

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PRE-CAST SPECIALTIES, INC.,            )  
  )  
      Petitioner,                        )  
  )  
vs.                                        ) CASE NO. 91-2957BID  
  )  
PALM BEACH COUNTY SCHOOL BOARD,    )  
  )  
      Respondent.                      )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 28, 1991, in West Palm Beach, Florida, before Stuart M. Lerner, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Fred A. Cianelli, Vice President  
Pre-Cast Specialties, Inc.  
5600 Northwest 72nd Avenue  
Miami, Florida 33166

For Respondent: Robert A. Rosillo, Esquire  
School Board of Palm Beach County  
3970 RCA Boulevard, Suite 7010  
Palm Beach Gardens, Florida 33410

STATEMENT OF THE ISSUES

Whether Respondent should sustain Petitioner's challenge to the preliminary determination to reject Petitioner's bid as not responsive to Respondent's Invitation to Bid No. SB 91C-284V and to award the contract to another bidder that submitted a higher bid?

PRELIMINARY STATEMENT

By letter dated May 6, 1991, Petitioner filed a written protest contesting Respondent's initial decision (1) to deem Petitioner's bid not responsive to Respondent's Invitation to Bid No. SB 91C-284V because of Petitioner's failure "to return [with its bid] page No[s]. 3 & 4 of [the] special conditions," and (2) to award the contract to South Eastern Prestressed Concrete, Inc., instead of Petitioner. On May 13, 1991, the matter was referred to the Division of Administrative Hearings for the assignment of a Hearing Officer to conduct a hearing on the matter.

Two witnesses testified at hearing: Betty Helser, Respondent's Director of Purchasing; and Fred A. Cianelli, Petitioner's Vice President. In addition to the testimony of these two witnesses, two exhibits were offered and received

into evidence: the bid submitted by Petitioner; and the bid submitted by South Eastern Prestressed Concrete, Inc.

At the close of the evidentiary portion of the hearing on May 28, 1991, the Hearing Officer announced on the record that post-hearing submittals had to be filed no later than ten days following his receipt of the transcript of the hearing. The Hearing transcript was filed on June 12, 1991. Respondent filed a proposed recommended order on that same day. All of the findings of fact proposed by Respondent in its proposed recommended order have been accepted and incorporated in substance, although not necessarily repeated verbatim, in this Recommended Order. To date, Petitioner has not filed any post-hearing submittal.

#### FINDINGS OF FACT

Based on the record evidence, the following Findings of Fact are made:

1. On March 12, 1991, Respondent issued Invitation to Bid No. SB 91C-284V (hereinafter referred to as the "ITB") through which Respondent solicited the submission of bids to supply Respondent with prestressed concrete poles for a one year period beginning May 16, 1991.

2. The ITB was a multi-page document with various component parts.

3. Bidders were instructed on the first page of the ITB to complete and "RETURN ONE COPY OF ALL BID SHEETS AND THIS [BIDDER ACKNOWLEDGMENT] FORM."

4. They were advised elsewhere on the first page of the ITB that "[o]ne copy of all bid documents that ha[d] page numbers, and this executed Invitation to Bid [Bidder Acknowledgment] [F]orm [had to] be returned for the Bid to be considered."

5. The advisement concerning the requirement that all numbered pages had to be returned for a bid to be considered was repeated at the bottom of each numbered page of the ITB.

6. Directly beneath the Bidder Acknowledgment Form on the first page of the ITB was the following provision:

This Invitation to Bid, General Conditions, Instructions to Bidders, Special Conditions, Specifications, Addenda and/or any other pertinent document form a part of this proposal and by reference are made a part thereof.

7. The ITB further provided, among other things, that "[i]n the best interest of [Respondent], [Respondent] reserve[d] the right to reject any and all bids and to waive any irregularity in bids received."

8. Petitioner and South Eastern Prestressed Concrete, Inc. (South Eastern) submitted the only bids in response to the ITB.

9. In accordance with the ITB'S instructions, Petitioner completed and returned to Respondent the Bid Summary Sheet, on which it indicated its price offer. It also completed and executed the Bidder Acknowledgment Form and returned it, along with the entire first page of the ITB, to Respondent.

10. Petitioner, however, failed to return, as part of its bid submittal, all of the numbered pages of the ITB. Omitted from Petitioner's submittal were numbered pages 3 and 4. These missing pages contained paragraphs A. through N. of the ITB's Special Conditions, which covered the following subjects: A. Scope; B. Delivery; C. Award; D. Term of Contract; E. Brand Name; F. Catalog Cuts; G. Estimated Quantities; H. Bid Exempt; I. Bidders Responsibility; J. Corrections; K. Joint Bidding, Cooperative Purchasing Agreement; L. Withdrawal; 1/ M. Minority Certification Application; and N. Public Entity Crimes.

11. There was nothing on numbered pages 3 and 4 of the ITB that the bidder needed to fill out or sign. While paragraphs M. and N. of the ITB's Special Conditions did make reference to certain forms that the bidder had to complete and submit to Respondent, these forms did not appear on either numbered page 3 or numbered page 4. They were separate documents. Petitioner completed these forms and submitted them to Respondent pursuant to the requirements of the Special Conditions.

12. Petitioner did not propose in its bid submittal any contract terms or conditions that were at variance with those set forth in paragraphs A. through N. of the ITB's Special Conditions.

13. Petitioner did not intend to signify, by failing to return numbered pages 3 and 4, any unwillingness on its part to adhere to contract terms and conditions set forth on those pages.

14. Of the two bids submitted in response to the ITB, Petitioner's was the lowest.

15. A preliminary determination, though, was made to reject Petitioner's bid because Petitioner had not returned numbered pages 3 and 4 of the ITB and to award the contract to South Eastern as the lowest responsive bidder. It is this preliminary determination that is the subject of the instant bid protest filed by Petitioner.

#### CONCLUSIONS OF LAW

16. District school boards in this State, with certain limited exceptions not applicable to the instant case, are required to purchase commodities and services through the process of competitive bidding. Section 237.02(2), Fla. Stat.; Fla. Admin. Code Rule 6A-1.012.

17. It has been said on more than one occasion that competitive bidding requirements, such as those imposed upon district school boards, have as their purpose and object the following:

[T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the

[government], by affording an opportunity for an exact comparison of bids.

Wester v. Belote, 103 Fla. 976, 138 So. 721, 723-24 (Fla. 1931); Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So.2d 1190, 92 (Fla. 2d DCA 1977).

18. In soliciting and accepting competitive bids, a district school board has wide discretion. See D.O.T. V. Groves-Watkins Constructors, 530 So.2d 912, 913 (Fla. 1988); Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982). It has "the authority to reject any or all bids" and to accept, what it deems to be, "the lowest and best bid." Fla. Admin. Code Rule 6A-1.012.

19. Its discretion with respect to these matters, while broad, is not unbridled. It must exercise such discretion in a manner that is not illegal, dishonest, fraudulent, arbitrary, unreasonable, capricious or in any other way that would subvert or undermine the purpose and object of competitive bidding. See D.O.T. v. Groves-Watkins Constructors, 530 So.2d 912, 913-14 (Fla. 1988); Caber Systems v. Department of General Services, 530 So.2d 325, 336 (Fla. 1st DCA 1988); Couch Construction Company, Inc. v. Department of Transportation, 361 So.2d 172, 175 (Fla. 1st DCA 1978); Wood-Hopkins Contracting Company v. Roger J. Au & Son, Inc., 354 So.2d 446, 450 (Fla. 1st DCA 1978).

20. In exercising its discretion, a district school board may not accept a bid that is materially at variance with the invitation to bid. "However, although a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. Department of General Services, 493 So.2d 50, 52 (Fla. 1st DCA 1986). If it does not provide the bidder with such a palpable competitive advantage, it constitutes a minor irregularity that should be waived by the school board. See Robinson Electrical Co., Inc. v. Dade County, 417 So.2d 1032, 1034 (Fla. 3d DCA 1982).

21. The outcome of the instant bid protest hinges upon whether Petitioner's failure to return numbered pages 3 and 4 of the ITB was a material variance that rendered the bid invalid or rather a minor irregularity that should be waived. 2/ Respondent has heretofore taken the position that it was the former. According to Respondent, by failing to return these numbered pages, Petitioner "left out" of its bid the "material" contract terms and conditions specified in these missing pages.

22. If Petitioner's failure to return these numbered pages had the effect suggested by Respondent of excluding from the bid these contract terms and conditions, the Hearing Officer would agree with Respondent that there was a material variance that required Respondent to reject the bid as non-responsive. Such is not the case, however. Although Petitioner may not have returned these numbered pages, its bid nonetheless included the terms and conditions found on these pages.

23. On the first page of the ITB, which Petitioner did return, was the following statement appearing directly beneath the Bidder Acknowledgment Form that Petitioner completed and executed:

This Invitation to Bid, General Conditions,  
Instructions to Bidders, Special Conditions,  
Specifications, Addenda and/or any other

pertinent document form a part of this proposal and by reference are made a part thereof.

"It is a generally accepted rule of contract law that, where a writing expressly refers to and sufficiently describes another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing." OBS Company, Inc. v. Pace Construction Corporation, 558 So.2d 404, 406 (Fla. 1990). Applying this "generally accepted rule of contract law" to the facts of the instant case, the Hearing Officer concludes that the contract terms and conditions found on numbered pages 3 and 4, having been incorporated by reference, were a part of Petitioner's bid, notwithstanding that these pages were not returned with the bid.

24. Petitioner's failure to return these pages, while contrary to the directions set forth in the ITB, has not given it any palpable competitive advantage over South Eastern, which followed these directions and returned these pages with its bid. Accordingly, this omission on its part should be viewed, not as a material variance that renders its bid invalid, but as a minor irregularity that should be waived by Respondent.

25. Because Petitioner submitted the lowest and best bid and its bid did not vary in any material manner from the requirements of the ITB, it should be awarded the contract advertised in the ITB.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Palm Beach County School Board enter a final order sustaining the instant bid protest and awarding to Petitioner the contract advertised in Invitation to Bid No. SB 91C-284V.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 24th day of June, 1991.

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STUART M. LERNER  
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 24th day of June, 1991.

#### ENDNOTES

1/ This paragraph provided as follows:

A bidder wishing to withdraw a bid for any reason, after the final call for bids at the

designated time of opening, may not do so unless a written request is submitted to the Superintendent of the School Board of Palm Beach County giving reasons for bid withdrawal. If recommended by the Superintendent, this request will be submitted to the Board for their consideration.

2/ That Petitioner failed to return these pages as required by the ITB is uncontroverted.

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 OF TIME 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.