



# Board Agenda Item 9

---

DATE: January 24, 2023

TO: Board of Supervisors

SUBMITTED BY: Sanja Bugay, Director, Department of Social Services

SUBJECT: Appeal and Agreement with Brain Learning Psychological Corporation for Assessment Services

RECOMMENDED ACTION(S):

- 1. Hear and consider appeal by Foster Assessment Center and Testing Service, Inc. (FACTS) challenging the Department of Social Services' (DSS) recommended award of the proposed Agreement for specialized assessments for CalWORKs Welfare-To-Work participants to Brain Learning Psychological Corporation.**
- 2. If FACTS's appeal is upheld, direct DSS to return to the Board at a later date with a recommended Agreement with FACTS for specialized assessments for CalWORKs Welfare-To-Work participants for the Board's consideration and action.**
- 3. Approve and authorize the Chairman to execute an Agreement with Brain Learning Psychological Corporation for specialized assessments for CalWORKs Welfare-To-Work participants, effective January 24, 2023, not to exceed four years and six months, which includes a one year and six-month base contract and three optional one-year extensions, total not to exceed \$1,133,063.**

The County's Request for Proposals (RFP) solicited competitive bids for Welfare-To-Work (WTW) Specialized Assessments. Bids were requested in the fee-for-service model, which the DSS determined was the most fiscally prudent for this service.

The Appeal: The DSS recommends that your Board first hear and consider the appeal from Foster Assessment Center and Testing Service, Inc. (FACTS) challenging the DSS's recommended award of the proposed Agreement to Brain Learning Psychological Corporation (Brain Learning). Both the Purchasing Manager (first appeal) and the County Administrative Officer (CAO) (second appeal) have reviewed and considered FACTS's appeals pursuant to the County's appeal process and both of them denied the appeals. FACTS now makes its appeal to your Board for its consideration and action. As of the date that this item was prepared, FACTS had not yet indicated whether they would appeal the decision to your Board. Therefore, the DSS may supplement this item with an oral report with new issues that may arise.

Time sensitivity for this item: The DSS's most current agreement for these services expired on December 31, 2022, and these services are not currently being provided. FACTS was the prior vendor for these services. All required assessments were provided in December and Brain Learning is ready to begin providing assessments immediately upon approval of the recommended agreement.

The County's Evaluation Team ranked FACTS's proposal higher than Brain Learning's proposal, with three of five reviewers ranking FACTS's proposal as their chosen proposal and made the final recommendation

to the DSS for tentative award of the recommended Agreement to FACTS.

The DSS did not agree with the Evaluation Team's recommendation to DSS. The DSS found that both vendors met the requirements of the RFP, but did not find a substantial benefit offered by FACTS that offsets the significantly higher estimated maximum compensation amount of the FACTS proposal, which was approximately 48% higher than the potential maximum compensation amount of the Brain Learning proposal. The DSS found this significant difference in cost between the two proposals (i.e., \$574,140 cost difference) for the full potential term of the Agreement was not supported by any significant difference in assessment quality for the requested services.

Recommended Agreement: The DSS recommends that your Board approve and authorize the proposed Agreement with Brain Learning, which will allow the DSS to provide State-mandated specialized assessments for Limited English Proficiency, Learning Disability Evaluations and Independent Assessments and document the presence or absence of limited English proficiency and potential learning disabilities that limits a California Work Opportunity and Responsibility to Kids (CalWORKs) WTW client's ability to engage in work or job-related training.

There is no additional Net County Cost associated with recommended action #3. This item is countywide.

ALTERNATIVE ACTION(S):

Your Board could require the services to be re-bid; however, this would delay services to WTW clients, and WTW and assessment services are State mandates. Should your Board not approve recommended action #3, the DSS will be out of compliance and unable to provide the required access for WTW recipients and applicants.

FISCAL IMPACT:

There is no increase in Net County Cost associated with recommended action #3. The maximum amount to be paid to Brain Learning under this agreement shall not exceed \$1,133,063 for the total term of the recommended agreement and will be funded with the CalWORKs Single Allocation. Actual costs will be determined by the quantity of the assessments provided, as compensation will be provided on a fee-for-service basis. Sufficient appropriations and estimated revenues are included in the FY 2022-23 Adopted Budget for Department of Social Services Org 5610 and will be included in subsequent budget requests.

The County has a required Maintenance of Effort (MOE) of \$4,022,882 for FY 2022-23 for the CalWORKs program. Once the MOE has been met, all expenses over that amount will be 100% funded with State and Federal dollars up to the amount of the annual CalWORKs Single Allocation. Social Services Realignment funds will be used to meet the CalWORKs MOE.

DISCUSSION:

The CalWORKs program provides temporary financial assistance and employment services to needy families with dependent children. The program is designed to assist families in their path towards work and self-sufficiency. Participants may face numerous barriers relating to limited English proficiency and potential learning disabilities, as disclosed by the participant or as suspected by the DSS following a screening at WTW appraisal. Specialized assessments assist the DSS in determining an appropriate course of action regarding participants' employment needs and goals.

On August 26, 2022, the DSS issued RFP No. 23-006 for WTW Specialized Assessments. The DSS requested bids in the fee-for-service model, which the DSS determined was the most fiscally prudent for this service. In a fee for service model, the DSS only pays for the services and assessments actually provided, instead of a flat fee arrangement. Accordingly, the maximum compensation amount of each

proposal is “estimated,” because the maximum compensation amount will partially depend on the number of participants, based on the rates proposed.

The response period closed on September 23, 2022, and two vendors responded (i.e., FACTS and Brain Learning). Both proposals were deemed responsive by Purchasing and provided to the Evaluation Team for review, and both vendors met the requirements of the RFP.

The County’s Evaluation Team was composed of representatives from the DSS and community-based agencies familiar with the CalWORKs population. The Evaluation Team evaluated each proposal based on the requirements of the RFP, including bidder capability, qualifications, and accessibility to clients.

When reviewing the submitted proposals and the recommendation of the Evaluation Team, DSS staff identified an error in item 5 in Exhibit A: Cost Proposal, which requested a cost for monthly reporting activities, such as submitting invoices. The DSS does not pay for invoicing activities in any of its agreements. FACTS had proposed a fee ranging from \$2,300 to \$2,660 over the term of the agreement, while Brain Learning proposed \$0 for this activity. FACTS’s proposal stated that its contract bid pricing was only valid when the entire scope of all services was awarded, so the DSS Program Manager contacted FACTS to find out if this proposed fee could be removed, to which FACTS agreed. The DSS Program Manager was also preparing options to provide to the Evaluation Team for the second review and ranking meeting, so she discussed with FACTS excluding certain Optional Services (and the pricing proposed on those Optional Services), for which FACTS had proposed pricing and Brain Learning proposed providing at no cost, but ultimately, that discussion did not change the outcome.

The Evaluation Team recommended FACTS to the DSS as the vendor to provide the services. However, the DSS did not concur with the recommendation, and instead is recommending Brain Learning as the provider. The DSS administers the program, and the management of the DSS ultimately makes the decision which contractor would best achieve DSS’s goals and objectives, and provide the best value for the DSS.

The DSS found Brain Learning is able to provide all services that were requested in the RFP at a significantly lower overall cost for the potential full term of the recommended Agreement, which is 48% less than the cost of the FACTS proposal (i.e., \$574,140 cost difference). Brain Learning provided several services requested, which include informational trainings to DSS staff and to clients, at no cost, while the FACTS proposal included a cost to the DSS for those services. Based on their proposal, Brain Learning was found to be equally capable of providing all services requested at a more favorable cost to the County.

On December 5, 2022, FACTS appealed the DSS’s funding recommendation to the Purchasing Manager. FACTS’s allegations and claims, and Purchasing’s determinations are as follows:

1. FACTS alleges that there is an RFP contradiction because two items were listed as optional in the RFP.

Purchasing’s determination: Certain items in the RFP were Optional Services, so a bidder could elect not to provide those Services. If a bidder did elect to provide the Optional Services, the quantity needed was either estimated (not known because the number of participants in the WTW program was estimated) or was a “guaranteed quantity,” which means there would be no fluctuation in the quantity of these items needed.

2. FACTS alleges that the RFP clearly defined a bidding process that appeared appropriate, but that DSS staff discussions with FACTS (after the after the proposals were submitted and after the Evaluation Team’s first review and ranking) made it unclear what services were to be provided, and what would be eliminated, and were in contradiction to the written RFP, upon which FACTS reasonably relied at the onset of the process.

Purchasing’s determination: Any discussion between FACTS and DSS staff after the RFP

proposals were submitted did not negate the appropriateness of the RFP bidding process, which was clear, and resulted in two responsive proposals, one from FACTS, and one from Brain Learning. The discussion did not change the outcome.

3. FACTS alleges a proposal rating discrepancy because the tentative award posting on Public Purchase listed FACTS's proposal maximum compensation amount as approximately 62% higher than the maximum compensation amount proposed by Brain Learning, which FACTS alleges should be listed as only 12% higher than the maximum compensation amount proposed by Brain Learning.

Purchasing's determination: DSS wanted to obtain all of the services, including the Optional Services, and when comparing FACTS's overall proposal (with all Optional Services included) and Brain Learning's overall proposal (with all Optional Services included), the estimated maximum compensation amount of FACTS's proposal was significantly higher than the estimated maximum compensation amount of Brain Learning's proposal. This does not constitute a proposal rating discrepancy.

4. FACTS claims that Brain Learning primarily works with evaluating children, and this RFP is for adults, and FACTS claims that Brain Learning is not qualified to supply the RFP requirements.

Purchasing's determination: As stated in its proposal, Brain Learning's proposal states that it works with adults in similar WTW programs in other counties. The DSS found that both vendors met the requirements of the RFP and there was not a significant difference in assessment quality for the requested services.

5. FACTS claims that because Brain Learning does not list a location in Fresno County on its website, this is a violation of the legality of the procurement context, and argues that Brain Learning should not have been considered to have provided a responsive proposal that met the geographic requirements of the RFP.

Purchasing's determination: FACTS's allegations do not assert any facts challenging the legality of the procurement context. Brain Learning met all the qualifications of the RFP, including two proposed testing sites in metro Fresno.

6. FACTS claims that due to its discussions with DSS staff, it did not withdraw from its lease with its landlord, and FACTS will be at a great monetary loss due to the alleged mishandling of the RFP content, reversal of the Evaluation Team review recommendations by the DSS, and the procurement context of the RFP.

Purchasing's determination: As stated on page 10 of the RFP, the County of Fresno will not be held liable for any costs incurred by vendors in responding to this RFP, including leasing costs. Only the Board has the authority to award an agreement for these services, and the County is not responsible for costs of leasing decisions made by FACTS prior to that award by the Board.

7. FACTS claims that the award for this service was unfair, as the process morphed verbally during discussions after issuance of the RFP, different than called for in the written RFP, which FACTS alleges introduced errors and unfairness into the procurement process.

Purchasing's determination: The DSS staff contact with FACTS occurred after the RFP proposals were submitted, did not negate the appropriateness of the RFP bidding process, and did not give Brain Learning any advantage.

8. FACTS claims that certain competitive strengths of FACTS that were praised by the Evaluation Team were mislabeled as "weaknesses" by the DSS.

Purchasing's determination: There were multiple members of the panel, who each held differing opinions and the Summary of Evaluation is intended to capture only highlights of the review process, and Purchasing did not find any unfair competitive procurement.

On December 21, 2022, the Purchasing Manager sent FACTS an appeal denial letter which addressed each of FACTS's allegations and claims, and reiterated that recommendation by the Evaluation Team is merely a recommendation to the awarding department, the DSS, and the DSS has the right not to accept the recommendation of the Evaluation Team when deemed appropriate. In this situation, the DSS chose not to accept the Evaluation Team's recommendation because the DSS found no significant difference in the quality of services proposed by each vendor, and the services proposed by Brain Learning in its proposal would be provided at a significantly lower cost than the services proposed by FACTS in its proposal. The Purchasing Manager informed FACTS that Purchasing did not find sufficient information alleged by FACTS that would justify overturning the DSS's recommendation of tentative award to the Board for the award of the proposed agreement to FACTS.

On January 6, 2023, FACTS submitted an appeal to the CAO for the same reasons described above, with the addition of four claims described below, and the CAO made the same determinations as Purchasing as to the initial allegations and claims. FACTS's allegations and claims, and the CAO's determinations concerning the additional claims are as follows:

1. FACTS claims that certain State rules and Code of Regulations require that weighted values be awarded during evaluation criteria.

CAO's determination: FACTS did not produce any specific State rules or regulations, and the County is not aware of any such laws or regulations. The CAO did not find any need for weighted values in the evaluation process, as alleged by FACTS.

2. FACTS claims that the outlined provision of services is not in compliance with the manufacturer's suggested method for testing Fresno County CalWORKs recipients.

CAO's determination: County staff, in conjunction with its contracted service provider, will evaluate the situation of each client and weigh all benefits and risks of different methods of testing instrument administration, and institute all necessary safeguards for the virtual administration of any test. Brain Learning's proposal specifically states that it will only use validated testing instruments.

3. FACTS claims that Brain Learning is not testing via the preferred method and/or utilizing validated methods suggested by the actual test manufacturer, leaving the County susceptible to numerous Americans with Disability Act lawsuits.

CAO's determination: This claim is vague, and difficult to understand. Brain Learning's proposal specifies that Brain Learning has never been involved in a lawsuit or legal action.

4. FACTS claims that FACTS has much stronger capability (current provider), qualifications (largest in the state), location (actual in-person testing facility in metro Fresno), and provides additional services (provides a wealth of free optional services if any particular customer demonstrates that need).

CAO's determination: Based on their proposals submitted to the County's Public Purchase, and input from my staff, the CAO believes that both vendors are qualified for the proposed agreement, and offer comparable and satisfactory service delivery.

On January 10, 2023, the CAO issued a letter informing FACTS that the second appeal had been denied.

The term of the recommended agreement is a one-year and six-month base contract with up to three optional one-year extensions, consistent with the terms of the RFP. The agreement may be terminated without cause by either party upon providing 30-day advance written notice.

ATTACHMENTS INCLUDED AND/OR ON FILE:

On file with Clerk - Agreement with Brain Learning Psychological Corporation

On file with Clerk - Advanced Agenda Item Materials

CAO ANALYST:

Ron Alexander