

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-5260

AHF MCO OF FLORIDA, INC.
d/b/a PHC FLORIDA HIV/AIDS
SPECIALTY PLAN,

Appellant,

v.

AGENCY FOR HEALTH CARE
ADMINISTRATION and SIMPLY
HEALTHCARE PLANS, INC.,

Appellees.

On appeal from a Final Order of the Agency for Health Care
Administration.
Justin M. Senior, Secretary.

December 31, 2020

PER CURIAM.

Appellant, AHF MCO of Florida, Inc. d/b/a PHC Florida HIV/AIDS Specialty Plan, appeals a Final Order entered by the Agency for Health Care Administration (“AHCA”), one of two Appellees, in which AHCA dismissed Appellant’s formal written bid protests for lack of standing. For the reasons that follow, we find no error in AHCA’s characterization of Appellant as a non-responsive bidder for violating section 287.057(23), Florida Statutes (2017), which prohibits a respondent in a bid solicitation

from contacting government employees or officers.¹ We likewise find no error in AHCA's determination that, because of the cone-of-silence violation, Appellant lacked standing to initiate the bid protest because it would have no chance of obtaining the contract award in a re-bid proceeding. We therefore affirm the Final Order.

As explained by the administrative law judge ("ALJ"), this case involves a bid protest that was the culmination of AHCA's year-long procurement process seeking vendors to provide Medicaid managed care plans. Florida has offered Medicaid services since the 1970s, and the state and federal governments together fund healthcare for eligible children, seniors, disabled adults, parents, and pregnant women. The program's annual budget exceeds \$25 billion and is the largest part of Florida's budget. AHCA administers the Medicaid program in Florida and refers to the managed care program as Statewide Medicaid Managed Care ("SMMC"). SMMC includes two programs – Managed Medical Assistance ("MMC") and Long-term Care, with MMC covering the full spectrum of health care. This case involves a subset of the MMC program known as Specialty Plans. Section 409.966(2), Florida Statutes (2017), required AHCA to select eligible Medicaid managed care plans for each of the eleven regions of Florida. The law also required AHCA to use the invitation to negotiate ("ITN") process created by section 287.057(1)(c), Florida Statutes (2017), and to conduct separate and simultaneous procurements.

In July 2017, AHCA released eleven ITNs. The top two ranking Specialty Plans per specialty population in each region would be invited to negotiations. AHCA evaluated the responses, chose to negotiate with some providers, not including Appellant, and posted its notice of intent to award contracts in April 2018.²

¹ This provision is commonly referred to as establishing a "cone of silence."

² In Region 10 (Broward County), Appellant had the lowest score of four bidders. In Region 11 (Miami-Dade and Collier Counties), Appellant had the lowest score of three bidders. In both regions, Simply Healthcare Plans, Inc., the other Appellee in this appeal, had the highest score.

Appellant, which had been “one of the incumbent providers for HIV and AIDS specialty plans” in Regions 10 and 11, challenged the Agency’s awards in those regions. Appellant maintained that AHCA should reject all proposals and restart the procurement process, which, according to it, had been fundamentally flawed based on AHCA’s scoring process. AHCA referred Appellant’s challenge to the Division of Administrative Hearings.

During the formal administrative hearing before the ALJ, Appellant’s counsel acknowledged the following:

There’s a cone of silence issue that’s been raised against my client here based upon the fact that they engaged in some free speech activity [D]id they organize demonstrations once it was – they figured out that they weren’t going to be invited to negotiations? Yes, they did.

Did they try to get other nonprofit organizations who are committed to the fight against HIV and AIDS to submit letters of concern to the governor? Yes, they did.

Did they run ads in newspapers stating that this was a travesty and that that should not be the decision that was made? Yes, they did.

Thereafter, AHCA’s Bureau of Support Services’ chief, who was responsible for all agency solicitations and was the procurement officer for the ITNs at issue, testified about certain activities Appellant was involved in after it learned that it would not be invited to negotiate for Regions 10 and 11. The activities involved protests outside of AHCA’s headquarters, submission of newspaper articles, and a letter of concern being sent to the governor. AHCA made no determination at that time that Appellant was a non-responsive or non-responsible bidder under section 287.057(23) because Appellant had not been invited to negotiate.

In the Amended Recommended Order, the ALJ found no merit in AHCA’s argument that Appellant lacked standing because of its cone-of-silence violations. The ALJ reasoned that because AHCA did not reject Appellant’s response during the bid proceeding on that basis, it could not find Appellant a non-responsive bidder in

response to Appellant's bid protest. He also reasoned that Appellant had standing to initiate the protest because it was challenging AHCA's scoring process itself which, according to Appellant, fundamentally undermined the review process.³ After agreeing with Appellant that AHCA's review process was flawed, the ALJ recommended that AHCA enter a final order rejecting all responses to the ITNs for the HIV/AIDS Specialty Plans in Regions 10 and 11.

In ruling upon the exceptions to the Amended Recommended Order, AHCA concluded in part that Appellant did not have standing to raise any challenge to the bid process because it was a non-responsive bidder by virtue of violating the cone of silence mandated by section 287.057(23). AHCA recognized that there was no factual dispute that Appellant contacted government officials during the time frame provided for in the statute, and that Appellant's counsel admitted that the violations occurred. AHCA reasoned that Appellant would have no chance of obtaining the contract award during a re-bid proceeding and was, thus, in a position similar to that of a non-bidder who has no standing to protest a bid proceeding. As such, AHCA dismissed Appellant's protest. This appeal followed.

Appellant contends that AHCA erred in dismissing its bid protests for lack of standing. We review this issue *de novo*. See *Agency for Health Care Admin. v. Best Care Assurance, LLC*, 302 So. 3d 1012, 1015 (Fla. 1st DCA 2020) (explaining that the issue of whether a party has standing to bring an action is a question of law reviewable *de novo* on appeal).

Section 120.57(3), Florida Statutes (2017), addresses procedures applicable to protests to a contract solicitation or award. The statute provides in part that "[a]ny person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest" § 120.57(3)(b), Fla. Stat. (2017). The primary basis for AHCA's dismissal of

³ We need not address AHCA's rejection of this conclusion of law given our disposition as to the cone-of-silence issue. Nor do we need to address Appellant's second issue on appeal, which pertains to the merits of the challenges it raised in its bid protests.

Appellant's protests was what it determined to be Appellant's cone-of-silence violations. Section 287.057, Florida Statutes (2017), which addresses the procurement of commodities or contractual services, provides in part:

(23) Each solicitation for the procurement of commodities or contractual services shall include the following provision: "Respondents to this solicitation or persons acting on their behalf *may not contact*, between the release of the solicitation and the end of the 72-hour period following the agency posting the notice of intended award, excluding Saturdays, Sundays, and state holidays, *any employee or officer of the executive or legislative branch concerning any aspect of this solicitation*, except in writing to the procurement officer or as provided in the solicitation documents. Violation of this provision may be grounds for rejecting a response."⁴

(Emphasis supplied).

As did AHCA, we find the ALJ's reasoning concerning the cone-of-silence violations unpersuasive. While it is true that AHCA did not deem Appellant non-responsive during the negotiation phase below, it had no reason to do so given that Appellant was not one of the two bidders who were invited to negotiate in Regions 10 and 11 for the HIV/AIDS program. Had Appellant engaged in a cone-of-silence violation prior to the invitation to negotiate being issued, there is no doubt that AHCA

⁴ The ITNs at issue included this language. The ITNs also defined the terms "responsive reply" as a "reply submitted by a responsive and responsible vendor, which conforms in all material aspects to the solicitation" and a "responsible vendor" as "a vendor who has the capacity in all respects to fully perform the Contract requirements and the integrity and reliability that will assure good faith performance." See § 287.012(25), Fla. Stat. (2017) (defining "responsible vendor"); § 287.012(27), Fla. Stat. (2017) (defining "responsive vendor" as "a vendor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation").

would have had the authority to reject Appellant’s response pursuant to section 287.057(23).

This case presents a rather novel situation where a bidder who was displeased when it was not invited to negotiate had, according to Appellant, “its organizers and HIV patients picket[ing] AHCA’s office, march[ing] in AHCA’s parking lot, wav[ing] signs, and otherwise protest[ing] AHCA’s decision the old-fashioned way.” It is undisputed that these activities, along with the other actions acknowledged below, occurred within the time period addressed in section 287.057(23). That activity—the protesting outside AHCA’s headquarters and the letter of concern to the governor—was contact with officers and employees of the executive branch concerning an aspect of the solicitation in which Appellant was involved, in violation of section 287.057(23). We see no reason why AHCA, acting within its discretion, could not conclude, based on the cone-of-silence violations, that Appellant would have “no chance of obtaining the contract award” as a non-responsive bidder in any re-bid that Appellant sought in its protest. In turn, AHCA’s determination that Appellant was in a position similar to that of a non-bidder for purposes of standing to challenge a bid proceeding was well-taken. *See Westinghouse Elec. Corp. v. Jacksonville Transp. Auth.*, 491 So. 2d 1238, 1241 (Fla. 1st DCA 1986) (“Absent extraordinary circumstances not present here, a non-bidder does not have standing to challenge the successful bid.”).

Accordingly, the Final Order is AFFIRMED.

LEWIS, TANENBAUM, and LONG, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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