

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALBRITTON WILLIAMS, INC.,)
)
)
Petitioner,)
)
vs.) CASE NO. 91-6594BID
)
FLORIDA STATE UNIVERSITY,)
)
)
Respondent.)
_____)

RECOMMENDED ORDER

Notice was provided, and on November 13, 1991, a final hearing was conducted in this case under authority set forth in Section 120.57(1), Florida Statutes. The hearing was held in the offices of the Division of Administrative Hearings in Tallahassee, Florida. Charles C. Adams was the hearing officer.

APPEARANCES

For Petitioner: Edgar Lee Elzie, Jr., Esquire
McFarlane, Ferguson, Allison & Kelly
210 South Monroe Street
Post Office Box 82
Tallahassee, FL 32302

For Respondent: Gerald B. Jaski, Esquire
Sonja P. Mathews, Esquire
William D. Moore, Esquire
Florida State University
311 Hecht House
Tallahassee, FL 32306-4038

ISSUES

The issues here concern the decision by the Respondent to reject the bid of the Petitioner and others associated with the solicitation for lease space, Invitation To Bid (ITB) No. 1991:104, in favor of use of property held by the Respondent.

PRELIMINARY STATEMENT

Petitioner challenged the Respondent's decision to reject Petitioner's bid in lieu of space available on property owned by the Respondent. To resolve the dispute the case was submitted to the Division of Administrative Hearings to conduct a hearing. The case was received by the Division on October 17, 1991.

The case was to be heard on October 30-31, 1991 before Stephen F. Dean, Hearing Officer. Given a pending real estate transaction between Hearing Officer Dean and William Moore, an attorney representing the Respondent, Hearing

Officer Dean recused himself from further participation in the case. The case was then taken over by the present hearing officer.

Respondent then moved for a continuance of the hearing based upon a personal emergency of its counsel. The motion was unopposed. The case was reset to be heard on November 12, 1991. Due to the unavailability of a court reporter, the case was not heard until November 13, 1991.

In furtherance of its case, Petitioner presented the testimony of Lorilyne E. Gerato, Sallie Ann Dickson, Mark Bertolami, Curtis Whigham and James S. Chason. Eleven exhibits by the Petitioner were admitted. Respondent presented the testimony of Al Gilligan, John Carnaghi, Lorilyne E. Gerato and Sallie Ann Dickson. Concerning the exhibits by Respondent, to include those exhibits about which decision on their admission had been reserved, Petitioner's exhibits 1-10 were admitted, Exhibit 11 was denied admission, Exhibits 12-16 were admitted, Exhibit 17 was denied admission, Exhibit 18 was admitted, Exhibit 21 was denied admission, Exhibits 22-26 were admitted, Exhibit 27 was denied admission, and Exhibits 28-35 were admitted.

In addition to the in hearing appearance and testimony given by the aforementioned witnesses, excerpted deposition testimony was presented by Petitioner associated with the witnesses John Carnaghi, Lorilyne Gerato, Sallie Dickson, Robert Thompson and Anse Cates. Additional excerpts from the deposition of Anse Cates were presented by Respondent. Respondent also offered deposition testimony of James Chason, and Petitioner provided additional excerpts of testimony from that deposition session pertaining to James Chason. Ruling had been reserved on the question of the admissibility of testimony in the Gerato deposition pertaining to lines 5-17 at page 31 and lines 15-16 commencing at page 34 and ending on page 35. Those references are admitted. Concerning the witness Cates and the deposition for that individual, ruling had been reserved on the excerpted testimony set forth on page 19 commencing at line 21 through line 8 at page 22; lines 4-24 at page 24; and line 7-10 at page 25. Those references are admitted. Other rulings associated with the deposition testimony of various witnesses are set out in the transcript of hearing.

The hearing transcript was filed on December 2, 1991. The parties timely submitted proposed recommended orders with associated argument filed on December 12, 1991. Those materials have been considered in preparing the recommended order. A discussion is given on the proposed fact finding by the parties through an Appendix to the Recommended Order.

FINDINGS OF FACT

1. As early as March 1991, Respondent began to consider the possibility of leasing space off its campus to accommodate its postal services operation. This was necessitated by a lack of acceptable space on campus.

2. The need to acquire acceptable space led the Respondent to enter into a lease agreement with the Petitioner for the period June 26, 1991 through October 20, 1991 for property located at 148 Four Points Way in Tallahassee, Florida. The expectation by the Respondent was that this emergency lease would be followed by a more permanent lease arrangement through a competitive bidding process. To this end Respondent set about preparing its invitation to bid through ITB No. 1991:104. In doing so Respondent followed all applicable procedures.

3. Petitioner, among others, responded to the invitation and following evaluation of those responses was found to have offered the apparent best bid. The results of the evaluation were posted through a tabulation sheet. The posting took place on September 10, 1991.

4. The preliminary decision by the Respondent was met with the notice of protest by another bidder, Grace H. Dansby. That protest was received on September 12, 1991.

5. Before Respondent received the protest by Dansby on September 10, 1991, Lorilyne Gerato, who had coordinated the bid activities for the Respondent, had notified James Chason, President for Petitioner, of the results of the bid tabulation. Other bidders were also extended this courtesy of notifying them of the outcome of the tabulation. She told Chason that Petitioner was the low bidder, and Chason gained the impression that his company had gotten the bid. Gerato told Chason in this September 10, 1991 conversation that it would be necessary to wait for 72 hours from the time of the posting of bid results to see if a protest was filed and that a letter would be sent to Chason concerning the outcome of the assessment process and that the letter would not be dispatched before the 72 hour protest had expired. Having considered the record, it was not reasonable for Chason to believe that the contact by Gerato constituted a commitment by the Respondent to enter into a lease with Petitioner to the exclusion of rights and opportunities by Dansby to protest the preliminary decision finding Petitioner the best bidder and the Respondent's opportunity to consider its course of action with the advent of that protest.

6. Dansby, in the person of counsel, made complaints about the bidding process to Dr. James Pitts, a vice president with the Respondent in charge of development. Those complaints were made known to John Carnaghi, Vice President for Finance and Administration, for the Respondent, who had overall responsibility for this project.

7. Although Ms. Dansby in addition to being a bidder on this project is a trustee of the Florida State University Foundation, which is associated with the work Dr. Pitts performs for the Respondent, the affiliation between Dansby and the Respondent did not influence Respondent in its intended disposition of this case as a means to benefit the bidder Dansby.

8. Mr. Carnaghi, who was responsible for deciding the course of action, given the Dansby protest, was concerned that the protest would not be resolved in a time sufficient to allow entry into the lease space that Petitioner was offering under the terms of the subject ITB. Knowing that the emergency lease that had been entered into with Petitioner, as described, could not be extended beyond its October 20, 1991 expiration date, he had great concern about where to house the postal services function once the emergency lease expired. He was also mindful that the emergency lease with Petitioner had been entered into after two failed attempts in locating other facilities for the postal services in that the space that he tried to locate in the other two facilities proved to be unavailable. Even before the Dansby protest had been filed, there was mention that it might be forthcoming, and there was the additional concern that Petitioner might protest if its bid was rejected. There was also the concern that the cost for the initial year in the lease period contemplated by the Petitioner was more than Respondent had expected to pay, notwithstanding the fact that the Petitioner's response to the ITB was responsive to the terms set forth in the ITB. Although the Respondent had not conducted a pre-bid estimate concerning lease expenses for the first year with exactitude, the estimate was sufficiently precise to demonstrate that the lease costs for the initial year

called for by the Petitioner's response to the ITB was high, being in excess of \$60,000 in a circumstance in which the estimate by the Respondent was in the \$30,000 range. In the face of these events, it occurred to Carnaghi that he had property known as the Maples property which had come into ownership by the Respondent that might meet the needs for space for the postal services. Carnaghi had first seen this property and its building around September 5 or 6, 1991. The renovation cost to prepare this building to receive the postal services function approximated the initial expense for the first year lease with Petitioner. It was believed that the space could be prepared in time to move the equipment before the expiration of the emergency lease. In fact, the building at the Maples property was sufficiently prepared to allow the function to move into that location on October 17, 1991. In making the decision to reject bids in favor of available space owned by the Respondent, Respondent was aware that the postal operations were not generating revenue in the manner expected, an item of critical concern given that the postal services operation must earn its keep. Thus, the decision was reached to reject all bids in favor of use of space available that belonged to the Respondent. Having made the decision to reject the bids in favor of use of its space, the bidders were notified of this decision on September 16, 1991. Mrs. Dansby did not continue to pursue her protest. The Petitioner did avail itself of the opportunity to protest leading to the hearing and this recommended order.

9. In addition to the individual notices provided to the respective bidders dated September 16, 1991, further posting was given indicating that the bidders had until September 24, 1991 to contest the decision to reject all bids.

10. Gerato had called Chason on September 13, 1991 to tell him of the Dansby protest and the concern that Respondent did not have time to wait for that protest to be resolved and was going to reject the bids. Chason replied that he felt that the Petitioner was in a position to conclude the necessary improvements in the building called for by the specifications set out in the ITB, even if it were necessary to wait out the 10 day protest period, the opportunity given for filing a formal written protest subsequent to the notice of intent to protest dated September 12, 1991. Subsequently Gerato spoke to Chason on the following Tuesday, and Chason tried to convince Gerato that he did not believe that Dansby would follow through with the protest in that Chason did not think there were adequate grounds for Dansby to protest. Chason continued to emphasize that Petitioner was in the position to make the necessary improvements in the time frame specified and was prepared to do so. Gerato made Chason aware of the fact that the Respondent having had a chance to look further at the situation discovered that there was property available to the University unrelated to the responses to the ITB and that the Respondent was going to reject bids in response to the ITB in favor of the property available to the University. Chason had also offered to extend the time for using the Petitioner's property for 30 days beyond the termination of the emergency lease conditioned upon use of that property in the 30 days leading to a lease under the subject ITB as opposed to the use of the property to provide the Petitioner with an opportunity to prepare space other than that offered by the Petitioner. This offer was placed in writing by correspondence of September 20, 1991. Respondent replied to the Petitioner on September 24, 1991 rejecting that opportunity in favor of the Maples property as being the most cost effective alternative. The remarks in the correspondence by Al Gilligan, Director of Business Financial/Auxiliary Services, to the effect that at a future point if operational revenue projections prove accurate that the Respondent might seek considerable increase in space and would consider the building which Petitioner offered in the present bidding process through a future bidding process is not

seen as an attempt to favor Ms. Dansby in some future competitive bidding conducted by the Respondent as Petitioner has contended.

11. The fact that the decision to use available space belonging to the Respondent was a considerable reduction from what had been sought through the ITB is not seen as an impropriety by the Respondent in rejecting Petitioner's space in favor of its own.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action pursuant to Section 120.57(1), Florida Statutes.

13. In accordance with Section 120.53(5), Florida Statutes, Petitioner offered a timely challenge to the decision to reject bids for off campus lease space provided by private prospective lessors in favor of space which it owned.

14. In carrying out the bid solicitation process, evaluation process and in reaching its ultimate decision, Respondent complied with the terms set forth in the ITB and requirements of Rules 6C2-2.011, Florida Administrative Code, in procedure and substance. The choice to reject all bids in favor of space which the University owned was one that was supported by reason and is not regarded as constituting fraud, illegality, arbitrariness or dishonest dealing. Department of Transportation v. Groves Watkins, 530 So.2d 912 (Fla. 1988).

15. Respondent had not entered into a contract with Petitioner subject to formal execution prior to the decision to reject all bids. In particular, the contact made by Gerato with Chason on September 10, 1991 did not form the basis for an oral contract, and nothing that ensued beyond that point brought about a contract subject to finalization in executing a lease. Those matters which are called for in Rule 6C2-2.011, Florida Administrative Code, had not been attended when Gerato told Chason on September 10, 1991 that Petitioner was the apparent best bid. Moreover, when the Dansby protest occurred on September 12, 1991 that precluded the opportunity for the Petitioner and Respondent to enter into a contract pending resolution of that dispute and allowed Respondent to make the ultimate decision to reject all bids. Section 120.53(5), Florida Statutes; and Caber Systems v. Department of General Services, 530 So.2d 325 (Fla. 1st DCA 1988). Those decisions concerning votes by local government and the binding nature of those votes as they deal with the question of whether a contract had been entered into between the local government and a bidder are not controlling in this circumstance which is governed by Section 120.53(5), Florida Statutes, and Rule 6C2-2.011, Florida Administrative Code. See also Dedmond v. Escambia County, 244 So.2d 758 (Fla. 1st DCA 1971); Schloesser v. Dill, 383 So.2d 1129 (Fla. 3rd DCA 1980); and Berry v. Okaloosa County, 334 So.2d 349 (Fla. 1st DCA 1976).

RECOMMENDATION

Upon consideration of the findings of fact and conclusions of law, it is recommended that a Final Order be entered which dismisses the Petitioner's bid protest and confirms the decision to reject all bids in favor of space owned by the University.

DONE and ENTERED this 2nd day of January, 1992, in Tallahassee, Florida.

CHARLES C. ADAMS
Hearing Officer
Division of Administrative Hearings
The Desoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of January, 1992.

APPENDIX

The following discussion is given concerning the proposed findings of fact by the parties.

Petitioner's facts:

Paragraph 1 is not necessary to the resolution of the dispute.

Paragraph 2 is subordinate to facts found.

Paragraphs 3 through 5 are not necessary to the resolution of the dispute.

The First sentence in paragraph 6 is subordinate to facts found. The latter sentence is not necessary to the resolution of the dispute.

Paragraph 7 is subordinate to facts found.

Paragraph 8 is not necessary to the resolution of the dispute.

Paragraphs 9 and 10 are subordinate to facts found.

Paragraphs 11 through 17 are not necessary to the resolution of the dispute.

Paragraph 18 is subordinate to facts found, except in its suggestion that Petitioner had "gotten the bid," taken to mean that the rights of Petitioner and Respondent concerning any possible contract had been basically determined subject to finalization through signing of a lease.

Paragraph 19 is not necessary to the resolution of the dispute.

Paragraphs 20 through 24 are subordinate to facts found.

Paragraph 25 is acknowledged; however, the arrangements to make improvements did not involve the kind of expenditures that would occasion a claim of estoppel.

Paragraph 26 constitutes argument.

Paragraph 27--See discussion of paragraph 25.

Paragraph 28 constitutes a discussion of testimony in its first sentence. The second sentence is contrary to facts found.

Paragraph 29 is subordinate to facts found.

Paragraph 30 is rejected as it attempts to describe a contract between Petitioner and Respondent.

Paragraph 31 is not necessary to the resolution of the dispute nor are paragraphs 32 through 35.

Paragraph 36 is subordinate to facts found.

Paragraph 37 is not necessary to the resolution of the dispute.

Paragraph 38 is subordinate to facts found in the first sentence. The remaining sentence is argument.

Paragraph 39 is not necessary to the resolution of the dispute.

Paragraph 40 through 42 are subordinate to the facts found.

Paragraphs 43 through 45 are not necessary to the resolution of the dispute.

Paragraph 46 is subordinate to facts found.

Paragraphs 47 through 56 are not necessary to the resolution of the dispute.

Paragraphs 57 through 64 are subordinate to facts found.

Paragraph 65 is not necessary to the resolution of the dispute.

Paragraphs 66 through 68 are subordinate to facts found.

Paragraph 69 is rejected to the extent that it attempts to show that Mr. Carnaghi acted improperly in rejecting the bids.

Paragraph 70 is not necessary to the resolution of the dispute.

Paragraphs 71 and 72 are subordinate to the facts found.

Paragraph 73 is the correct statement, but does not preclude the University from electing to use available space it had.

Paragraph 74 is subordinate to facts found.

Paragraphs 75 and 76 are not necessary to the resolution of the dispute.

Paragraph 77 in its first two sentences is subordinate to facts found, and the latter sentence is argument.

Paragraphs 78 through 80 are subordinate to facts found.

Respondent's Facts:

Paragraphs 1 through 4 are subordinate to facts found.

Paragraph 5 is not necessary to the resolution of the dispute.

Paragraphs 6 and 7 are subordinate to facts found.

Paragraphs 8 and 9 are not necessary to the resolution of the dispute.

Paragraphs 10 through 18 with the exception of the last sentence in 18 are subordinate to facts found. That sentence constitutes a conclusion of law.

Paragraphs 19 and 20 are subordinate to facts found.

Paragraphs 21 and 22 constitute recitation of testimony and argument as does paragraph 23.

COPIES FURNISHED:

Edgar Lee Elzie, Jr., Esquire
McFarlane, Ferguson, Allison & Kelly
210 South Monroe Street
Post Office Box 82
Tallahassee, FL 32302

Gerald B. Jaski, Esquire
Sonja P. Mathews, Esquire
William D. Moore, Esquire
Florida State University
311 Hecht House
Tallahassee, FL 32306-4038

Dale Lick
President
Florida State University
211 Westcott Building
Tallahassee, FL 32306

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.