERICA, INC.

4. PSA was formed in 1989 as a Georgia corporation. The original goal of PSA was to provide home healthcare to pediatric patients. In 1997, PSA collaborated with Locklin Technical Institute, the Santa Rosa County School District, and the Santa Rosa County Health Department to develop a model for providing health services at all the Santa Rosa County schools. PSA began providing health services to Santa Rosa County schools in 1998, adding Okaloosa County schools in 2009, and then Escambia County in 2013. PSA provides pediatric healthcare to students and homebound individuals across the United States.

5. From 2013 until the present year, PSA provided healthcare services to all schools governed by the District. There have been no notable or significant problems during this tenure. The District is generally very pleased with the quality of services provided by PSA, as expressed by Ms. Hanna in a letter of recommendation she prepared for PSA.

6. In its RFP response, PSA discussed its origin, its experience with the District and other nearby counties, and its overall organization. As a nationwide company, PSA has in place all the accoutrements of a large corporate business, such as a human relations department, compliance officer, financial officers, internal general counsel, information officer, and the like. Its team of leaders was described in PSA's RFP response. PSA also has insurance in place to cover any potential claim that might arise, opting to have far more coverage than required by the District.

7. PSA's financial condition is solid. It has over \$355 million in assets, according to its 2016 audited financial statement. With about \$259 million in liabilities, PSA has over \$95 million in equity. PSA has been involved in mergers and acquisitions, being somewhat aggressive but well within its capabilities. PSA could easily cover its operating costs under the healthcare contract for the 45 days the District may lag behind payments under a new contract.

8. PSA has in place the employees and contracted individuals necessary to provide services under the RFP. Many of those persons are already working, providing the same services under PSA's existing contract with the District. PSA also has a management team in place for the District services,

led by Lori Shanahan. Starting work under the RFP would be a seamless transition.

ALOA CARE GROUP

9. Aloa was formed by Jodi Kendrick, who, coincidentally, managed PSA's contractual healthcare services with the District for the past decade. Ms. Kendrick's employment with PSA was terminated sometime in May 2017, for undisclosed reasons. Oddly, neither PSA nor Aloa alluded to the reasons for Ms. Kendrick's termination at final hearing.

10. Aloa has only two current employees: Ms. Kendrick acts as the administrator; and her husband, Ben, who will be the operations manager. Neither Ms. Kendrick nor her husband has any experience operating a healthcare company. It is their intention to hire the 50 to 70 persons needed to fulfill the RFP services once the contract is awarded. As of the date of final hearing, just three days before Aloa's contract with the District was to go into effect, Ms. Kendrick was interviewing some prospective employees but had not hired anyone yet.

11. Aloa did not submit any financial information in the RFP response by which its financial stability and long-term financial viability could be measured. Aloa noted that it was applying for a Small Business Association-backed loan to ensure its ability to cover three months of expenses. Ms. Kendrick

said she was receiving counseling from the Small Business Development Center at a local college as well.

12. Aloa provided a quote for insurance from a legitimate insurance agent. Aloa indicated that it has established a relationship with a local accounting firm for the purpose of assistance with financial matters and had "tasked Regions Bank/PayCor with catering to the HR and payroll needs of our company." During the de novo final hearing, Ms. Kendrick did not provide any updated or more specific information on those generalized statements of intent.

13. Aloa presented three letters of recommendation with its RFP response, including one from Ms. Hanna, who also served on the review committee for the District. The instructions provided to the review committee contained the following cautionary language concerning conflicts of interest and ethical considerations:

A conflict of interest or the appearance of a conflict of interest may occur if you are directly or indirectly involved with an organization that has submitted a proposal for evaluation. Prior to reviewing any proposals, you must inform Purchasing of any potential conflicts of interest or the appearance thereof. If you become aware of any potential conflict of interest as you review a proposal, you must immediately notify the Purchasing Agent leading the evaluation effort. You may be disqualified as an RFP evaluator if you conduct yourself in a way that could create the appearance of bias or unfair advantage with or on behalf

of any competitive bidder, potential bidder, agent, subcontractor, or other business entity, whether through direct association with contractor representatives, indirect associations, through recreational activities or otherwise. Examples of potentially biasing affiliations or relationships are listed below:

A. [Acceptance of benefits]

B. [Direct employee/ownership affiliation]

C. Your relationship with someone who has a personal interest in this proposal. This includes any affiliation or relationship by marriage or through family membership, any business or professional partnership, close personal friendship, or any other relationship that you think might tend to affect your objectivity or judgment or may give an appearance of impropriety to someone viewing it from outside the relationship.

14. In this case, in addition to writing a letter of reference for Ms. Kendrick, Ms. Hanna also assisted Ms. Kendrick with information concerning provision of the very services for which Aloa submitted a bid. The information and discussions occurred prior to the RFP's posting, but the conversations were specifically about the school health services. Ms. Kendrick expressed an interest in applying for a contract to provide those services; Ms. Hanna attempted to assist her. They exchanged information via email and met personally on occasions. When the RFP was posted, Ms. Hanna should have disclosed her discussions with Ms. Kendrick, but did not.

15. The obvious appearance of conflict in this situation was not addressed by the District or by the review committee during its discussion of the bids. Not one of the reviewers even commented on the letter by one of its members; they only noted that - as Ms. Hanna interjected - one of PSA's letters of recommendation was not from a professional person or group. According to Ms. Hanna, she did not know that Ms. Kendrick would use the recommendation letter as part of her RFP response, but once that fact was known, Ms. Hanna should have recused herself from further involvement. That she did not reeks of impropriety.

16. Mr. Dombroskie drafted a "cone of silence" email on April 10, 2018, two days prior to release of the RFP. The email reminded the committee members of their commitment to maintain confidentiality and to avoid any conflicts. The email was not sent, apparently,^{1/} until the day after the RFP was released even though it would usually have been sent out prior to or contemporaneously with the RFP issuance. This is just one more odd occurrence relating to this particular RFP process.

THE REVIEW COMMITTEE

17. The review committee was comprised of the four previously identified individuals and it was overseen by Mr. Dombroskie. Ms. Hanna had selected Ms. Szafran and Ms. Colo as members of the committee; Mr. Dombroskie had chosen

Mr. Mostert. The reviewers' experience relating to review of these RFP responses was minimal: Mr. Mostert knew little about school health services and had only served on one RFP committee before; Ms. Szafran had served on "maybe three committees" in the past and her expertise was in Exceptional Student Education; and Ms. Colo had no prior experience with RFP reviews and was not familiar with school health services.

18. Each of the members completed a scoring sheet that addressed three areas of consideration from the RFP, assigning points for each. Responses to the Company Experience/References section could generate up to 10 points. That section asks the applicant for:

A narrative letter which profiles the background, experience and qualifications of the Responder. Include a brief description of all lawsuits that are pending and/or filed against the Responder over the last three years and any disciplinary action taken against the Responder. Provide a minimum of three references that use your School Health Services (preferably in Florida). [P]rovide a brief outline of each contract with information regarding student population, program operations, staffing patterns, costs and any other information deemed relevant. Additionally, include agency contact names, titles and phone numbers. Furthermore, list any contracts which have been terminated early or upon renewal within the past five years.

19. The Financial Ability section also provided for up to 10 points. That section requires the applicant to:

Provide evidence of your company's financial stability and long term viability. Provide proof of your company's insurance as required in Section XIV of this RFP or submit a letter of your intention to have the required insurance prior to start of any work under this agreement.

20. The Proposed Service Model section gave up to 45 points and was the most extensive section of the RFP, requiring bidders to:

Identify the proposed management and office support team that will be responsible for providing required contract administrative services. General information is required for the management/administrative personnel at the regional or corporate levels. Indicate the proposed specific individual who would serve as the day-to-day contact and be responsible for the operation of the overall program. Provide an organizational chart. Provide a detailed narrative addressing your firm's understanding of the District's needs and of your plan to meet the school health needs of the District: a staffing matrix, medical oversight, supervision, hierarchy, implementation deadline, description of training support provided to employees during implementation and afterwards, etc. [D]escribe the level of customer service to be provided, list the hours customer support will be available, is customer support available via the internet and/or telephone? Quality Sustainment Operations Plan shall describe the systemic approach to keep the service level at target to prevent unexpected operation problems and to implement additional quality and improvements.

21. A fourth section, Program Cost, was worth 35 points but was not directly graded by the review committee. It was

completed by John Dombroskie based on program cost data submitted in sealed packages by each applicant.

22. A meeting of the committee was held to discuss and, if desired, adjust the scores given for each bidder. Following the discussion at that meeting, the total points on each reviewer's scoring sheet, including the program cost points assigned by Mr. Dombroskie, were totaled. Aloa received 96 points; PSA received 95.83 points. PSA's number was later adjusted downward to 94.22 based, incredibly, on a post-review committee determination by Ms. Hanna that Mr. Dombroskie's calculations--which were not part of the review committee's purview--were in error. Although the manner in which the correction was done was not terribly egregious,^{2/} it was outside the prescribed process for an RFP review.

23. There are several other findings by the committee that warrant discussion.

24. First, the financial review by committee members strains all credulity. PSA, which submitted an audited financial statement showing over \$95 million in net worth, garnered scores of 8, 8, 8, and 5 from the reviewers (out of 10 possible points). Conversely, Aloa, which provided no financial information whatsoever and only an expressed intent to seek a loan for needed capital, received points of 10, 7, 7, and 6 from the reviewers.

25. Aloa's RFP response did not include a balance sheet, profit and loss statement, evidence of cash on hand, any identification of a bank account, or any other information from which its financial stability and long-term viability could be measured. The committee members noted only that the winning bidder would be required to have available assets to pay employees' salaries for the first 45 days of the contract, pending payment by the District for services provided. The only suggestion that Aloa could satisfy this requirement was that it had applied for a loan. Period. By any conceivable objective and unbiased measure, as compared to PSA's financial condition, as proven by its audited financial statement, Aloa's financial position was woefully inferior. That fact is not reflected in the scores assigned by the reviewers.

26. Next, several of the committee members noted that the recommendation letters submitted by PSA were "weak" due to the fact that one of them came from a student's parent rather than from a professional. The RFP requires applicants to provide references that use their services (preferably in Florida). There is no requirement in the RFP that the letters be from professionals. PSA provided three such letters, including one from a student's parent who knew firsthand how PSA's services had been used. For committee members to discredit PSA for insufficient letters of recommendation is not reasonable. By

contrast, the letters from Aloa addressed Ms. Kendrick personally, not her company (which of course had no history to be addressed). Those letters commended Ms. Kendrick for her work done while an employee of PSA; there are no recommendation letters for work done on her own behalf or by Aloa. The letters were, in essence, laudatory comments about PSA's operations in which Ms. Kendrick was involved. The Aloa letters were not technically responsive to the RFP.

27. It should be noted that the committee credited Aloa with having past experience solely because its owner, Ms. Kendrick, had experience working with PSA. The committee did not compare PSA's decades of experience and 4,000-plus skilled caregivers, nor their established management team and operation establishment. The review results in this area do not seem legitimate.

28. The proposed service models described by both applicants were quite similar in nature, which is not surprising as Aloa's principal developed her proposed service model while working for PSA. The committee noted with favor that Aloa was going to be totally focused on providing school healthcare. PSA, by contrast, had other endeavors and interests, e.g., home pediatric healthcare services. The committee did not acknowledge that PSA is a nationwide company and its other ventures did not detract from its ability to provide school

healthcare under the contract. Nor did Aloa's stated intention to enter into mental healthcare services in the next two or three years seem to warrant disapproval by the committee. The reviews showed an unearned and unwarranted bias in favor of Aloa on all accounts.

29. All of Aloa's "company experience" was based on her work as an employee of PSA. All of her successes were associated with how PSA operated. There was no testimony or evidence that PSA's success was due solely or largely because Ms. Kendrick was involved. And the fact that Ms. Kendrick's employment with PSA was terminated cannot be ignored. Looking at the RFP review as a whole, it does not seem completely aboveboard and believable.

CONCLUSIONS OF LAW

30. DOAH has jurisdiction over this matter pursuant to sections 120.569 and 120.57(1), Florida Statutes, and pursuant to a contract between DOAH and the District. Unless specifically stated otherwise, all references to Florida Statutes will be to the 2018 codification.

31. PSA, whose bid was rejected in favor of another bidder, has standing in this proceeding. See Westinghouse Elec. Corp., v. Jacksonville Transp. Auth., 491 So. 2d 1238 (Fla. 1st DCA 1986).

32. PSA has the burden of proof in this matter as it is protesting the proposed agency action. § 120.57(3)(f), Fla. Stat. See also Dep't of Banking & Fin., Div. of Servs. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996). The standard of proof is by a preponderance of the evidence. See Cisneros v. Sch. Bd. of Dade Cnty., 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008); McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); and § 120.57(1)(j), Fla. Stat. PSA must prove in this case that the District's decision to award the contract to Aloa was clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

33. The final hearing in this matter is de novo in nature. Its purpose is to evaluate the action taken by the District. State Contracting and Eng'g. Corp. v. Dep't of Transp., 709 So. 2d 607 (Fla 1st DCA 1998). Still, the District has wide discretion in its review of RFP responses and the award of a contract. Dep't of Transp. v. Groves-Watkins Constr., 530 So. 2d 912, 913 (Fla. 1988).

34. An agency decision is "contrary to competition" when it unreasonably interferes with the objectives of competitive bidding. Those objectives have been stated to be:

[T]o 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) (quoting Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931)).

35. To determine whether an agency acted in an arbitrary or capricious manner, it must be determined "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).

However, if a decision 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. Dravo Basic Materials Co., Inc. v. Dep't of Transp., 602 So. 2d 632 n.3 (Fla. 2d DCA 1992).

36. The actions of the District's review committee, as set forth above, are clearly erroneous. For whatever reason, the committee completely ignored Aloa's lack of financial stability or long-term viability. Despite all of Ms. Kendrick's experience being under the tutelage of PSA, PSA was given

inferior consideration for its programs. The similarity of comments by reviewers (despite their representations that all reviews were independent) raises questions. For example, why would committee members question a non-professional letter of recommendation when the RFP did not have that requirement? And why would no member of the committee even comment on the fact that one of its members had written a letter of recommendation for one of the competing applicants? Very questionable.

37. Public officers and employees (including District employees) are subject to the code of ethics in chapter 112, Florida Statutes. There are proscriptions therein against a public employee having a business relationship with anyone with whom the employee is procuring business. While there is no per se violation of that chapter concerning Ms. Hanna's pre-RFP discussions with Ms. Kendrick, the appearance of impropriety cannot be ignored. This is especially so when considering Ms. Hanna's letter of recommendation on Aloa's behalf.

38. The award of the contract to Aloa was arbitrary and capricious, i.e., as defined in Black's Law Dictionary, 10th Edition (2014): "Characterization of a decision or action taken by an administrative agency . . . meaning willful and unreasonable action without consideration or in disregard of facts or without determining principle." The facts set forth in the RFP proposals are not consistent with the findings of the

committee. The scoring sheets lack credibility under the circumstances described herein.

39. The District has opted to commence its contract with Aloa prior to the final resolution of this challenge. The most efficient remedy is for the RFP to be re-posted, allowing all interested bidders to submit their bids. A totally new review committee should be convened in order to avoid any conflict or appearance of impropriety.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by Petitioner, Escambia County School District, declaring the award of a contract under RFP No. 181001 to Aloa Care Group erroneous, arbitrary and capricious.

DONE AND ENTERED this 24th day of July, 2018, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 2018.

ENDNOTES

^{1/} The copy of the email introduced into evidence has a date of April 10, 2018, at 10:01 a.m., but Mr. Dombroskie testified that it did not go out until later. There was no explanation for that discrepancy. A follow-up email from "Lauren - Joe Hammons Office" states, "The April 10, 2018 (10:01 a.m.) email (Cone of Silence Concerning RFP 181001 - School Health Services) from John Dombroskie you inquired about was sent to the following [people]."

^{2/} Ms. Hanna expressed surprise when she saw Mr. Dombroskie's findings, as if she had expected a different result. She said the calculations just didn't look right, so she took it upon herself to recalculate the numbers. Her changes did not affect the outcome - Aloa still prevailed, but by a wider margin.

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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.