

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOOLEY & MACK CONSTRUCTORS, INC.)
)
 Petitioner,)
)
vs.) CASE NO. 91-2703BID
)
FLORIDA BOARD OF REGENTS,)
)
 Respondent.)
)
NORWOOD INDUSTRIAL CONSTRUCTION)
COMPANY, INC.,)
)
 Intervenor.)
_____)

RECOMMENDED ORDER

Pursuant to notice, Don W. Davis, a duly designated Hearing Officer of the Division of Administrative Hearings, held a formal hearing in the above-styled case on May 17, 1991, in Tallahassee, Florida.

APPEARANCES

For Petitioner: William R. Dooly, Esquire
 2070 Ringling Blvd.
 Sarasota, Florida 34237

For Respondent: Jane Mostoller, Esquire
 Florida Board of Regents
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 325 West Gaines Street
 Tallahassee, Florida 32399-1950

For Intervenor: Alfred J. Malefatto, Esquire
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 Suite 310-East
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STATEMENT OF THE ISSUES

The primary issue for determination is whether Petitioner's bid, in response to Respondent's invitation to bid, is responsive; and, if so, whether Petitioner should be awarded the bid.

Determination of this issue requires resolution of other issues; whether Petitioner complied with "good faith requirements" related to advertising for minority business enterprise (MBE) participation, or whether failure to comply with those requirements constitutes a material defect in Petitioner's bid response.

PRELIMINARY STATEMENT

On February 27, 1991, Petitioner was advised by Respondent that Petitioner was the apparent low bidder on a project known as BR-198, Veterinary Medicine Teaching Hospital Expansion Phase II.

Bidders were required to have an expenditure of at least 15 per cent of the base bid with certified MBE's, or provide evidence of good faith efforts to meet this goal. Since only approximately 11 per cent of Petitioner's bid called for MBE participation, Respondent requested Petitioner to submit evidence of good faith efforts for review.

Petitioner complied. On March 1, 1991, Respondent advised Petitioner that Petitioner had not met the good faith requirements. On March 18, 1991, Respondent tentatively awarded the project to Intervenor.

Petitioner filed a formal bid protest dated March 27, 1991. Thereafter the matter was transferred to the Division Of Administrative Hearings for conduct of a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes.

At the final hearing, Petitioner presented the testimony of one witness. Testimony of two witnesses were presented on behalf of Respondent. Intervenor presented testimony of one witness. Together, the parties presented 28 joint evidentiary exhibits.

A transcript of the final hearing was filed with the Division of Administrative Hearings on June 12, 1991. Proposed findings of fact were submitted by the parties and are addressed in the appendix to this recommended order.

FINDINGS OF FACT

The parties stipulated to findings of fact set forth in paragraphs 1.-10., below.

Stipulated Facts

1. A call for bids was published by Respondent, Florida Board of Regents, for BR-198, Veterinary Medicine Teaching Hospital Expansion - Phase II (BR-198), located at the University of Florida, Gainesville, Florida, in the publication known as the Florida Administrative Weekly.

2. Sealed bids were received on February 21, 1991, at which time the bids were publicly opened and read aloud.

3. On February 27, 1991, Dooley and Mack Constructors, Inc. (Petitioner) was informed by the University of Florida that the first and second apparent low bidders for the project did not meet MBE requirements, and that Petitioner was now the apparent low bidder for the project. The University requested that Petitioner submit its MBE good faith efforts for review.

4. On March 1, 1991, Petitioner was informed by the University of Florida that it failed to meet the MBE good faith effort requirements, and therefore, its bid was rejected. The reason for rejection of Petitioner's bid was that Petitioner's advertisement for MBE participation, as part of its demonstration of good faith effort, did not appear in the media at least seven days prior to bid opening.

5. Intervenor, the next apparent low bidder, submitted good faith efforts for review by the University and was determined to be the lowest responsive bidder. Intervenor was awarded the project by the Chancellor of the Florida Board of Regents on March 18, 1991.

6. By letter dated March 19, 1991, Petitioner was advised that the Chancellor had awarded the contract to Intervenor. Petitioner was provided an opportunity to file a notice of protest pursuant to Section 120.53(5), Florida Statutes.

7. Petitioner filed a timely notice of protest with Respondent on March 22, 1991.

8. Petitioner timely filed a formal bid protest in regard to this project which was received by Respondent on March 27, 1991.

9. By facsimile (FAX) letter dated February 13, 1991, Petitioner requested that the Gainesville Sun, a newspaper in Gainesville, Florida, run an advertisement for one day to solicit bids from qualified MBE companies for BR-198. The advertisement was published in the February 18, 1991 edition of the newspaper.

10. The Project Manual, Section 1-3 of 1-10 Pages, Special Conditions section, paragraph 1.7.2.2., provides that advertisements for minority business enterprises must run or be published on a date at least seven days prior to bid opening.

Other Facts

11. The Project Manual is an assembled volume which contains instructions to bidders, bidding requirements, sample forms, and contract conditions and specifications for BR-198.

12. A special condition of the bid requires that at least 15 percent of the project contract amount be expended with MBEs certified by the Department of General Services. 1/ In the absence of compliance with this requirement, a bidder must demonstrate that good faith efforts were expended to comply.

13. A contractor desiring to demonstrate that a good faith effort was undertaken to meet the 15 percent goal is required by the bid's special conditions to have advertised to inform MBEs of subcontracting opportunities. The importance of advertising is to alert the minority community regarding projects that are out for bid and are available to subcontractors. The advertisements must have been run in trade association, or minority-focus media, or a local newspaper with a minimum circulation of 25,000. Advertisements must be run or published a minimum of seven days prior to bid opening.

14. Petitioner's advertisement in a local newspaper, the Gainesville Sun, was not published until February 18, 1991, only three days prior to the February 21, 1991 bid-opening. Further, the advertisement was not faxed to the newspaper until February 13, 1991, and then with the written request to "please place as soon as possible and run for one day." A letter from the newspaper to Petitioner stated that the legal notice advertisement was published on February 18, 1991, as opposed to February 16, 1991, due to a date error on their FAX machine. The latter date, even if publication had occurred, would not have complied with bid requirements.

15. Petitioner also submitted a project notice published in the construction industry bulletins F.W. Dodge Reports, dated February 1, 1991; CMD Reports, dated February 18, 1991; and the Mid State Notifier, dated February 1, 1991. The notices listed Petitioner as well as other bidding contractors. However, it is specifically found that no direct admissible evidence supports Petitioner's responsibility for initiating publication of these notices, a requirement of the good faith effort. Specifically, the notices were published as the result of information received by the publications from the University of Florida. Therefore, good faith efforts on Petitioner's behalf may not be established by either publication, regardless of publication date.

16. Moreover, the F.W. Dodge Reports, CMD Reports, and the Mid State Notifier are private subscription publications directed toward the construction industry in general as opposed to any particular trade in the construction industry. Further, these publications are not directed to or focused on minority businesses. A trade association publication is generally published by not-for-profit associations, such as the Association of General Contractors, and various trade unions.

17. Petitioner did not comply with advertising requirements related to a good faith effort, a prerequisite for bid award. Petitioner's failure to comply with constitutes a material defect in Petitioner's bid response.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter. Section 120.57(1), Florida Statutes.

19. Facilities in the university system of the State of Florida are maintained and constructed in accordance with rules adopted and administered by Respondent. Section 240.209(3)(o), Florida Statutes.

20. Respondent has adopted Rule 6C-14.021(5), Florida Administrative Code, which requires, in pertinent part, that:

a bid which is incomplete or not in conformance with requirements of the specifications shall be determined to be nonresponsive and shall be rejected.

21. In the absence of compliance with the 15 percent requirement, Petitioner was required by the special conditions of the bid request to demonstrate "good faith efforts" in order for its bid to be considered responsive.

22. Respondent has promulgated Rule 6C-14.025(3), Florida Administrative Code, which reads as follows:

Factors which shall be considered in determining whether a contractor has made "good faith efforts" to use the services or commodities of a minority business enterprise are set forth in Paragraph 287.0945(3)(b), F.S.

23. Section 287.0945(3)(b), Florida Statutes, states that whether a good faith effort has been made by a contractor includes a determination of whether the contractor advertised in "general circulation, trade association, and/or minority-focus media concerning the subcontracting opportunities."

24. Respondent determined that Petitioner did not meet good faith effort requirements relating to advertisement of the project to minorities. Although the Chancellor of the Board of Regents is authorized by Rule 6C-14.021(5), Florida Administrative Code, to waive "informalities" in a bid, the failure to provide prospective MBE subcontractors with a minimum of required notice (seven days) prior to a bid opening is not a mere informality which may be waived. Instead, such failure to advertise for MBE participation in accordance with bid requirements is a material variance and the bid should be deemed nonresponsive. To do otherwise would undermine the competitive bid process and provide an unfair advantage to Petitioner, as opposed to Intervenor who was deemed to have complied with good faith effort requirements, and was thereby determined to have been the lowest responsible bidder.

25. Petitioner has not met its burden of establishing entitlement to the relief sought in this proceeding. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981). The facts established in this proceeding demonstrate that Respondent's rejection of Petitioner's bid was based upon Petitioner's failure to comply with good faith requirements, a material component of the bid.

26. However, contrary to argument of counsel for Respondent, this case is unlike the situation in Department of Transportation v. Groves-Watkins Constructors, 530 So.2d 912 (Fla. 1988), and the scope of the Hearing Officer's inquiry is not limited to determining whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly. All bids were not rejected in this case. Instead, only nonresponsive bids were rejected.

27. It is essential to remember that the purpose of competitive bidding is to secure the lowest responsible offer, Robinson Electrical Co., v. Dade Co., 417 So.2d 1032 (Fla. 3rd DCA 1982); Tropabest Foods, Inc. v. Department of General Services, 493 So.2d 50 (Fla. 1st DCA 1986). Respondent has achieved that goal in this case.

28. The facts established at the final hearing demonstrate that Petitioner's bid was facially and in fact nonresponsive, as supported by competent substantial evidence.

RECOMMENDATION

Based on the foregoing, it is hereby

RECOMMENDED that a Final Order be entered granting the award of the bid in BR-198 to Intervenor as the lowest responsible bidder.

DONE AND ENTERED this 27th day of June, 1991, in Tallahassee, Leon County, Florida.

DON W. DAVIS
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative
Hearings this 27th day of
June, 1991.

APPENDIX TO RECOMMENDED ORDER CASE NO. 91-2703BID

The following constitutes my specific rulings, in accordance with Section 120.59, Florida Statutes, on findings of fact submitted by the parties.

Petitioner's Proposed Findings.

- 1.-10. Adopted in substance, although not verbatim
- 11.-14. Rejected, unnecessary.
- 15. Adopted in substance, though not verbatim.
- 16. Rejected, unnecessary.
- 17. Rejected, unnecessary, argumentative
- 18. Adopted.

Intervenor's Proposed Findings.

- 1.-16. Adopted in substance, though not verbatim.
- 17-18. Rejected, unnecessary. Respondent's Proposed Findings.
- 1.-10. Adopted in substance.
- 11.-22. Adopted in substance, though not verbatim.
- 23.-24. Rejected, unnecessary.
- 25.-40. Adopted in substance, though not verbatim.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.