IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

COMPLETE TITLE OF CASE

TRI-COUNTY COUNSELING SERVICES, INC., et al.,

Appellants,

v.

OFFICE OF ADMINISTRATION, et al.,

Respondents.

DOCKET NUMBER WD82751

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DATE: March 3, 2020

APPEAL FROM

The Circuit Court of Cole County, Missouri
The Honorable Richard G. Callahan, Judge

JUDGES

Division One: Chapman, P.J., and Pfeiffer and Gabbert, JJ. CONCURRING.

ATTORNEYS

Thomas W. Rynard and Stephanie S. Bell, Jefferson City, MO, Attorneys for Appellants.

Eric S. Schmitt, Attorney General, and Craig H. Jacobs, Assistant Attorney General, Jefferson City, MO, Attorneys for Respondents Office of Administration, Division of Purchasing, and the Department of Social Services, Children's Division.

Charles W. Hatfield and Alexander C. Barrett, Jefferson City, MO, Attorneys for Respondent Great Circle.

Jennifer S. Griffin and Douglas E. Nelson, Jefferson City, MO, Attorneys for Respondent Cornerstones of Care.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

TRI-COUNTY COUNSELING SERVICES, INC., et al., Appellants,
v.
OFFICE OF ADMINISTRATION, et al., Respondents.

WD82751 **Cole County**

Before Division One Judges: Thomas N. Chapman, Presiding Judge, and Mark D. Pfeiffer and Anthony Rex Gabbert, Judges

Tri-County Counseling Services, Inc. doing business as Family Facets and its executive director, Sheila Searfoss, (collectively "Family Facets") appeal the judgment of the Circuit Court of Cole County, Missouri ("trial court"), partially granting motions to dismiss of Office of Administration, Division of Purchasing ("OA"), and the Department of Social Services ("DSS") (collectively "State"), and Intervenor Cornerstones of Care ("Cornerstones") relating to certain counts of Family Facets' First Amended Verified Petition ("Petition") and the First Amended Cross-Claim of Intervenor Great Circle, a Missouri Not-For-Profit Corporation ("Great Circle"), and otherwise ruling in favor of the State on all remaining counts after a bench trial.

On September 13, 2017, the State issued a Request for Proposal ("RFP") seeking seventeen separate contracts for services including Intensive In-Home Services (IIS) at seventeen different project sites in Missouri. The RFP required, among other things, the provision of a certain number of IIS Specialists at each project site. The minimum qualifications of an IIS Specialist required a college degree or a professional license or designation, and multiple years of experience, as well as the ability to respond 24 hours per day, seven days a week.

The RFP contained several scored categories, including Cost (80 maximum points); Vendor's Experience and Reliability, Expertise of Personnel ("Experience") (30 maximum points); Method of Performance ("Performance") (80 maximum points); MBE/WBE Participation (10 maximum points); and the Sheltered Workshop Preference ("Sheltered Workshop") (10 preference points). The Experience and Performance categories were subjectively and comparatively scored by three evaluators from DSS, and the remaining categories, including the Sheltered Workshop category were scored objectively by OA.

Eleven vendors submitted bids including proposals for multiple project sites in response to the RFP, including Family Facets, Great Circle, and Cornerstones. Family Facets' proposal committed to sheltered workshop participation, indicating that it would use IIS Specialists to be hired and employed directly by Lake Area Industries, an organization that operates a sheltered workshop, to perform some of the services required by the RFP. After the initial review of Family Facets' proposal, the State concluded that the proposal included adequate documentation of use of a sheltered workshop and awarded ten preference points to Family Facets for each site it bid on,

except one for failure to submit properly completed paperwork. The arrangement between Family Facets and Lake Area Industries was memorialized in a Memorandum of Understanding ("MOU") between the parties, but was not provided to the State as part of Family Facets' initial proposal.

In April 2018, after the proposals received were evaluated, the State tallied each vendor's total scores for each of the sites and issued Notices of Award for each site, awarding contracts to Family Facets (eight sites: 733, 736, 738, 739, 831, 932, 933, and 936); Great Circle (five sites: 732, 735, 737, 931, and 935); and Cornerstones (four sites: 731, 734, 740, and 934). Two bid protests followed. Family Facets' protest addressed multiple issues with evaluations of the proposals for sites 732 and 735. Great Circle's protest challenged the award of Sheltered Workshop points to Family Facets for Sites 732, 733, 738, 739, 831, 932, and 933. Family Facets' protest was based on its claims that: accreditation was improperly considered by the evaluators because accreditation was not specifically mentioned in the RFP; the improper analysis of implementation time frames; and the inconsistent point allocations for method of performance when the method of performances proposed did not vary from site to site. Each point of Family Facets' protest expressly mentioned sites 732 and 735 and requested relief only for these sites.

In response to Family Facets' protest, the State sustained the protest, cancelled the complained-of contracts, issued an Amended Notice of Award to Great Circle to reflect the protest relief granted, and opened the procurement process on the complained-of sites for rebid. In response to Great Circle's protest, the State sustained the protest, deducted the Sheltered Workshop points previously granted to Family Facets and re-scored the points awarded without Family Facets receiving the ten Sheltered Workshop preference points on its proposals. Following the re-scoring of the Family Facets points, OA determined that the best vendor proposal for sites 733, 831, 932, and 933 was Cornerstones. The State issued an Amended Notice of Award to Family Facets reflecting the results of the Great Circle protest.

Family Facets filed an eight-count Petition in the trial court alleging, in relevant part, that the State violated the procurement requirements of section 34.165 and 1 CSR 40-1.050(10) [2016] by disallowing Sheltered Workshop preference points (Count II), by materially changing the points awarded to Family Facets after the time for submission of bids had closed, rather than rebidding the contracts for the four sites "taken" from Family Facets (Count III), by unfairly, unreasonably, arbitrarily and capriciously determining Experience points by improperly considering offeror accreditation (Count IV), by unfairly, unreasonably, arbitrarily and capriciously calculating Performance points by improperly evaluating implementation schedules and varying scores among the different sites even though the proposed method of performance did not vary from site to site (Count VI), and by awarding the contract to a non-responsive vendor because Cornerstones' proposal failed to provide information for community resources on three sites and did not mention an implementation date for one (Count VII), and therefore requested injunctive relief, including a temporary restraining order and preliminary injunction on all counts (Count VIII). Great Circle intervened and filed a First Amended Cross-Claim ("Cross-Claim"). Cornerstones was also granted leave to intervene.

A bench trial was held, as well as argument on motions to dismiss filed by the State and by Cornerstones against Family Facets' Petition and Great Circle's Cross-Claim. Subsequently, the trial court issued its judgment, which included dismissals of Counts III, IV, VI, and VII on the grounds that Family Facets failed to exhaust available administrative remedies, partially dismissed

Count VIII to the extent that it was derivative of Counts III, IV, VI, and VII, and issued findings of fact and conclusions of law ruling in favor of the State on Count II "since Family Facets was not entitled to the sheltered workshop preference of Section 34.165, RSMo, the denial of the preference points to Family Facets was reasonable, and not arbitrary or capricious[,]" and likewise ruled in favor of the State on Count VIII to the extent that it was derivative of Count II. Family Facets appealed.

AFFIRMED.

Division One holds:

Because any services provided by IIS Specialists employed by Lake Area Industries were not services provided by a sheltered workshop pursuant to section 34.165 and 1 CSR 40-1.050, the services to be provided by Lake Area Industries did not qualify for the Sheltered Workshop preference, and the trial court did not err in ruling in favor of the State on Counts II and VIII regarding the determination that Family Facets was not entitled to the Sheltered Workshop preference points. Because Family Facets failed to show that it exhausted its administrative remedies that were available to it or that it should be deemed to have done so, the trial court did not err in dismissing Counts III, IV, VI, VII, and VIII, in part, for failure to exhaust administrative remedies. Because Family Facets failed to show it was not required to exhaust administrative remedies under the futility exception to the exhaustion of administrative remedies doctrine, the trial court did not err in dismissing Counts III, IV, VI, VII, and VIII, in part, for failure to exhaust administrative remedies. Because Family Facets was subject to an exhaustion requirement in that the protest procedure rule applies to an amended award of a contract and the protest procedure is the type of remedy that is subject to the exhaustion requirement because it is legislatively authorized and has the force and effect of law, the trial court did not err in dismissing Counts III, IV, VI, VII, and VIII, in part, for failure to exhaust administrative remedies.

Opinion by: Mark D. Pfeiffer, Judge March 3, 2020

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THIS SUMMARY IS **UNOFFICIAL** AND SHOULD NOT BE QUOTED OR CITED.