COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1679 **Cir. Ct. No. 2006CV636**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

LAW OFFICES OF ELIZABETH G. RICH,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN DEPARTMENT OF ADMINISTRATION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. The Law Offices of Elizabeth G. Rich appeals a circuit court order denying Rich's petition to review the Wisconsin Department of

Administration's (DOA) denial of her[1] protest of a decision of the University of Wisconsin – Milwaukee and dismissing her claim. Rich argues that, in awarding a contract to another proposer, UWM violated the notice requirement of WIS. ADM. CODE Adm 10.08(6) (Dec. 2006),[2] and that the evaluation committee acted arbitrarily in administering the contract selection process. She also asserts that the winning proposal was inadequate. We disagree and affirm.

¶2 In May 2005, UWM issued a request for proposal (RFP) to award a contract for legal services at the University Legal Clinic. The RFP stated that the one-year contract would begin July 1, 2005. Rich submitted a timely proposal and was granted a personal interview. On November 17, 2005,[3] UWM notified Rich of its intent to contract with another proposer, Wartman Law Office. Wartman had been the service provider for the past several years. Rich protested UWM's intent to contract in a letter to the chancellor on grounds that Wartman's proposal lacked certain requirements; the bid-scoring process was arbitrary and unreasonable; and issuance of the notice of intent was unreasonably delayed. UWM denied her protest.

¶3 Rich appealed the denial to the DOA, which found no evidence that the evaluation process was arbitrary and unreasonable. The DOA concluded that the absence of a cover page on Wartman's proposal was de minimus and remediable and that any delay of the notice of intent was acceptably explained and

[1] The appellant is the Law Offices of Elizabeth G. Rich, but we use "her" or "she" for readability.

[2] Unless otherwise noted, all references to the Wisconsin Administrative Code are to the December 2006 version and all references to the Wisconsin Statutes are to the 2005-06 version.

[3] The letter of intent indicated "Sent November 3—Returned for Changed Address."

did not prejudice Rich. Finding no statute or rule violation, the DOA denied her appeal. Rich then petitioned for review pursuant to WIS. STAT. §§227.52-.53. The circuit court denied her petition and dismissed the action.

¶4 In an appeal from a circuit court order in an administrative review proceeding, we review the agency's decision, not the order of the circuit court. ***Motola v. LIRC***, 219 Wis. 2d 588, 597, 580 N.W.2d 297 (1998). We examine whether the decision was arbitrary or unreasonable—in other words, if it is so unreasonable as to lack a rational basis, or if it resulted from unconsidered, willful or irrational decision making. *See* ***Glacier State Distrib'n Servs., Inc. v. DOT***, 221 Wis. 2d 359, 368-70, 585 N.W.2d 652 (Ct. App. 1998). We may not substitute our judgment for the agency's on an issue of discretion. ***Mews v. Wisconsin Dep't of Commerce***, 2004 WI App 24, ¶11, 269 Wis. 2d 641, 676 N.W.2d 160; WIS. STAT. § 227.57(8). Furthermore, our review is confined to the administrative record and we must affirm the agency's decision unless we find grounds specified in the statute for not affirming it. WIS. STAT. § 227.57(1), (2). Even if the agency's decision is against the great weight and clear preponderance of the evidence, we will not reverse if substantial evidence exists to sustain it. ***Mews***, 269 Wis. 2d 641, ¶11. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Id.***

¶5 Rich first argues that UWM violated WIS. ADMIN. CODE § Adm 10.08 because the notice of intent was unreasonably delayed. She contends the contract began on July 1 yet she did not receive the notice of intent until November. WIS. ADMIN. CODE § Adm 10.08(6) provides:

> **(6)** NOTICE OF INTENT. When the competitive negotiation process is used to procure services over $10,000, a letter of intent to contract shall be sent by the contracting agency to the selected proposer. Copies of the

> letter of intent shall be sent to all other proposers in the evaluation process. All letters of intent shall be sent at least 5 days before the intended date of award.

The delay, she asserts, deprived her of the opportunity to meaningfully protest the decision because by the time she received notice, the contract already was four months underway.

¶6 Rich's argument begs the question. It operates from the premise that since July 1 was the anticipated date stated in the RFP, the contract necessarily was awarded by July 1. She offers no factual proof of the date the contract actually was awarded, however, other than that Wartman provided services beyond July 1. UWM explained that workload issues delayed the contract award and that it is not uncommon, when University or State operations intervene, to continue the original contract until a new one is awarded for the full period specified in the RFP. The DOA deemed that an acceptable explanation of the delay in awarding the contract. Reasonable minds could accept that conclusion.

¶7 Rich likewise offers no law to shore up her contention that UWM was legally bound to award the contract by July 1, 2005. Indeed, §1.7 of the RFP provides that the contract "shall be effective on the date indicated on the purchase order *or the contract execution date* and shall run for one year from that date." (Emphasis added.) The RFP thus envisions that the contract could be awarded later than the anticipated date, as UWM explained occurred in this instance. We note that an objective of WIS. ADMIN. CODE ch. Adm 10 is to ensure that contracts for services "are entered into only in the best interests of the state." WIS. ADMIN. CODE § Adm 10.02(1). We presume public officers perform their official duties in compliance with all statutory requirements. ***Lisbeth v. Kahl***, 42 Wis. 2d 264, 271, 166 N.W.2d 160 (1969). Awarding a contract within the RFP's stated time frame

may be preferable and likely is the goal. It also is necessary, however, that a contemplated contract be in the State's best interest. We conclude that Rich has not demonstrated that the notice of intent to contract was untimely.

¶8 Nevertheless, we will address briefly her claimed inability to meaningfully protest UWM's decision. An aggrieved proposer must file its notice of intent to protest, and then its protest, within five and ten working days, respectively, after issuance of the letter of intent to award a contract. WIS. ADMIN. CODE § Adm 10.15(1). Rich asserts that the short timeframe is "obviously so that [UWM], or on appeal [the DOA], has the opportunity to alter the initial award." Rich implies that her protest became meaningless when UWM allegedly awarded Wartman the contract four months earlier. We disagree. Rich was given all of her administrative remedies. She filed a protest with UWM, an appeal to the DOA and a petition for review with the circuit court. Each entity responded fully to the points she raised. We see no prejudice.

¶9 Rich also argues that the form of the notice of intent to contract was wrong because it was addressed to her rather than being a copy of the one sent to Wartman. *See* WIS. ADMIN. CODE § Adm 10.08(6). She did not raise this issue when she protested either to UWM or to the DOA. Again, our review is limited to the record developed before the agency. WIS. STAT. § 227.57(1). A party's failure to raise an issue before the administrative agency generally constitutes waiver. ***State v. Outagamie County Bd. of Adjustment***, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376. We will not address it further beyond noting that, whether the notice was addressed personally to her or was a copy of Wartman's, Rich received notice, took her protest and was accorded her full remedies.

¶10 Rich next asserts that one evaluator's negative comments about the organization of her proposal and presentation demonstrate that the evaluation committee used improper criteria and therefore misapplied WIS. ADMIN. CODE § Adm 10.08 in rejecting her. Rich contends that correct application of the RFP criterion requires an assessment of the proposer entity's organizational capability to provide the requested services, not the individual's organizational skills.

¶11 Section 3 of the RFP describes the proposal selection process and § 3.3 lays out three areas to be evaluated—qualifications, references and capabilites—and the weight to be given to each. Section 4.2, "Capabilities," instructs the applicant to "[d]escribe … your experience and capabilities in providing similar services …." The score sheets further refine "capability" as "organization capability" and explain that it means "demonstrat[ing] organizational capability in providing the services requested." In rating Rich's organization capability, one evaluator noted that Rich appeared "somewhat disorganized" and that her application contained errors and "seemed thrown together."

¶12 Rich asserts that, unlike Wartman's, her application had no errors but her organizational capability matches Wartman's because they both are solo practitioners. Neither Wartman's nor Rich's proposals are before us, however, as they were not part of the administrative record.[4] Even if they were, the existence or lack of errors in either proposal or the fact that both are solo practitioners does not prove that selecting Wartman's proposal over Rich's was the result of

[4] Rich supplies Wartman's proposal and portions of hers in the appendix to her brief. We will not consider assertions of fact that are outside of the record. ***Balele v. Wisconsin Personnel Comm'n***, 223 Wis. 2d 739, 752, 589 N.W.2d 418 (Ct. App. 1998).

arbitrary, irrational or unreasonable decision making. Rich's opinion that her proposal and interview performance were superior to Wartman's is just that: an opinion. She offers no facts or law to establish that the evaluator's comments lacked a rational basis, or that the evaluator or evaluation committee misapplied the RFP scoring criteria or violated WIS. ADMIN. CODE § Adm 10.08. Rather, the DOA concluded that the purpose of the interview was to clarify and elaborate on the written proposal, that organizational skills are demonstrable and were measured as part of the interview process and comments in that regard are not arbitrary or unreasonable in that context. When we examine the record against the evaluation criteria, the DOA's explanation does not strike us as either inconsistent with the language of the RFP or clearly erroneous. *See* ***Irby v. Bablitch***, 170 Wis. 2d 656, 659, 489 N.W.2d 713 (Ct. App. 1992).

¶13 Rich's next claim of error is that the State arbitrarily administered the contract selection process. In support, Rich observes that the three evaluators' oral interview score sheets are undated; bear a different RFP number than the one at issue; contain "obvious white-outs" and changes on some of her scores;[5] and are marked "Page 1 of 2" but lack Page 2s. She also comments that while there ostensibly were three evaluators, the handwriting on the score sheets "looks quite similar." Rich contends these errors are "too capricious" to be discounted as simple mistakes or sloppiness, and asks that we disqualify the evaluations and remand the matter to permit her to take discovery. *See* WIS. STAT. § 227.57(4).

[5] Some alterations appeared to benefit Rich. Also, Rich acknowledges that some scores apparently also were changed on Wartman's score sheets.

¶14 UWM explained in response to Rich's protest that the interview process "allows for rating, discussion among raters and re-rating of the proposals," such that score sheets often end up with line outs and other markings. Similarly, the DOA explained that evaluators first perform a written evaluation and then conduct the oral interview to clarify and elaborate on the written proposal, and that evaluators are permitted to adjust their scores during this process.

¶15 Rich does not explain how undated score sheets that bear her or Wartman's name but have an incorrect RFP number violate any statute or rule. The criteria the RFP required to be covered were on the Page 1s. Rich offers no evidence of what, if anything, of substance was or should have been on a second page or that any of the evaluation criteria specified in the RFP were ignored. The administrative record supports the decisions rendered.

¶16 Finally, Rich asserts that Wartman's proposal should have been disqualified because Wartman did not submit the cover page provided with the RFP, a certification that he engaged in no collusion to influence the proposal process, or a statement pursuant to WIS. STAT. § 16.754 that materials covered in the bid were wholly or substantially manufactured in the United States. She contends she was the only other proposer who submitted a conforming proposal and the contract therefore should have been awarded to her.

¶17 This argument also fails. First, WIS. STAT. § 16.754, "Preference for American-made materials," by its plain terms does not apply. It addresses State contracts for manufactured goods. Legal services are not manufactured goods.

¶18 In addition, Rich cites no authority for her claim that a failure to include the noncollusion certification mandates disqualification of a proposal. Section 2.4 of the RFP specifications addresses a proposal's organization and

format. It lists "cover page" among the RFP sections "which should be submitted or responded to." Rich has not established that "cover page" unequivocally means the general cover page of the RFP or that its submission is mandatory. The word "should" connotes a discretionary, not mandatory application. *See* ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶30, 253 Wis. 2d 323, 646 N.W.2d 314. Moreover, nowhere on the RFP cover page or elsewhere in the RFP does it say that failure to submit the cover page or the certification disqualifies a proposal.

¶19 Finally, the absence of the certification is easily remediable. UWM advised Rich that no law or rule expressly requires the proposer to submit the cover page furnished with the RFP, and therefore supplying it for an otherwise responsive proposal can be done later. Indeed, sec. 7.0 of the RFP provides that UWM reserves the right to incorporate standard State contract provisions into any contracts it negotiates. Among those is sec. 8.0 of the Standard Terms and Conditions for RFPs, by which the State reserves the right to waive any technicality in any submitted proposal.

¶20 Our review of the record satisfies us that UWM and the DOA gave reasonable explanations for the delay in awarding the contract and the challenges Rich raised to the evaluation process. An interview inescapably has a subjective component, but that alone does not make it arbitrary or unreasonable. Because Rich has not established otherwise, we conclude the evaluators considered the criteria required by the RFP and that their decision had a rational basis. We see no statutory or administrative rule violation.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. § 809.23(1)(b)5.