

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HARRELL ROOFING, INC,)
)
 Petitioner,)
)
 v.)
)
 FLORIDA STATE UNIVERSITY,)
) CASE NO. 92-5465BID
 Respondent.)
)
 ALLSTATE CONSTRUCTION, INC.,)
)
 and)
)
 SOUTHEAST ROOFING,)
)
 Intervenor.)
)
 _____)

RECOMMENDED ORDER

The final hearing in the above-styled matter was heard pursuant to notice by Stephen F. Dean, assigned Hearing Officer of the Division of Administrative Hearings, on September 21, 1992, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Wendell Parker
Mike Harrell
Harrell Roofing, Inc.
P.O. Box 20421
Tallahassee, Florida 32316

For Respondent: Sonja Mathews
Florida State University
540 W. Jefferson Street
Tallahassee, Florida 32306-4038

For Intervenor: Davisson F. Dunlap, Jr.
3375-A Capital Circle, N.E.
Tallahassee, Florida 32308
Counsel for Allstate Construction

Mr. Jeff Miller
Route 16, Box 1307
Tallahassee, Florida 32310
Representing Southeast Roofing

STATEMENT OF ISSUES

1. Whether Allstate Construction's (Allstate) bid was delivered in time.
2. Whether Florida State University (FSU) had the authority to waive the lateness of Allstate's bid if it was late.
3. Whether the failure by Allstate to acknowledge receipt of Addendum No. 2 was a bidding irregularity.
4. Whether Allstate's failure to acknowledge receipt of Addendum No. 2 could be waived by FSU.

PRELIMINARY STATEMENT

Florida State University requested bids for repairs to the roof and walls of Thagard Student Health Center on July 2, 1992. Thereafter, two addenda were issued. The first addendum was issued on July 27, 1992, and the second on July 28, 1992. Bids were received from several contractors to include the Petitioner and Intervenor in this case. The bids were opened and posted on August 6, 1992, and the bid tabulation sheet posted on the same day.

Prior to the end of the posting period, the Petitioner notified FSU of Petitioner's intent to protest the bid. Subsequently, the Petitioner filed a timely formal protest petition. Attempts between the parties to resolve the dispute failed, and the matter was forwarded to the Division of Administrative Hearings for formal hearing pursuant to Section 120.53(5)(d), Florida Statutes. Allstate Construction, Inc. and Southeast Roofing, Inc. (Southeast) filed petitions to intervene which were granted; however, at hearing Southeast did not actively participate.

At the hearing, the parties presented witnesses regarding the events of August 6, 1992; and concerning the nature of the changes called for in Addendum No. 2. The parties submitted documentary exhibits. Copies of several of the key exhibits are attached to this order for ease of reference. Subsequently, FSU and Allstate filed proposed findings which were read and considered. Appendix A states which of the proposed findings were adopted, and which were rejected and why. Harrell submitted a letter which was also read and considered.

FINDINGS OF FACT

1. Florida State University requested bids for repairs to the roof and walls of Thagard Student Health Center on July 2, 1992. Thereafter, two addenda were issued. The first addendum was issued on July 27, 1992, and the second on July 28, 1992.
2. Item #1 of Specifications in Addendum No. 1, which is attached, changed the date the bids were to be presented to August 6, 1992 at 2:00 p.m. in Room 124-D of Mendenhall Maintenance Building at FSU.
3. Item #1 to Specifications in Addendum No. 2, which is attached, changed the specifications of ringlets and counterflashings published in Item #4 to Specifications in Addendum No. 1; and Item #2 in Addendum No. 2 changed the specifications of the materials in the cants published in the original specifications.

4. On August 6, 1992, representatives of Harrell, Southeast, and FSU were present in Room 124-D, Mendenhall Maintenance Building prior to 2:00 p.m. Harrell and Southeast had already presented their bids to Sallie Dixon, FSU's representative. One of the persons present had called upon Ms. Dixon to call time and open the bids, but she had not done so when Dot Mathews and Joe O'Neil entered the room.

5. Mr. O'Neil announced to those present that Ms. Mathews was late because he had misdirected her to another part of the building when Ms. Mathews had entered the office he was in, Room 124, and had asked directions. Ms. Mathews immediately handed Allstate's bid to Ms. Dixon, and Ms. Dixon received it.

6. Immediately, Ms. Dixon opened, tabulated, and posted the bids. Allstate had the lowest responsible bid. Allstate's bid did not acknowledge receipt of Addendum No. 2.

7. FSU's rules on bidding provide that the official time will be that of the clock in the reception area of the Purchasing Department; however, the opening was held in Mendenhall Maintenance Building because of repairs to the Purchasing Department, and the university's officials were uncertain whether the reception area and clock existed at the time of the opening.

8. It was the clear impression of all present, except Ms. Mathews, that the bid presented by Ms. Mathews was after 2:00 p.m. The estimates of the time varied, but none placed the time beyond 2:04 p.m.

9. FSU generally sent an acknowledgment form with an addendum which required the bidders to acknowledge receipt of the addendum; however, in this instance, the addendum was sent by the supervising engineer, and an acknowledgment form was not sent with the addendum. The specifications did not require acknowledgment of addenda.

10. The essence of the substantial amount of testimony received on the impact of the changes was (1) that the change in thickness of materials had a negligible impact, and (2) the real change in costs was the result of the requirement that the paint finish be by the manufacturer.

11. The requirement that the materials be painted by the manufacturer was part of Addendum No.1. Further, the bidders are deemed manufacturers, and the finish that they put on the manufactured items is "by the manufacturer".

12. Although testimony was received that Petitioner would have manufactured the items and then had them coated thereby increasing their total costs, an alternative method of manufacture was described by Allstate's representative in which the painted raw materials are retouched after being cut and welded into the finished structures. Petitioner's choice of the first method was explained by its representative to be its effort to comply with the bid requirement that the winning contractor guarantee the finish for twenty years. Intervenor's choice was to use the second method.

13. To the extent that one method may have been more expensive than the other, there was no prohibition of the Petitioner to adopt the less expensive method; and, therefore, there was no economic advantage to Allstate.

14. In the absence of an economic advantage to Allstate, Allstate's failure to acknowledge Addendum No. 2 was a minor irregularity. FSU waived the

lateness of Allstate's bid and Allstate's failure to acknowledge Addendum No. 2, and awarded the bid to Allstate.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Section 120.53, Florida Statutes.

16. Rule 6C2-2.015(7)(d), Florida Administrative Code, provides in pertinent part:

(d) Receipt of Bids. Bids shall be delivered to the Purchasing Department, or as otherwise directed, at or prior to the date and time specified in the Invitation to Bid for the bid opening. Bids which are not delivered to this location and only this location, no matter what reason, shall not be considered. It is the bidder's responsibility to assure that their bid is delivered at the proper time and place for the bid opening[.] The clock in the Reception area of the Purchasing Department is designated as the official time piece for purposes of determining whether a bid or proposal was received by the appointed hour.

17. The facts are clear that the bid was delivered late as measured by the time pieces in the room where the bids were opened. The university's official did not synchronize her watch with the "official time piece" prior to the opening. The facts reveal that the university's representatives did not know whether the "official time piece" existed on the day of the opening. However, the persons present testified that the bid was no more than four (4) minutes late.

18. The only Florida case addressing late bids is *Hewitt Contracting Company, Inc., v. Melbourne Regional Airport Authority*, 528 So.2d 122 (Fla. 5th DCA, 1988), which involves remarkably similar facts. In *Hewitt*, supra, the Authority had advertised for bids to be received at 11:00 a.m. local time on a given date. Hewitt submitted a bid prior to 11:00 a.m., and Hubbard submitted a bid between 11:00 and 11:10 a.m. After 11:10 a.m., the Authority's director entered the room, announced the bidding was closed, opened and tabulated the bids. Hubbard had the low bid and was awarded the contract. Hewitt objected to Hubbard's bid being considered because it was filed late. The court held that the Authority had discretion to waive the irregularity of Hubbard's filing under the facts in the case.

19. The facts reveal that Allstate failed to acknowledge receipt of Addendum No. 2.; that an acknowledgment form was not provided in this instance; and that the bid documents did not call for disqualification if the addenda were not acknowledged as some invitation to bid provide. Credible evidence was received that change in the thickness of the materials was inconsequential to the costs of the project. Credible evidence was received that the requirement for manufacturer's paint on the items was potentially an issue; however, two things impact consideration of this issue. First, this requirement repeats a

requirement in Addendum No. 1, and really was not a change. Second, there were two methods to paint the items, and the bidders were free to use either method.

20. A minor irregularity is defined as:

. . . [A] variation from the Invitation to Bid terms and condition, which does not affect price offered, or give the bidder an advantage or benefit not enjoyed by the other bidders or does not adversely impact the interest of the University[.] . . .

21. Because all the bidders were free to use either method, the failure to acknowledge Addendum No. 2 was a minor irregularity because there was no economic advantage to Allstate which was not enjoyed by the other bidders, and no adverse impact to the University.

22. FSU could elect to waive minor irregularities. Being four minutes late when the bidding had not been closed and none of the other bids opened is a minor irregularity, as was failing to acknowledge Addendum No. 2. FSU waived these irregularities. An agency has great discretion in this regard, and one attacking the decision must show that the decision was arbitrary and capricious. See *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So.2d 50 (Fla. 1982) and *Florida Department of Transportation v. J.W.C. Co.*, 396 So.2d 778 (Fla. 1st DCA 1981). Although it is an article of faith among contractors that being late is fatal, this is no longer the law in all cases in Florida.

23. The Petitioner had the burden to show that FSU's waiver of these irregularities was arbitrary and capricious. Petitioner failed to meet this difficult burden.

RECOMMENDATION

Based upon the consideration of the facts found and the conclusions of law reached, it is,

RECOMMENDED:

That the Petitioner's Petition be dismissed, and the bid be awarded to Allstate Construction, Inc.

DONE and ENTERED this 30th day of October, 1992, in Tallahassee, Florida.

STEPHEN F. DEAN, 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 30th day of October, 1992.

APPENDIX CASE NO. 92-5465BID

Florida State University and Allstate Construction, Inc. submitted proposed findings which were read and considered. The following states which findings were adopted and which were rejected and why:

Florida State University's Proposed Findings:

Para 1-4 Adopted.
Para 5-7 Not necessary/irrelevant.
Para 8 Adopted.
Para 9-11 Not necessary/irrelevant.
Para 12-24 Adopted.
Para 25 Not necessary/irrelevant.

Allstate Construction's Proposed Findings:

Para 1,2 Adopted.
Para 3 Not necessary/irrelevant.
Para 4-8 Adopted.
Para 9 Not necessary/irrelevant.
Para 10-15 Adopted.

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.