

AWI Order No. 2003-09-00730 Date: 1/21/03

FILED

Agency for Workforce Innovation

AGENCY CLERK

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By:



AGENCY FOR WORKFORCE INNOVATION
An Executive Agency of the State of Florida

Goodwill Industries-SunCoast, Inc.

v.

OGC Case No.: 2003-09-00730

Tampa Bay Workforce Alliance (TBWA)

AGENCY DECISION ON APPEAL OF LOCAL PROCUREMENT DECISION

BACKGROUND

This matter has come before the undersigned pursuant to the Workforce Investment Act of 1998 (WIA), as codified at 29 United States Code (USC), sections 2802 et seq., the applicable federal regulations as contained in 20 Code of Federal Regulations (CFR), part 652 et seq., and the Florida Workforce Innovation Act, as contained in Chapter 445, Florida Statutes.

The Workforce Investment Act is the federal employment and training initiative, designed to increase occupational skills, improve the quality of the workforce, reduce welfare dependency and enhance the productivity and competitiveness of the national economy. The program is implemented through the federal funding provided for the workforce systems throughout the United States. The Florida legislation parallel to the federal program is known as the Workforce Innovation Act.

WORFORCE ENTITIES AND THE PARTIES

The Agency for Workforce Innovation (AWI) as created by section 20.50, Florida Statutes, is the grant recipient of federal workforce funds and the state entity responsible for the administration of workforce policy as established by Workforce Florida, Inc.

Tampa Bay Workforce Alliance (TBWA) is the local workforce board for the state Region 15, chartered by WFI as required by 445.004 (11), Florida Statutes. The local boards are responsible for the development of the local workforce plan and generally coordinating workforce activities.

Goodwill Industries-Suncoast, Inc. (Goodwill) is the Appellant in this proceeding.

ACS State and Local Solutions, Inc. (ACS) was the successful bidder and awarded the contracts for the protested bids under this review.

JURISDICTION AND STANDARD OF REVIEW

The WIA section 181 (c) and applicable regulations in 20 CFR, part 667, subpart F, require that the State and each local area adopt a procedure for dealing with grievances and complaints. As described in section 667.600 (b) (1) of 20 CFR, the local procedures are required to accommodate the grievances and complaints of participants and other interested parties affected by the local Workforce Investment System. In the present case, Goodwill filed a grievance at the local level contesting the procurement of RFP No.1-2003, Workforce Management Services and 11-2003 for Employer Services. Because Goodwill was not satisfied with the decision at the local level, it appealed that decision to the State, as provided in 20 CFR 667.600 (c). The present matter is being conducted by the State in its review capacity, as provided in the State's grievance procedures promulgated as rule chapter 60BB-1, Florida Administrative Code. All documents submitted by both parties have been date-stamped and will be referenced herein as (R at "page #").

STATEMENT OF THE CASE

This case began when Goodwill was denied the award of the contract to provide Workforce Management Services and Employer Services to TBWA. After being unsuccessful in its informal and formal local appeals, Goodwill brought this appeal.

FINDINGS OF FACT

Based upon review and consideration of the documentation and written arguments submitted by the parties, the following have been determined to be the relevant facts.

1. On April 1, 2003 the TBWA issued two Requests for Proposals: (10-2003) Workforce Management Services and (11-2003) Employer Services. (R at 244 et seq. and 324 et seq.)

2. The Request for Proposals (RFPs) set out an appeal process for respondents denied funding. Contested issues must have been based upon one or more of the following criteria: (1) Clear and substantial error or misstated facts by the review team upon which the decision was made by TBWA, (2) unfair competition or conflict of interest in decision making process, (3) any illegal or improper act or violation of law, and (4) other legal basis on grounds that may substantially alter TBWA's decision. (R at 258 and 336)

3. The due date for both RFPs was May 19, 2003.

4. Four responses were received for the Employer Services contract and the respondent's were: (1) Affiliated Computer Systems (ACS) State and Local Solutions, Inc., (2) General Management Solutions, Inc., (3) Goodwill Industries-Suncoast, Inc. and (4) TTI America, Inc. (R at 393)

5. Three responses were received for the Workforce Management Services contract and the respondent's were: (1) Affiliated Computer System (ACS) State and Local Solutions, Inc., (2) Goodwill Industries-Suncoast, Inc. and (3) TTI America, Inc. (R at 395)

6. The Review Committee members for both contracts were: Gloria Anthony, Greater Tampa Bay Chamber of Commerce; Joli Cooper, Cooper Nelson & Associates; Elizabeth Corey, Journey to Work Institute; Barbara Hendry, Hendry Corporation; and Tonja Helton, Cargill Crop Nutrition. (R at 393 and 395).

7. The Review Committee met on June 9, 2003 and recommended the Board's approval to enter negotiations with ACS for both contracts based upon the evaluation that ACS offered valuable added services under the contracts. (R at 393 and 395)

8. The Review Committee's detailed Proposal Rating Sheets provided an analysis of the evaluation criteria for each proposal and a detailed review based upon the responses submitted. (R at 2343 – 2479)

9. The TBWA Executive Committee met on June 11, 2003 and approved the Review Committee's recommendation that staff enter into negotiations with ACS for two contracts. (R at 398-401)

10. On June 25, 2003 the TBWA voted to award Contract Number 10-2003 and Contract Number 11-2003 to ACS. (R at 403)

11. As a result, on July 1, 2003 Goodwill appealed the TBWA's decision based on various objections, including an appearance of impropriety and misstatements. (R at 31)

12. Pursuant to the appeals process set forth in the RFPs, a hearing was held on August 6, 2003 before the Chairperson of TBWA, Ms. Simone Gans-Barefield. (R at 413)

13. As a result of that hearing, a letter containing the findings of the Chairperson was sent on August 8, 2003. The pertinent findings based upon the testimony and evidence submitted were that TBWA made a “full informed decision based on a process that did not contain any appearance of impropriety and that decision should not be overturned simply because the losing parties are unhappy with its results.” (R at 442)

14. In addition to the original allegations, during the hearing on August 6, 2003, Goodwill’s counsel alleged that there was an ex parte communication between the Review Committee and ACS during the Review Committee’s questioning of ACS officials regarding services in another region. According to counsel for Goodwill, Ms. Hendry stated in the June 25th Board meeting approving the contract award to ACS that she had made inquiry of ACS executives regarding the performance issues and had been satisfied that the problems were minor. (R at 423)

15. The August 8, 2003 letter also addressed the allegation raised at the hearing on August 6, 2003 regarding an ex parte communication between ACS and the Review Committee. Ms. Barfield’s letter states that this interaction took place at a publicly noticed meeting and was not an ex parte communication. (R at 441)

16. Goodwill again appealed this decision to the full Board on August 27, 2003. Presentations were made to the TBWA Board by counsel for the Board, Goodwill and ACS. The Board voted to affirm Ms. Gans-Barefield’s decision of August 8, 2003. (R at 478)

17. Goodwill bases its appeal on events that occurred prior to and concurrent with some of the events of the RFP. Those events are set forth in the following findings of fact.

18. TBWA contracted with Excel Alternatives, Inc. for youth services within the region. The record does not reflect the exact dates of this contract but it is clear that this contract

existed prior to the procurement for workforce management services and employer services. It is represented at various board meetings that there was an assignment of this contract to ACS. (R at 276, 384, 389, 399)

19. On March 13, 2003, it is represented in correspondence to TBWA from Dr. Timothy J. Giannoni, President of Excel that the Excel Board approved the “general framework of the acquisition contract” with ACS and expected to formally sign the Purchase Agreement on March 31, 2003. (R at 71)

20. On March 28, 2003, a meeting of the First Jobs/First Wages, Youth Council was held.¹ During this meeting, the acquisition of Excel by ACS is referenced and there is discussion about a proposed distribution from the sale. (R at 877)

21. By letter dated April 4, 2003, the Controller of Excel Alternatives, Inc. notified the TBWA that the Board of Directors for Excel had voted to make distribution of funds from the sale of assets to ACS to the school districts and workforce boards that Excel held contracts with over the preceding nine years. (R at 88)

22. On May 15, 2003, the TBWA, Finance Committee² met and considered both the approval of the contract assignment from Excel to ACS and the acceptance of the proposed distribution from Excel. The Finance Committee voted to recommend both of these actions to the TBWA Board. (R at 385)

23. During the June 25, 2003 TBWA Board meeting, representatives from Goodwill and Excel made presentations to the Board regarding the distributions from Excel. This meeting

¹ It should be noted that none of the Review Committee members for the RFP proposals were present during this meeting. Gloria Anthony is the only acknowledged member of the Review Committee that also sits on this committee and she is marked absent according to the minutes of this meeting.

² No member of the Review Committee was noted as being a member of the Finance Committee or present for this meeting.

is the same meeting at which the Board approved entering negotiations with ACS for the workforce services and employer services contracts. (R at 403 through 407)

24. Also at this meeting, the representative for Excel, Ms. Beverly Winesburgh, Vice-Chair of Excel, represented that when Excel began to consider the sale to ACS, a four-member taskforce was convened to make recommendations on how to distribute proceeds from a sale. The recommendation was made to the Excel Board in January 2003 to give funds to the partners who helped grow their (Excel's) business. This included four workforce boards and eight school districts in the State. She also explained that the Board of Directors for Excel, who remained independent of ACS, made the distribution. (R at 404)

25. During this same meeting, Gloria Anthony, a member of the Review Committee for the RFP proposals in question, stated that at no time during the selection process was the financial offer from Excel discussed or considered. Ms. Anthony continued by stating that the committee maintained the integrity, honesty and trust representative of the spirit of the Board in unanimously selecting ACS as the most qualified candidate to support and carry out the strategic plan. Another member of the Review Committee, Barbara Hendry, stated that ACS's proposal was "by far the best of the four proposals received." (R at 407)

25. While the TBWA Board approved the negotiation with ACS, the motion to accept the distribution from Excel was defeated after extended discussion and input from all parties regarding the distribution from Excel and any potential impact on the procurement process. (R at 407)

CONCLUSIONS OF LAW

The underlying legal determination to be made in this case is whether TBWA acted in bad faith, thus rendering the decision to award the contracts to ACS as an arbitrary and capricious action. Further, Goodwill has alleged violations by ACS of the procurement process by ACS failing to disclose the Excel distribution on the lobbying certifications form and ACS failing to disclose investigations in the debarment certification form relating to services rendered to other regional workforce boards.

The local workforce boards such as TBWA are not subject to state procurement law, once they have in place procurement standards that been approved by Workforce Florida, Inc., 445.007(11), Fla. Stat. “A regional workforce board may designate as its One-Stop delivery system operator any public or private entity that is eligible to provide services under any state or federal workforce program that is a mandatory or discretionary partner in the region’s One-Stop delivery system if approved by Workforce Florida, Inc., upon a showing by the regional workforce board that a fair and competitive process was used in the selection.” §445.009(2)(b), Fla. Stat. TBWA has submitted procurement procedures that were approved by Workforce Florida, Inc. in the Five Year Plan Outline for Region 15 (R-508). The procurement procedure adopts “Federal Circular A-110 and those appropriate polices embodied in Florida Statutes 287, with specific reference to thresholds for purchasing categories of Florida Statutes – 287.” (R-623) The TBWA has bound itself to the standards under Federal Circular A-110 and the portion of Chapter 287, Florida Statutes specifically dealing with the threshold amounts for informal and formal competitive processes.

It is not unusual or unorthodox for an entity that receives government funding to be required to have a competitive procurement process. What is significant is the federal and state

laws that define the standards to which a “competitive procurement” is governed. While an agency has broad discretion in evaluating bids and awarding contracts, it may not act arbitrarily or capriciously, nor can it subvert the competitive bidding process through an element of bias, fraud, favoritism, illegality or dishonesty. DOT v. Groves Watkins Constructors, 530 So. 2d 912 (Fla. 1988).

The Agency’s decision in TTI America, Inc. v. SFW, 2002/08-00018, (November 26, 2002) established the standard of review for these type cases as a “rational basis” determination. The Agency found in TTI that “[t]he rational basis standard is akin to the standard applied to government procurement cases where the validity of an exercise of discretion may be challenged only upon a clear showing that the agency action was arbitrary and capricious or an abuse of discretion or was not in accordance with the law.” See Tackett v. Schaffer, Inc. v. U.S., 633 F. 2d 940 Ct. Cl 1980. This standard parallels closely to Florida law involving review of procurement issues. “In Florida, ... a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.” Liberty County v. Baxter’s Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982). While the discretion vested in a public agency may not be exercised arbitrarily or capriciously, the court will generally not interfere with the agency’s judgment as long as the agency has acted in good faith. Culpepper v. Moore, 40 So. 2d 366 (Fla. 1949).

The federal courts have set out four factors to be considered when determining whether the government acted arbitrarily or capriciously towards the bidder-claimant: 1) whether the government procuring officials acted in bad faith, thus depriving the bidder of fair and honest consideration of proposal; 2) whether there was a reasonable basis for the government’s

decision; 3) the degree of discretion given to the procurement officials by applicable statutes and regulations; 4) whether government officials violated pertinent statutes or regulations, which if violated, may form the basis for recovery, but which need not automatically constitute grounds for recovery. Keco Industries, Inc. v. United States, 492 F. 2d 1200, 203 Ct.Cl. 566 (1974) (Keico II).

In essence, Goodwill's grievance is that the TBWA acted in "bad faith" with respect to this procurement process because of the distribution of assets from Excel during the same time period that the RFP's were offered. Goodwill's argument is that the TBWA created either an appearance of impropriety or an actual impropriety in the award of these contracts to ACS.

Arbitrary and capricious action may be shown by proof that there existed no reasonable basis for the award of the contract to another and subjective bad faith on the part of the procuring officials is such proof. Joseph L. DeClerk and Associates, Inc. v. United States, 26 Cl.Ct. 35 (1992). In order to determine if there was bad faith on the part of the procuring officials, the bidder must be able to demonstrate that alleged improper actions in fact caused harm to the integrity of the selection process. *Id.* A review of the procurement process begins with whether an alleged impropriety or appearance of impropriety occurred, and there must be an assessment of whether the facts surrounding the alleged impropriety or appearance of impropriety had an impact on the procurement process which rose to the level of arbitrary and capricious conduct. *Id.*

The plaintiff must demonstrate either the contracting officer's decision was arbitrary or capricious or that the plaintiff was prejudiced by a clear violation of a statute or regulation. The Court, absent an arbitrary decision cannot rescind a contract based on the mere appearance of impropriety. Synetics, Inc. v. United States, 45 Fed.Cl. (1999).

It appears from a review of the record presented, that the action by TBWA of awarding the workforce services and employer services contracts was not an arbitrary or capricious action. The record clearly reflects that the TBWA Board thoughtfully considered the issues relative to the prospective distribution from Excel Alternatives, Inc. and the impact that may have upon this particular procurement process. Indeed, the decision to proceed with negotiations with ACS for these contracts was made at the same meeting where the Board declined to accept the offer of the distribution from Excel. The Board accepted the statements from the Review Committee members that they did not consider the Excel distribution during the procurement process. In order to prevail on this appeal, Goodwill must have shown that there was an impropriety or an appearance of impropriety so great that there was an effect on the procurement process. Goodwill has failed to meet this burden.

In order to find that there has been an “arbitrary and capricious” action, there must be hard facts to support the record and not allegations based on suspicion and innuendo. CACI, Inc. v. United States, 719 F.2d 1567 (Fed.Cir. 1983). Goodwill has failed to show specific instances of impropriety during the solicitation process that impacted the contract award. In fact, the record lacks any facts to offset TWBA efforts to carry out the procurement in an arms length fashion. TBWA took the action of declining the Excel distribution after advice of counsel that they could accept the distribution and maintain the integrity of the procurement process.

There is a strong, albeit rebuttable, presumption of good faith regarding actions of public officials. *DeClerk* citing Gaskins v. United States, 652 F.2d 70, 227 Ct.Cl. 563 (1981). “A presumption of regularity supports the official acts of public officers, and in the absence of clear evidence to the contrary, it must be presumed that they have properly discharged their official duties.” *DeClerk* citing Francini & Co. v. United States, 2 Cl.Ct. 1 (1983).

In the case at hand, members of the Review Committee have represented that they did not consider the distribution from Excel in the review of the proposals for the contracts in question. In fact, it is noted from the committee meeting notes for the Finance Committee and Youth Council meetings that no member of the Review Committee was present when Excel made the announcement of its intentions with regard to a distribution.

The timing of the proposed distribution might have appeared to compromise the procurement, however, the facts show otherwise. The Board was fully aware of Goodwill's allegations during the June 25, 2003 Board meeting where there was a vote to go forward with negotiations with ACS. The TBWA Board found the allegations to be without merit. Also, at the same meeting, the Board chose to decline the distribution from Excel, thereby removing any doubt of their intentions with regard to the procurement process.

The representation made to the Board was that the Excel Board acted independently from ACS in determinations of how to distribute the proceeds from the sale. There is no substantive evidence in the record contradicting this assertion. The TBWA was certainly within the scope of a reasonable decision by evaluating the allegations and rejecting them.

In applying the four-factor test from Keco, the facts reflect that TBWA did not act in bad faith and TBWA did base its determination on a reasonable basis. While TBWA has broad discretion in the application of its procurement procedures, TBWA did not violate any statute or regulation in this procurement.

The other allegation by Goodwill regarding this procurement deals with ACS's disclosure of lobbying certifications as required by federal law and the failure of the Review Committee to fully investigate ACS's performance in other regions of the State.

The lobbying certification is required by Section 1352, Title 31, U.S.C.A. These requirements exist and certify federal funds will not be spent for the purposes of lobbying governmental officials. The following is the language for this certification:

29 CFR Part 93

The undersigned certifies, to the best of his or her knowledge and belief, that:

No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment or modification of any Federal contract, grant, loan or cooperative agreement.

If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employees of Congress, or employee of a Member of Congress in connection with this Federal contract, grant, loan or cooperative agreement, the undersigned shall complete and submit Standard Form – LLL, “Disclosure Form to Report Lobbying,” in accordance with its instructions.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S.C. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

In other words, any recipient or sub-recipient of federal funds, in this case under the Workforce Investment Act, must require contractors to assure the recipient or sub-recipient that this money will not be used for lobbying activities. Even if the proposed distribution from Excel were actually from ACS, this certification would not address that situation and does not merit further discussion in that the Excel distribution was not for the purpose of lobbying.

Second, there have been allegations of impropriety regarding the administration of contracts in other regions throughout the State for which ACS should have disclosed in the debarment statements required by the RFP. The appropriate debarment language follows:

29 CFR Part 98

The prospective primary customer certifies to the best of its knowledge and belief, that it and its principals:

1. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
2. Have not within a three-year period preceding this proposal been convicted or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
3. Are not presently indicted or otherwise criminally or civilly charged by a government entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and,
4. Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause of default.

That if the prospective primary customer is unable to certify to any statements in this certification, such prospective primary customer shall attach an explanation to the proposal.

The record does not show any adjudication by any authoritative entity that ACS has done any of the preceding action that would require a disclosure. Goodwill argues that TBWA or members of the Review Committee should have extensively sought out this information before pursuing a contract with ACS in Region 15. In the letter from Ms. Gans-Barefield on August 8, 2003, she states that her review of the matter disclosed that the members of the Review Committee, during the public question and answer session, questioned ACS about its Miami Dade operations. Since there was no further discussion on this matter, the Review Committee must have been satisfied with ACS's response as they recommended ACS for both contracts. It is certainly within the committee's scope of assessment to review such matters, and apparently

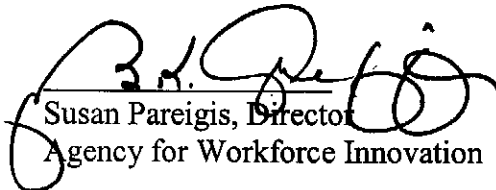
they did. There is no showing that the Review Committee or TBWA abused its discretion in reaching their decision to make no further inquiry in this matter.

The party protesting the award of a public contract has the burden to establish a ground for invalidating the award. GTECH Corp. v. State of Florida, 737 So. 2d 615 (1st DCA, 1999) Goodwill has not carried this burden under the facts and circumstances of this case.

WHEREFORE, the undersigned finds:

The record does not support a finding of an impropriety or an appearance of impropriety by TBWA or ACS to disqualify ACS in the procurement process. Therefore, the appeal of Goodwill is dismissed.

DONE and ORDER, this 15th day of December 2003, in Tallahassee, Florida.


Susan Pareigis, Director
Agency for Workforce Innovation

NOTICE OF RIGHTS TO APPEAL

FEDERAL

This Agency Decision is rendered pursuant to Workforce Investment Act regulation 20 CFR 667.600(c)(4) and Agency for Workforce Innovation rule Chapter 60BB- 1. A party adversely affected by this decision may petition the Secretary of the United States Department of Labor within 60 days of receipt of this decision. Any appeal must be submitted by certified mail, return receipt requested, to the Secretary, U.S. Department of Labor, 2000 Constitution Ave., N.W., Frances Perkins Building, Washington, DC 20210, Attention ASET. A copy of the appeal must be simultaneously provided to the ETA Regional Administrator, U. S. Department of Labor, ETA, Atlanta Federal Center, 61 Forsyth Street, S.W., Room 6M12, Atlanta, GA. 30303 and to the AWI, Office of the General Counsel, 107 E. Madison Street, Caldwell Building, MSC # 150 Tallahassee, Fl. 32399-6545.

STATE

THIS DECISION CONSTITUTES FINAL AGENCY ACTION, pursuant to §120.68(2), Florida Statutes, Judicial Review of this proceeding maybe instituted by filing a notice of appeal in the district court of appeal in the appellate district where the Agency maintains its headquarters or where a party resides. Such notice of appeal must be filed with the district court of appeals within thirty (30) calendar days of the date this order is filed in the Official Records of the Agency for Workforce Innovation, as indicated in the certification of the Agency Clerk, or further review will be denied.

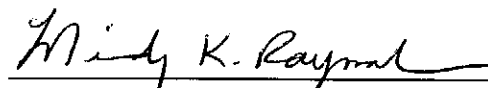
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was provided by via Facsimile and U. S. Mail, this 15th day of December 2003, to:

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