

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STATE PAVING CORPORATION,)
)
Petitioner,)
)
vs.) CASE NO. 87-3848BID
)
DEPARTMENT OF TRANSPORTATION,)
)
Respondent,)
and)
)
GILBERT CORPORATION OF)
DELAWARE,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, K. N. Ayers, held a public hearing in the above-styled case on September 11, 1987, at Tallahassee, Florida.

APPEARANCES

For Petitioner: John O. Williams, Esquire
John Beck, Esquire
1343 East Tennessee Street
Tallahassee, Florida 32308

For Respondent: Brant Hargrove, Esquire
John Anderson, Esquire
Department of Transportation
Haydon Burns Building
Tallahassee, Florida 32399-0458

For Intervenor: Douglas Wilson, Esquire
213 South Jefferson Street, Suite 700
Roanoke, Virginia 24011

By Amended Petition for Formal Hearing received September 8, 1987, State Paving Corporation, Petitioner, challenges the proposed action of the Florida Department of Transportation (DOT), Respondent, to award contract on State Project No. 97870-334, etc. to Gilbert Corporation of Delaware (Gilbert), Intervenor, the apparent low bidder. As grounds therefor, it is alleged that the Gilbert bid is unbalanced. Petitioner's initial challenge to the proposed award, filed August 21, 1987, was challenged by a Department of Transportation Motion to Dismiss which was forwarded to the Division of Administrative Hearings with the Petition. The principal ground for the Motion to Dismiss is that the Petition challenged the bid specifications and such a challenge must be made prior to the bid opening.

A prehearing conference was held September 4, 1987, on the Motion to Dismiss and Gilbert's Petition to Intervene at which both intervention and dismissal was granted with leave to file an Amended Petition alleging the facts upon which to base the allegation that the bid of Gilbert is unbalanced. This hearing is on the Amended Petition. Ruling on Respondent's motion to strike portions of the Amended Petition was reserved when made and again when renewed at the close of Petitioner's case. This motion was to strike paragraphs 8p and 9 of the Amended Petition. Paragraph 8 of the Amended Petition listed those bid items that Petitioner contends rendered Gilbert's bid unbalanced. Subparagraph 8(p) was, "All items in the document entitled 'This is Not an Addendum'. . . ." Paragraph 9 alleged that Gilbert's bid was so unbalanced that Petitioner's bid is actually the low bid and the contract should be awarded to Petitioner. For reasons noted below, the motion to strike Section 8p is now granted and the motion to strike Paragraph 9 is denied.

At the hearing, Petitioner called two witnesses, Respondent called two witnesses, Intervenor called one witness and two exhibits were admitted into evidence.

Proposed findings have been submitted by the Petitioner and Intervenor, and the Department of Transportation adopted the proposed findings submitted by the Intervenor. Treatment accorded those proposed findings is contained in the Appendix attached hereto and made a part hereof.

BACKGROUND

To understand the posture of this case at the time the hearing began, it is necessary to review the history thereof. The initial bid protest was filed by State Paving on August 21, 1987, after Department of Transportation announced its intent to award the bid to Gilbert. That petition basically challenged the bid specifications and plans. Department of Transportation's motion to dismiss that Petition was granted on the basis of Rule 14-25.024, Florida Administrative Code, and Capeletti Brothers, Inc. vs. Department of Transportation, 499 So.2d 855 (Fla. 1st DCA 1986). Rule 14-25.024 (1), Florida Administrative Code, requires challenges to bid solicitations be made prior to the date on which bids are to be received. Capeletti, supra, at p. 857 holds that a failure to file a timely protest constitutes a waiver of Chapter 120 proceedings. Accordingly, objections to evidence challenging the bid specifications was sustained at the hearing. To expedite the proceedings, a continuing objection to any such question was granted. Accordingly, when preparing this Recommended Order, all testimony challenging the bid specifications has been disregarded as evidence in these proceedings.

FINDINGS OF FACT

1. On or about June 3, 1987, DOT advertised that it would receive bids on State Project No. 97870-334, etc. in Dade, Broward and Palm Beach Counties to improve portions of the Florida Turnpike.

2. On June 24, 1987, bids were received by DOT from Gilbert, State Paving and Archer Western Contractors. The apparent low bidder at bid opening on June 24, 1987, was Gilbert and State Paving was apparent second low bidder.

3. DOT was informally advised by John Beck, an attorney representing State Paving, that Gilbert's bid was believed to be unbalanced and the appropriate

officials referred the issue to the DOT Bureau of Estimates to look into the low bid to see if it was unbalanced to the detriment of the State.

4. Review of the Gilbert bid began with an internal analysis of the bid prices in comparison to the DOT Estimate of the Work. All bid prices above or below a certain percent of the engineer's estimate of costs were prepared in a computer printout and those items were checked by the consultants on the project. Basically, the major items in the project, which comprises some 400 bid items, were broken down to 10 groupings and the bids for each item in these groups was prepared for the three bidders and tabulated in Exhibit 2.

5. The DOT Technical Committee reviewed the bids and concluded there was no unbalancing in Gilbert's bid which was detrimental to the State. This recommendation was approved by the Awards Committee which had also been furnished the information in Exhibit 2 by the consulting engineer for the project. Based upon this information, the Awards Committee concluded that the awards should go to Gilbert as no unbalancing detrimental to the State was found.

6. Specification made a part of all DOT bid proposals provide that DOT may reject an unbalanced bid. As a matter of policy, DOT only rejects unbalanced bids deemed contrary to the interests of the State.

7. Bids may be unbalanced in numerous ways. One significant method is known as front loading where the bidder submits a high bid for the work to be done at the beginning of the project such as clearing and grubbing and low bids for the work done later in the project. If successful in getting the award, this bidder would have excess profits on the clearing and grubbing which could draw interest while the less profitable later work was being done. Another variant is to study the plans and specifications to see if the quantities listed in the bid proposal are accurately reflected in the plans and specifications. If not, those items for which the bid proposal shows more than the plans and specifications reasonably required can be bid low, and for those items by which the bid proposal shows less than actually will be required can be bid high. Since the contractor is paid by the units used, those excess units at a higher price would result in more profit for the contractor yet allow him to submit an overall lower bid. For example, if the bid proposal contains two similar items for which the request for proposal estimates 100 each will be required, and the bidder concludes that only 50 will be required at Site A and 150 at Site B, he submits a low bid for Site A and a high bid for Site B. If the fair price for these units is \$10 each, and the bidder bids \$5 per unit for Site A or \$500, and \$15 for Site B or \$1500, the total bid price is \$2000, but if the bidder only installs 50 at Site A he would be paid \$250 and install \$150 at Site B for which he would be paid \$2250. His total compensation would be \$2500.

8. In competitively bid contracts, such as the instant project, contractors modify their prices by taking a calculated risk that certain items bid on will not need to be accomplished and submit a nominal bid of \$1 or 1 cent for such an item. By definition, such a bid is unbalanced, but if the item so bid has to be provided, the contractor has to provide this service at the bid price.

9. The only evidence submitted by Petitioner tending to show Gilbert's bid was unbalanced to the detriment of the State was testimony, objected to and sustained, that the plans and specifications showed more of certain units would be needed than the estimated quantities on the bid proposal, which constituted the basis for the bids submitted. Such evidence constitutes a challenge to the

bid specifications and is untimely. Gilbert's witness who prepared the bid submitted by Gilbert adequately explained the basis for bids submitted by Gilbert on the challenged items.

10. The document entitled "This is Not an Addendum," clearly states on its face that "an addendum may follow containing the following information." No bids are solicited thereby and for no item contained thereon is the State obligated to contract. This document was provided all bidders before bids were open and no unfair advantage to anyone or detriment to the State was shown. In a project containing some 400 bid items, many modifications of the contract during construction is required to cover unforeseen circumstances that arise. While it would be better to get competitive bids on every bit of work done on this project, in this imperfect world unforeseen items will appear. The document complained of attempts to alert the bidders to some anticipated work not foreseen when the bid proposal was prepared, but it is not a part of the bid solicitation.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

12. DOT bid specifications provide that it may reject unbalanced bids. As a matter of policy, such bids are rejected only when deemed contrary to the State's interest. Since all bids are to some extent "unbalanced", this is a reasonable policy justified by the evidence presented at the hearing.

13. State Paving has the burden to prove, by a preponderance of the evidence, that Gilbert's bid in this project was unbalanced to the detriment of the State. This burden State Paving has failed to meet. The only evidence tending to show an advantage to Gilbert and detriment to the State was the untimely and therefore inadmissible challenge to the quantities shown in the bid solicitations. Even had this evidence been admissible, Gilbert explained the basis for its bid on each challenged item.

14. With respect to State Paving's contention that because of the unbalancing of Gilbert's bid, State Paving was the low bidder and should receive the award, the only evidence to sustain this position was the opinion of State Paving's expert witness that the quantities shown on the bid solicitation were inconsistent with the plans and specifications. This constitutes an untimely challenge to the bid solicitation and is inadmissible.

15. From the foregoing, it is concluded that State Paving Corporation has failed to prove, by a preponderance of the evidence, that the bid submitted by Gilbert Corporation of Delaware, Inc., on Project No. 97870-334, etc. was unbalanced to the detriment of the State of Florida. It is

RECOMMENDED that the Petition of State Paving Corporation challenging the award of the bid on State Project No. 97870-334, etc. to Gilbert Corporation of Delaware, Inc., be dismissed.

ENTERED this 1st day of October, 1987, in Tallahassee, Florida.

K. N. AYERS
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32301
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of October, 1987.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 87-3848

Treatment Accorded Petitioner's Proposed Findings

- 1-5. Contained in HO preamble and HO #2.
- 6-7. Contained in HO #3.
8. Accepted only insofar as consistent with HO #4 and 5. Otherwise rejected.
9. Rejected.
10. Accepted. However, when the bid was reviewed for unbalancing, Petitioner's Amended Complaint was not in existence.
11. Included in HO #8.
12. Accepted insofar as included in HO #10; otherwise rejected.
13. Rejected as unsupported by credible evidence.

Treatment Accorded Proposed Findings submitted by Intervenor and Adopted by the Respondent.

1. Included in HO #1.
2. Included in HO #2.
3. Included in HO #3.
4. Included in HO #4.
- 5-6. Included in HO #5.
- 7-13. Included in HO Preamble.
- 14-15. Included in HO #9.
16. Included in HO #8.
17. Accepted. See HO #4.

COPIES FURNISHED:

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

STATE PAVING CORPORATION,

Petitioner,

vs.

CASE NO. 87-3848BID

DEPARTMENT OF TRANSPORTATION,

Respondent,
and

GILBERT CORPORATION OF DELAWARE,

Intervenor.

_____ /

FINAL ORDER

The Record in these proceedings and the Recommended Order have been reviewed. The Exceptions to Recommended Order filed by Petitioner, State Paving Corporation, are addressed herein.

1. Exception No 1 is reargument of Respondent's motion to dismiss portions of the Petition for Formal Hearing which has already been ruled on by the Hearing Officer.

Fla. Admin.Code Rule 14-25.024 clearly sets forth the requirement that a bid solicitation protest be filed before bid are received:

Any person adversely affected by a bid solicitation shall file a notice of protest, in writing, prior to the date on which bids are to be received, and shall file a formal written protest within ten days after filing the notice of protest.

Fla. Admin. Code Rule 14-25.024(1).

As noted by the First District Court of Appeal in *Capeletti Brothers, Inc. v. Department of Transportation*, 499 So.2d 855 (Fla. 1st DCA 1986), the purpose of the bid solicitation protest "is to allow an agency, in order to save expense to the bidders and to assure fair competition among them, to correct or clarify plans and specifications prior to accepting bids." *Id.* at 857.

Petitioner's failure to timely file a bid solicitation protest constitutes a waiver of Chapter 120 proceedings. *Id.* at 857. So any waiver which has occurred has been on the part of the Petitioner. The Hearing Officer's ruling is considered correct as a matter of fact and of law.

2. Exception No. 2 is nothing more than a challenge to the ultimate conclusion of the Recommended Order that Petitioner failed to meet its burden of persuasion and the protest should be dismissed. The Recommended Order is found to be supported by competent, substantial evidence and to be supported by law. Any challenge to the dismissal of the Protest will have to be made by appeal from this Final Order to the district court of appeal.

3. Exceptions 3, 4, and 5 address the rejection by the Hearing Officer of certain portions of Petitioner's Proposed Recommended Order. It is the Hearing Officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. The Department cannot reweigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion. *Heifetz v. Department of Business Regulations*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Since the Recommended Order is supported by competent, substantial evidence, the Department cannot change the Hearing Officer's findings of fact.

Contrary to the assertions of Petitioner, the Hearing Officer did address the issue of unbalancing of bids. At page 5 of the Recommended Order, the Hearing Officer found that the DOT Technical Committee reviewed the bids and concluded there was no unbalancing. Petitioner failed to prove by a preponderance of the evidence that Gilbert's bid was unbalanced to the detriment of the State. Even though the Hearing Officer ruled that Petitioner's evidence was inadmissible, at page 8 of the Recommended Order he concluded: "Even had this evidence been admissible, Gilbert explained the basis for its bid on each challenged item." This finding of fact is supported by competent, substantial evidence. See Transcript of Hearing, pages 150-187.

Being supported by competent, substantial evidence and being correct as a matter of law, the Recommended Order is incorporated by reference and made a Part of this Final Order. It is

ORDERED that the protest of State Paving Corporation is DISMISSED and State Project 97870-3334 is AWARDED to Gilbert Corporation of Delaware, Inc.

KAYE N. HENDERSON, P.E.
Secretary
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