

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI ELEVATOR COMPANY,)
)
Petitioner,)
vs.)
)
FLORIDA STATE UNIVERSITY,) CASE NO. 88-2960BID
)
Respondent,)
and)
)
MONTGOMERY ELEVATOR COMPANY,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on June 30, 1988, at Tallahassee, Florida, before Michael M. Parrish, a duly designated Hearing Officer of the Division of Administrative Hearings. Appearances at the hearing were as follows:

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For Respondent: Sonja P. Mathews, Esquire
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Office of the General Counsel
The Florida State University
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For Intervenor: S. Grier Wells, Esquire
Brant, Moore, Sapp, MacDonald & Wells
121 West Forsyth Street, Suite 900
Post Office Box 4548
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ISSUES AND INTRODUCTION

This is a bid protest case arising from the efforts of Florida State University to obtain a contractor for the maintenance of all elevators and dumbwaiters at Florida State University. On or about April 28, 1988, Florida State University extended an Invitation To Bid, Bid No. K-1193-6, for the maintenance described above. Three bids were received in response to the bid solicitation. All three of the bids were rejected for failure to meet the bid specifications.

On May 27, 1988, Petitioner filed a timely notice of protest and on June 2, 1988, Petitioner filed a timely formal written protest incorporating a request for formal hearing. An answer and affirmative defenses and an amended answer and affirmative defenses were filed by Florida State University. A petition for leave to intervene was filed by Montgomery Elevator Company, one of the other unsuccessful bidders. Montgomery's petition asserted that its bid should have been accepted or, in the alternative, that Florida State University was correct in rejecting all bids. At the final hearing, Montgomery's petition to intervene was granted only to the extent that the petition seeks to support the rejection of all bids by Florida State University. Mowery Elevator Company, the third bidder, did not file a protest and did not attempt to participate in this litigation. The three primary issues addressed at the final hearing were: (1) whether the inventory certification required by the bid specifications is a material provision, (2) whether the Petitioner's inventory certification complies with the requirements of the bid specifications, and (3) whether it would be a reasonable exercise of agency discretion for Florida State University to reject Petitioner's bid as unreasonably high.

At the hearing the Petitioner and the Respondent both called witnesses and offered exhibits. The Intervenor offered to present the testimony of a witness, but objection to the offer of testimony was sustained. Following the hearing, all parties were afforded a reasonable period of time within which to file proposed recommended orders. Timely proposed recommended orders were received from all parties. All proposed recommended orders have been carefully considered during the preparation of this recommended order and all findings of fact proposed by all parties have been specifically addressed in the appendix to this recommended order.

FINDINGS OF FACT

Based on the stipulations of the parties and on the evidence received at the final hearing, I make the following findings of fact.

1. On or about April 28, 1988, Florida State University mailed its Invitation To Bid (ITB) No. K-1193-6, to prospective bidders. According to the elevator maintenance specifications attached to ITB No. K-1193-6, the stated purpose of the ITB was to secure bids for the continuous maintenance of all elevators and dumbwaiters as per the attached list in accordance with the conditions, specifications, and terms listed herein." Responses to the ITB were submitted by Miami Elevator Company in the amount of \$289,861.00, by Montgomery Elevator Company in the amount of \$192,356.00, and by Mowery Elevator Company in the amount of \$137,967.00.

2. Section VI of the ITB requires each bidder to submit the following documentation with its bid.

2. A statement indicating the address of the service center from which the bidder proposes to serve the University. To be acceptable the service center must be located within a ten (10) mile radius of the University campus to minimize travel time in securing parts and supplies.

3. A statement certifying that the local service center from which he will service this contract will contain and maintain an inventory of a least \$45,000.00 in parts and

materials specifically intended for the elevators to be repaired and maintained under this contract. This inventory is to be available in the Tallahassee service center for inspection upon the request of authorized University officials.

4. A list by name of the type and number of employees who will be assigned to the University under this contract detailing their education, training and experience record. To be acceptable the employees assigned must meet the following requirements in terms of quantity and qualifications.

a. A minimum of two (2) full time, fully qualified and certified master elevator mechanics MUST be assigned to service this contract. Both must possess a "certificate of competency" from the Dept of Business Regulation, Division of Elevator Inspection. Copies of these certificates are to accompany the the (sic) vendors bid. At least one (1) of these two mechanics MUST BE ASSIGNED EXCLUSIVELY to servicing this contract at all times. The contractor may designate one of the two mechanics to be the primary mechanic to service this contract and he will devote his time exclusively to this contract. In the event this mechanic is ill or for other reasons cannot service the contract, the second mechanic designated under this paragraph will assume the duties of EXCLUSIVE service to this contract.

THIS IS AN ABSOLUTE REQUIREMENT.

b. An additional, fully qualified mechanic holding the above required "certificate of competency" and at least one (1) helper will also be listed and be available to render immediate support to the two primary mechanics to maintain and repair the elevators and dumbwaiters covered by this contract.

* * *

3. The ITB specified that bids would be opened at 11:00 a.m. on Tuesday, May 17, 1988. On or about May 26, 1988, Florida State University posted its Bid Tabulation rejecting all bids for failure to meet various specifications. The reason for the rejection of each bidder was listed on the Bid Tabulation as follows:

a. As to Mowery the rejection was based on Mowery's failure to provide a certificate for additional mechanic; no proof of experience on other than Mowery Elevators; and no mention of traction elevators.

b. As to Montgomery the bid was rejected for failure to provide certificates for mechanics;

c. As to Miami the bid was rejected for failure to meet inventory requirements.

4. Paragraph 9, entitled "Awards," of the ITB reserves the right of the University to reject any and all bids as the best interest of the University may require.

5. The Miami Elevator Company bid included a letter of certification. Pertinent portions of that certification are as follows:

2. Address of service center from which we propose to serve the University:

850 Blountstown Highway
Tallahassee, Florida 32304
(904) 576-0161

3. We hereby certify that the Miami Elevator Company local service center has an inventory equal or greater than 10 percent of the total bid amount and have parts inventory greater than \$45,000.00 in our nearest supply warehouse.

6. In 1985, Florida State University issued bid specifications for elevator maintenance services. The 1985 bid specifications contained a certification requirement which included the following language:

A statement certifying that the local service center has an inventory equal to at least ten percent (10 percent) of the total bid amount and is supported by a parts inventory of parts required to service the elevators and dumbwaiters covered by this contract, of at least \$45,000.00 in the bidder's nearest supply warehouse. The local inventory, shall be available in the bidder's Tallahassee service center for inspection by authorized University personnel before the bid award. The successful bidder is to provide the University, by 7/31/85, with the parts list of the \$45,000.00 inventory he is required to maintain. Experience has shown that inventories in the above amounts are necessary to provide support for an installation with the number of elevators and dumbwaiters located at the University.

7. In 1988, prior to the preparation of the bid specifications at issue here, representatives of Miami Elevator Company met with representatives of Florida State University and suggested that the latter make certain changes to the above- quoted language from the 1985 bid specifications when they prepared the 1988 bid specifications. The University representatives followed the suggestions and when the 1988 specifications were issued, the certification requirements regarding inventory read as set forth above in paragraph 2 of these findings of fact.

8. When Miami Elevator Company prepared its bid response to the 1988 ITB, the company representative preparing the bid used the company's 1985 bid response as a model. When he came to the portion of the certification that addressed inventory, he forgot that he and one of his company colleagues had prevailed upon the University to change that requirement. Because of his failure to remember the change, the Miami Elevator Company representative simply copied the inventory certification statement that appeared in the company's 1985 bid response. That statement was responsive to the 1985 bid specifications regarding inventory certification, but was not responsive to the 1988 bid specifications regarding inventory certification. The representative of Miami Elevator Company intended to submit an inventory certification that complied with the requirements of the 1988 bid specifications, but simply made a mistake and copied the language from the company's 1985 bid response.

9. The inventory certification requirement is in a mandatory portion of the bid specifications. It is a material requirement because the availability of a sufficient parts inventory is critical to the timely and efficient maintenance and repair of the elevators and dumbwaiters.

10. The pricing portion of the Miami Elevator Company bid appears to have been prepared with a lack of much attention to detail. The total contract price of \$289,861.00 was calculated by one of the company's regional managers. The individual who calculated that total price had not inspected any of the elevators at the university, had no current personal knowledge of any specific elevator, and did not possess a certificate of competency from the Department of Business Regulation, Division of Elevator Inspection. Further, he appears to have misconstrued the significance of a report regarding the condition of some of the elevators and also appears to have made some unwarranted assumptions about the scope of the work required under the bid specifications. Another representative of Miami Elevator Company inspected some of the elevators, but he did not participate in the calculation of the bid amount. As a result of what appears to have been a rather broad-brush approach to the bid calculation process, the Miami Elevator Company bid was more than \$100,000.00 over what the university expected the bids to be and was almost \$100,000.00 over the second highest bid.

11. The base price of the prior contract awarded in 1985 was \$105,344.00. The Miami Elevator Company bid of \$289,861.00 represents an increase of approximately 175 per cent of the 1985 price. The university expected that there would be a significant price increase due to such matters as the inflation rate over the past three years, inflation projection for the next three years, and some of the differences between the 1985 and the 1988 bid specifications, but it did not expect an increase of 175 per cent. The university has estimated that a reasonable bid would represent approximately a 75per cent increase in the 1985 price. The factors on which the university estimate are based appear to be reasonable and logical.

12. The Miami Elevator Company facility located at 850 Blountstown Highway includes a separate warehouse on the property which contains inventory valued at approximately \$70,000.00. That inventory would be available to service the university elevators.

13. The subject ITB specifically required that each bidder certify that it agreed "to abide by all conditions of this bid." Miami Elevator Company made such a certification when its representative signed the first page of the ITB.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact and on the applicable legal principles, I make the following conclusions of law.

14. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Sec. 120.57(1), Fla. Stat.

15. The solicitation to supply the university with maintenance services for its elevators was by invitation to bid. The nature of invitations to bid, as distinguished from requests for proposals, has been described as follows in *Systems Development Corporation v. Department of Health and Rehabilitative Services*, 423 So.2d 433 (Fla. 1st DCA 1982):

Typically, an [ITB] is rigid and identifies the solution to the problem. By definition, the invitation specifically defines the scope of the work required by soliciting bids responsive to the detailed plans and specifications set forth. Section 287.057(1)(a) and (2), as amended. On the contrary, an RFP is flexible, identifies the problem and requests a solution. Consideration of a response to an [ITB] is controlled by cost, that is, the lowest and best bid, whereas consideration of an offer to an RFP is controlled by technical excellence as well as costs. (Footnote omitted) (Emphasis supplied).

16. Section 287.012(12), Florida Statutes (Supp. 1986), furthermore provides:

(12) "Responsive Bidder" or "Responsive Offeror" means a person who has submitted a bid which conforms in all material respects to the invitation to bid or request for proposals.

17. Rule provisions which relate to the issues in this case include paragraphs (e) and (f) of Rule 6C2-2.015(7), Florida Administrative Code, which read as follows:

(e) Bid Evaluation. Bids shall be evaluated based on the requirements set forth in the Invitation to Bid, which may include, but are not limited to criteria such as price, inspection, delivery and suitability for a particular purpose. Those criteria that affect the price shall be objectively measured to the extent practicable, such as all or none, discount, transportation cost or total or life cycle cost base. The Invitation to Bid shall set forth the criteria to be used. (emphasis supplied)

(f) Right to reject bids or waive minor

irregularities. The University reserves the right to reject any and all bids. The University also reserves the right to waive minor irregularities in an otherwise valid response. A minor irregularity is a variation from the Invitation to Bid terms and conditions, which does not affect the price offered or give the bidder an advantage or benefit not enjoyed by other bidders or does not adversely impact the interests of the University. Mistakes clearly evident on the face of the bid documents, such as an error in arithmetic extension or pricing may be corrected by the University. (emphasis added)

18. The bid of Miami Elevator Company is not responsive to the inventory certification requirements of the bid specifications. Comparing the Miami Elevator Company inventory certification to the requirements of the bid specifications reveals at least the following shortcomings: (a) there is no statement that the local service center will maintain the required inventory in the future, (b) there is no statement that the required inventory is in, or will be in, the Tallahassee service center, and (c) there is no statement that any existing or future inventory is specifically intended for the elevators to be repaired and maintained under the contract. Miami Elevator Company argues that its bid is responsive because it presently has an inventory of at least \$70,000.00 in its Tallahassee service center and because the university representatives know it has such a local inventory. The argument fails because present possession of the required inventory fails to meet all of the requirements of the bid specifications. In addition to having the required inventory, the bid specifications require that the bidder must also certify that it will maintain that inventory during the life of the contract and that the inventory will be "specifically intended for the elevators to be repaired and maintained under this contract." The argument based upon the current inventory also fails because, absent the required certification, the actual state of Miami Elevator Company's local inventory is totally irrelevant.

19. Miami Elevator Company also argues that its bid is responsive to the inventory certification requirements as a result of its having signed the certificate that it would "abide by all conditions of this bid." The argument fails, among other reasons, because it overlooks the differences between the meaning of the concept "conditions of this bid" (which it certifies it will abide by) and the concept "conditions of the bid specifications," upon which the logic of its argument depends. Insofar as they relate to the inventory requirement, the conditions in the Miami Elevator Company bid differ from, and are not responsive to, the conditions of the bid specifications. Therefore, if Miami Elevator Company were to do as it certified and abide by all conditions of its bid, it would still not be in compliance with, or responsive to, the conditions of the bid specifications regarding inventory.

20. The inventory requirements in the bid specifications are clearly material provisions and failure to comply with those provisions is more than a "minor irregularity," because such failure gives the bidder an advantage not enjoyed by other bidders and has an adverse impact on the interests of the university. See Rule 6C2-2.015(7)(f), quoted above. The adverse impact on the university is that, absent a responsive inventory certification, the university cannot be assured of an adequate local parts inventory during the life of the

contract. An arguably adequate present inventory does not address concerns about the future.

21. It is clear that the representative of Miami Elevator Company who prepared the bid made a mistake when he prepared the inventory certification. Now Miami Elevator Company is, in essence, asking for a waiver of the, inventory certification requirement or, alternatively, is asking that its bid be treated as though it were modified to comply with the inventory certification requirement. Such waivers or modifications are inappropriate because they tend to undermine rather than advance the purposes of competitive bidding. See *Graham v. Clyde*, 61 So.2d 656 (Fla. 1952); *Harry Pepper & Associate, Inc. v. City of Cape Coral*, 352 So.2d 1190 (Fla. 4th DCA 1977); *Robinson Electrical Co., Inc. v. Dade County*, 417 So.2d 1032 (Fla. 3d DCA 1982); *Lassiter Construction Co. v. School Board For Palm Beach County*, 395 So.2d 567 (Fla. 4th DCA 1981). Of particular application to the facts in this case is the following from *Graham*, supra:

If errors of this nature can be relieved in equity, our system of competitive bidding on such contracts would in effect be placed in jeopardy and there would be no stability whatever to it. It would encourage careless, slipshod bidding in some cases....

22. Because the Miami Elevator Company bid is not responsive to a material provision of the bid specifications, the bid should be rejected. But even if it were to be concluded that the Miami Elevator Company bid was responsive, it would still be appropriate for the university to reject the bid on the grounds that it was too high. In this regard attention is directed to *Caber Systems, Inc. v. Dept. of General Services, Apple Computers, Inc., and IBM*, ___ So.2d ___ (Fla. 1st DCA, Case No. 87-909, Opinion filed July 13, 1988), in which the court quoted with approval the following language from the recommended order:

6. [T]he courts have held that an agency's authority to reject all bids is not unbridled. An agency's rejection of all bids may not be arbitrary or capricious. But, otherwise, an agency has wide discretion to reject all bids. See *Liberty County v. Baxter's Asphalt and Concrete, Inc.*, 421 So.2d 505 (Fla. 1982); *Capeletti Bros., Inc. v. Dept. of General Services*, 432 So.2d 1359 (Fla. 1st DCA 1983); *Couch Constr. Co., Inc. v. Dept. of Transp.*, 361 So.2d 172 (Fla. 1st DCA 1978); *Woods Hopkins Contracting Co. v. Roger J. Au & Sons, Inc.*, 354 So.2d 446 (Fla. 1st DCA 1978).

7. A formal administrative proceeding under Section 120.57(1), Florida Statutes (Supp. 1986), arising out of the protest of an agency decision to reject all bids is de novo in the sense that the issue whether the agency decision to reject all bids has a rational basis or is arbitrary and capricious is decided upon evidence of facts and circumstances at the time of the final

hearing. See Couch Const. Co., Inc. v. Dept. of Transp., supra, at 175-176.

23. In Liberty County v. Baxter's Asphalt & Concrete, 421 So.2d 505 (Fla. 1982), the court described the nature of a public body's discretion in these types of matters at page 507:

In Florida, on the other hand, a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.

24. Similarly, the court in Couch Construction Company, Inc. v. Department of Transportation, 361 So.2d 172 (Fla. 1st DCA 1978) stated:

We affirm that the Department has wide discretion to reject all bids and to call for new bids for public contracts. Section 337.11(3), Florida Statutes (1977); Willis v. Hathaway, 95 Fla. 608, 117 So. 89 (Fla. 1928); Berry v. Okaloosa County, 334 So.2d 349 (Fla. 1st DCA 1976); Wood-Hopkins Contracting Co. v. Roger J. Au & Sons, Inc., 354 So.2d 446 (Fla. 1st DCA 1976). In making such a determination, the Department cannot act arbitrarily.

25. From the foregoing authorities it is clear that an agency may reject all bids if it has any rational basis for its decision. One rational basis for rejecting an otherwise responsive bid is that the bid amount is unreasonably high. In this case, even if the Miami Elevator Company bid were to be determined to be responsive, the amount bid is unreasonably high and it would be contrary to the university's best interests to accept such a high bid when it has a reasonable basis for expecting that on a rebid there are likely to be responsive bids in a much lower amount.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Florida State University issue a final order in this case rejecting all bids.

DONE AND ENTERED this 26th day of July, 1988, at Tallahassee, Florida.

MICHAEL M. PARRISH
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of July, 1988.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 88-2960BID

The following are my specific rulings on all of the proposed findings of fact submitted by all parties.

Findings proposed by Petitioner, Miami Elevator Company

Paragraphs 1, 2, 3, and 4: Accepted.

Paragraph 5: Accepted, with some additional details for clarity.

Paragraph 6: Rejected as irrelevant to the issues in this case.

Paragraphs 7 and 8: Accepted, with some unnecessary details omitted.

Paragraph 9: First sentence rejected as not supported by persuasive competent substantial evidence and as, in any event, irrelevant. Second sentence rejected as irrelevant.

Paragraphs 10 and 11: Accepted.

Paragraph 12: Rejected as constituting argument regarding legal conclusions rather than proposed findings of fact. Further, the legal conclusion asserted is not warranted by the evidence.

Paragraph 13: Rejected as statement of another party's position rather than proposed finding of fact.

Paragraphs 14 and 15: These two paragraphs have for the most part been rejected as constituting unnecessary details. Further, a number of the details proposed are not supported by persuasive testimony, because I am not persuaded that Mr. Herbst did a very careful job of informing himself about the requirements of the bid specifications or about the condition of the subject elevators.

Paragraph 16: All but last sentence rejected as subordinate and unnecessary details. Last sentence rejected as not supported by persuasive competent substantial evidence.

Paragraph 17: Rejected in part as subordinate and unnecessary details, in part as not supported by persuasive competent substantial evidence, and in part as contrary to the greater weight of the evidence.

Paragraph 18: Rejected as contrary to the greater weight of the evidence.

Paragraph 19: Most of this paragraph is rejected as constituting a statement of another party's position and as argument about that position. Findings are made that there are differences between the subject invitation to bid and the immediately preceding invitation to bid.

Paragraphs 20 and 21: Rejected as subordinate and unnecessary details.

Paragraphs 22 and 23: Rejected in part as argument rather than proposed findings, in part as not supported by persuasive competent substantial evidence, and in part as contrary to the greater weight of the evidence.

Paragraph 24: First two sentences rejected as contrary to the greater weight of the evidence. The remainder of this paragraph (dealing with Mowery) is rejected as irrelevant.

First Paragraph 25: Accepted in substance.

Second Paragraph 25: Rejected as irrelevant or as subordinate and unnecessary details.

Paragraph 26: Rejected as for the most part constituting argument rather than proposed findings; to the extent findings are proposed, they are rejected as not supported by competent substantial evidence or as contrary to the greater weight of the evidence.

Findings proposed by Respondent, Florida State University

Paragraphs 1 and 2: Accepted.

Paragraph 3: Rejected as constituting discussion of legal conclusions rather than findings of fact. (The conclusions are essentially correct, but they do not belong in the findings of fact.)

Paragraphs 4, 5, and 6: Accepted in substance, but with numerous unnecessary details omitted.

Paragraph 7: First two sentences rejected as cumulative and repetitious. Last sentence accepted in substance.

Paragraph 8: Accepted in substance.

Paragraph 9: Rejected as subordinate and unnecessary details dealing more with legal conclusions than with facts.

Paragraph 10: First two sentences rejected as cumulative and repetitious. The remainder of this paragraph is accepted in substance.

Paragraph 11: Rejected as irrelevant.

Paragraph 12: Rejected as constituting legal argument rather than proposed findings of fact.

Paragraph 13: Rejected as irrelevant to the issues in this case.

Paragraph 14: Rejected as constituting argument about legal conclusions rather than proposed findings of fact. (Again, the conclusions are essentially correct, but they do not belong in the findings of fact.)

Paragraphs 15, 16, 17, 18, and 19: Rejected as irrelevant because these proposed findings all relate to issues that were not raised in prehearing pleadings and were not raised in the prehearing statement.

Paragraph 20: Rejected as procedural details that do not need to be included in the findings of fact.

Paragraph 21: Accepted in substance.

Paragraph 22: Rejected as subordinate and unnecessary generalities.

Paragraphs 23, 24, 25, 26, 27, and 28: Rejected as subordinate and unnecessary details.

Paragraphs 29, 30, 31: Accepted in substance, with some unnecessary details omitted.

Paragraphs 32, 33, 34, and 35: The essence of the findings proposed in these paragraphs has been found, but most of the details proposed have been omitted as subordinate and unnecessary.

Findings proposed by Intervenor, Montgomery Elevator Company

Paragraph 1: Accepted.

Paragraph 2: Accepted in substantial part, but with irrelevant portions of the specifications omitted.

Paragraphs 3 and 4: Accepted.

Paragraph 5: Accepted in large part, but some irrelevant information has been omitted.

Paragraph 6: Accepted in substance.

Paragraph 7: First sentence rejected as constituting discussion of legal conclusions rather than proposed findings of fact. Second sentence accepted in substance by quotation of Miami Elevator Company's certification.

Paragraph 8: Accepted.

Paragraphs 9, 10, 11, 12, and 13: Rejected as irrelevant because these proposed findings all related to issues that were not raised in prehearing pleadings and were not raised in the prehearing statement.

Paragraph 14: Bid amount is accepted; remainder is rejected as subordinate and unnecessary details.

Paragraph 15: The essence of this paragraph has been included in the findings, but most details have been omitted as unnecessary.

COPIES FURNISHED:

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