

State Protest Committee Meeting No. 19
Summary of Decision and Minutes
Protest of RFP # 34349-03823
Insurance Assistance Program (“IAP”) Benefits

The Department of Health (“Health”) issued RFP # 34349-03823 for Insurance Assistance Program (“IAP”) Benefits Management (“the RFP”) on September 23, 2022. The State completed the evaluations and provided its Notice of Intent to Award the contract to Broward Regional Health Planning Council (“Broward”) on December 2, 2022. On December 16, 2022, Nashville CARES (“NC”) filed a protest of that determination with Chief Procurement Officer Michael Perry (“CPO”).

On February 15, 2023, the CPO issued his written decision denying NC’s protest. NC filed a Notice of Appeal of the CPO’s decision to the State Protest Committee (“Committee”) on February 16, 2023. Position Statements were submitted by NC, the CPO, and Broward.

The Committee convened on May 24, 2023, to hear NC’s appeal. The Committee was comprised of the following members: Eugene Neubert, Deputy Commissioner of the Department of Finance and Administration (“F&A”), as designee of F&A Commissioner Jim Bryson; Rick Dubray, Deputy Treasurer, Support Services with the Department of Treasury, as designee of State Treasurer David Lillard, Jr.; and Michael Winston, Director of Financial Management with the Department of General Services (“DGS”), as designee of DGS Commissioner Christi Branscom.

The protesting party NC, the CPO, Broward, and Health appeared for the meeting.

The issues for determination by the Committee were:

The contract award to Broward was arbitrary and capricious and exceeded the authority of the CPO; and was contrary to applicable law, regulations, and terms of the RFP for the following reasons:

1. Broward is not legally qualified to respond to the RFP.
2. Broward’s proposal provided incomplete and inaccurate responses to the RFP.
3. The CPO improperly bypassed and disqualified NC based on NC’s association with ScriptGuide RX (“SGRX”) even though such association is permissible under federal law and is consistent with the terms of federal regulations and the RFP.
4. The CPO failed to conduct a proper analysis of NC’s proposal by relying solely on the Health Resources Service Administration (“HRSA”) policy and not considering the controlling IAP regulations.
5. The CPO misapplied the federal regulatory bar on non-profit entities passing on awards to for-profit entities, because SGRX is a subcontractor, not a subrecipient.

6. The CPO erred by not holding Broward to the same scrutiny as NC.

After discussion and argument by counsel for NC, the CPO, and Broward and the Committee's questioning of Health, the Committee unanimously upheld the decision of the CPO denying NC's appeal based on the written position statements from the parties and oral presentations by counsel for NC, the CPO and Broward, as follows:

1. The Committee found no merit in the allegation that Broward is not legally qualified to respond to the RFP. The Committee determined that NC abandoned this argument as it did not address this argument in either its position statement or its oral presentation before the Committee. Thus, there was no evidence to support this allegation.
2. The Committee also found no merit in the allegation that Broward provided inaccurate information in its proposal. The Committee determined NC abandoned this argument as it did not address this argument in either its position statement or its oral presentation before the Committee. Thus, there was no evidence to support this allegation.
3. The Committee found that the CPO's decision to bypass NC's proposal was justified and not arbitrary or capricious. NC's proposal included using SGRX, a for-profit entity, to provide core services of the Ryan White program, which the CPO identified as an impermissible subcontracting relationship under federal law. Based on the CPO's preliminary determination that NC's proposal appeared to violate federal law, the CPO requested clarification from NC about its intended relationship with SGRX. After reviewing NC's response, the CPO determined that NC's proposal violated the federal directive and did not meet the terms of the RFP. Consequently, the CPO properly bypassed NC's proposal as nonresponsive. The Committee found further justification for the CPO's action to bypass NC's proposal based on the risk of jeopardizing federal funding for the Ryan White program due to an audit finding the CPO failed to properly apply federal law to NC's proposal.
4. The Committee determined that the CPO conducted a proper analysis of NC's proposal by a reasonable interpretation of applicable federal law. While NC is a nonprofit entity, NC's proposal described its intent to partner with SGRX, a private for-profit entity, to provide certain core services to the State. Federal law and guidance as well as the language of the RFP prohibit using a for-profit-entity to pass through funding to a second or subsequent-level entity unless there are no nonprofit entities available for providing such services. Broward is a nonprofit that is available to provide all required services. As a result, the Committee found that NC is not entitled to relief on this ground. The Committee found further justification for the CPO's action to bypass NC's proposal based on the risk of jeopardizing federal funding for the Ryan White program due to an audit finding the CPO failed to properly apply federal law to NC's proposal.
5. The Committee heard arguments on whether the CPO misapplied the federal bar on non-profit entities passing on awards to for-profit entities. NC argued that SGRX would be a permissible subcontractor and not a subrecipient of the award. The Committee determined that the label of SGRX, i.e., a subcontractor or a subrecipient, was not the deciding factor; but the proper analysis is to view the services SGRX would be providing. Based on NC's proposal, SGRX would

be performing certain core services under the contract instead of NC itself, which supported the CPO's decision to bypass NC.

6. The Committee found that the allegation that the CPO erred by not holding Broward to the same scrutiny as NC was not supported by evidence. The proposals made by NC and Broward were distinct, and any different actions taken by the solicitation coordinator based on information in each proposal was supported by the language in the RFP.
7. Upon proper motion and second, the Committee unanimously voted to deny the protest and uphold the previous decision of the CPO.
8. Upon proper motion and second, the Committee unanimously voted to return the protest bond to NC.