

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

W. P. AUSTIN CONSTRUCTION CORP.,)
)
 Petitioner,)
)
vs.) CASE NO. 94-6082BID
)
DEPARTMENT OF MANAGEMENT SERVICES,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case by video conference on November 17, 1994, before Michael M. Parrish, a Hearing Officer of the Division of Administrative Hearings. Witnesses and parties participated in both Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Timothy J. Armstrong, Esquire
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For Respondent: Stephen S. Mathues, Esquire
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STATEMENT OF THE ISSUE

The basic issue in this case is whether the Respondent should award a contract to the Petitioner for its Project No. HSMV 92044000, Repairs, Art Sutton Drivers' License Office, Miami, Florida, or should reject all bids and rebid the contract.

PRELIMINARY STATEMENT

This case arises from a timely formal written protest to the Respondent's intended decision to reject all bids received for the construction of its Project No. HSMV 92044000, Repairs, Art Sutton Drivers' License Office, Miami, Florida. Distilled to its essence, the case involves a dispute as to whether it would be arbitrary or capricious for the Respondent to implement its intended decision.

At the hearing on November 17, 1994, the parties offered Joint Exhibits 1 through 9 which were admitted in evidence. The Petitioner presented the

testimony of two witnesses, one of which was also recalled by the Respondent. At the conclusion of the hearing the parties were allowed until November 29, 1994, to file their proposed recommended orders. Neither party ordered a transcript of the proceedings at hearing. Thereafter, both parties filed timely proposed recommended orders containing proposed findings of fact and conclusions of law. All proposed findings of fact submitted by all parties are specifically addressed in the appendix to this Recommended Order.

FINDINGS OF FACT

1. On August 31, 1994, the Respondent received and opened bids for its Project No. HSMV 92044000, Repairs, Art Sutton Drivers' License Office, Miami, Florida (the Project).

2. The bid specification documents (the Specifications) for the Project included requirements for a Base Bid and for specific alternate proposals with respect to three defined items of alternate work. Section 01100 of the Specifications stated that "[a]ll Alternates described in this Section are required to be reflected on the Bid Form as submitted by the bidder." Part 2 of that section provided:

2.1 ALTERNATE NO. 1

A. Provide a deductive price to the base bid for the removal of existing window units and the installation of new units as indicated in plans and specification Section 08520.

2.2 ALTERNATE NO. 2

A. Provide a deductive price to the base bid for the provision of communications conductors see specification Section 16400.

2.3 ALTERNATE No. 3

A. Provide a deductive price to the base bid for the installation of all landscape materials as indicated on plans and as per specification Section 02960.

3. Also included in the Specifications as Exhibit 4 was a Proposal Form. The Specifications required each bidder to submit this form in triplicate on the bidder's letterhead. With respect to alternates, the Proposal Form required:

With the foregoing as a Base Bid, the following costs of alternate proposals are submitted in accordance with the drawings and specifications.

Alternate No. 1 Add or Deduct \$ _____

Alternate No. 2 Add or Deduct \$ _____

Alternate No. 3 Add or Deduct \$ _____

4. The Respondent's architect received four bids on August 31, 1994. As recorded on the Bid Tabulation and Notice of Award Recommendation, three bidders provided specific prices for the three alternates, as well as a Base Bid. The Bid Tabulation shows that two bidders provided specific prices for the three alternates and included the alternate prices in their Base Bids. The Petitioner provided specific prices for the three alternates, but excluded the alternate prices from its Base Bid. The fourth bidder provided a specific price for only

one alternate and excluded that alternate price from its Base Bid. (The fourth bidder was disqualified as non-responsive for failing to submit prices on all three alternates.)

5. In pertinent part, the Petitioner's proposal read:

With the foregoing as a Base Bid, the following costs of alternate proposals are submitted in accordance with the drawings and specifications:

Alternate No. 1 Add or Deduct . . .	\$4,400.00
Alternate No. 2 Add or Deduct . . .	\$1,158.00
Alternate No. 3 Add or Deduct . . .	\$2,084.00

These Alternates were in addition to the Petitioner's Base bid of \$204,322.00. The proposal form submitted by the Petitioner comports with Exhibit 4 to the Specifications, which was the mandatory Proposal Form.

6. On August 31, 1994, William Phillip Austin, Peititioner's President, wrote the architect:

Per our telephone conversation this date regarding the confusion relating to the Add/Deduct for Alternates 1, 2 and 3 for the above project, please be advised that our base bid did not include the work described in the Alternates. As stated if you want work described in Alternates 1, 2 and 3, you must add the cost to our base bid. The base bid including Alternates 1, 2 and 3 would, therefore, be \$211,964.00.

If we can provide additional information, please do not hesitate to contact us.

7. The Respondent's architect completed and submitted the bid Tabulation and Notice of Award Recommendation to the Respondent in early September. The document clearly discloses the amounts of each bidder's Base Bid and Alternate proposals. Using plus (+) and minus (-) signs, the Bid Tabulation further shows each bidder's method of calculation. The record is devoid of evidence that the Respondent had any problem in evaluating the bids and identifying the lowest bidder. The Petitioner was the lowest bidder on any combination of base bid plus or minus any or all alternates.

8. Subsequently the Petitioner received a NOTICE OF AWARD RECOMMENDATION dated October 4, 1994. The Notice informed the Petitioner that the Respondent "has recommended that the contract be awarded to your firm in the total amount of \$211,964.00, accepting the Base Bid and Alternates #1, #2 & #3. The Administrator of Contracts Design and Permitting, Division of Building Construction, Department of Management Services, State of Florida will consider this recommendation." Larry R. Coleman, Construction Projects Administrator, signed the letter. The Petitioner acknowledged receipt.

9. A representative of the second lowest bidder, Kalex Construction, then contacted the Respondent, complaining of the Award Recommendation. The grounds for the Kalex complaint are not in the record. However, on October 14, 1994, H. R. Hough, the Respondent's Contracts Administrator, sent the Petitioner a letter "to notify you of the State's decision to reject all bids on the above

referenced project due to ambiguities in the specifications." Mr. Hough's reasons for the rejection are "other than those stated by the protestor," Kalex.

10. The Respondent's Rule 60D-5.007, Florida Administrative Code, states:

Determination of Successful Bidder.

(1) All projects except where competitive bidding is waived under the provisions of Rule 60D-5.008 will be publicly bid in accordance with the provisions in the project specifications bidding documents. Award of contract will be made to the responsive bidder, determined to be qualified in accordance with the provisions herein and meeting the requirements of the bidding documents, that submits the lowest valid bid for the work. The lowest bid will be determined as follows:

(2) The lowest bid will be the bid from the responsive bidder that has submitted the lowest price for the base bid or the base bid plus the additive alternates or less the deductive alternates chosen by the Agency to be included in or excluded from the proposed contract, taken in numerical order listed in the bid documents. The order of the alternates may be selected by the Agency in any sequence so long as such acceptance out of order does not alter the designation of the low bidder.

11. Under the above-quoted rule, the Respondent compares bids beginning with the lowest "base bid." The Respondent is of the view that for this comparison to be fair and equal, all bidders must include the same scope of work in the "base bid." The Respondent does not interpret the above-quoted rule to allow deductive alternates from some bidders and additive alternates from others. (For reasons discussed in the Conclusions of Law which follow, the Respondent's interpretation and application of the above-quoted rule is erroneous.)

12. The Specifications contain some ambiguous and inconsistent language regarding whether alternates should be treated as additive or deductive. The ambiguous and inconsistent language did not provide any bidder with an advantage or a disadvantage, nor did it otherwise affect the fairness of the bidding process.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Sections 120.53 and 120.57(1), Florida Statutes.

14. The basic legal principles applicable to a case of this nature are summarized in Systems/Software/Solutions v. Department of Transportation, DOAH Case No. 92-0339BID, Recommended Order issued March 12, 1992, where Hearing Officer Kilbride wrote:

25. The law of Florida has established that a strong deference be accorded an agency's decision in competitive bidding situations:

[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.

Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So.2d 505, 507 (Fla. 1982).

26. In deciding Department of Transportation v. Groves-Watkins Constructors, 530 So.2d 912 (Fla. 1988), the Supreme Court of Florida ruled that the Liberty County decision established the standard by which an agency's decision on competitive bids for a public contract should be measured when it further held that the agency's discretion, as stated above, cannot be overturned absent a finding of "illegality, fraud, oppression or misconduct." Groves-Watkins, 530 So.2d at 913.

27. The Grove-Watkins standard was recently reiterated in Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So.2d 1131 (Fla. 1st DCA 1991). In Scientific Games, Inc., the Court was determining the scope of discovery to be permitted in an administrative proceeding concerning the evaluation of an RFP. The Court concluded that the scope of discovery must be viewed in light of the proper standard of review to be employed by the Hearing Officer in these types of proceedings and stated:

The Hearing Officer need not, in effect, second guess the members of the evaluation committee to determine whether he and/or other reasonable and well-informed persons might have reached a contrary result . . . "[T]he Hearing Officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly." Groves-Watkins, 530 So.2d at 914.

Scientific Games, Inc., 586 So.2d at 1131. See, also, C.J. Courtenay v. Department of Health and Rehabilitative Services, 581 So.2d 621 (Fla. 5th DCA 1991). (It is not the Hearing Officer's function to reweigh award factors and award to protestor).

Other summaries citing additional authorities can be found in the recommended orders issued in the following cases: Bozell, Inc., et al. v. Department of Lottery, et al., DOAH Case No. 91-3165BID, Recommended Order issued July 25, 1991; Consultec, Inc. v. Department of Administration, Division of State Employees' Insurance, et al., DOAH Case No. 91-5950BID, Recommended Order issued

November 13, 1991; Professional Testing Service, Inc. v. Department of Professional Regulation, DOAH Case No. 91-7429BID, Recommended Order issued January 3, 1992.

15. This case does not raise any issues with regard to whether the Respondent acted fraudulently, illegally, or dishonestly. The disposition of this case turns on whether the proposed rejection of all bids was arbitrary and capricious. For the reasons explained below, it was.

16. The mandatory Proposal Form included in the Specifications expressly provided for bidders to state their prices for each of the three alternates in terms of amounts to be added to the base bid or amounts to be deducted from the base bid. The Respondent's Rule 60D-5.007, Florida Administrative Code, also expressly provides for the evaluation of bids in which the prices for alternates are stated in terms of amounts to be added to the base bid or amounts to be deducted from the base bid. Such being the case, the fact that the Petitioner (and one other bidder) used additive prices for the alternates was, at worst, a "non-material bid deviation" to the extent that such pricing deviated from the language of Section 01100 of the Specifications providing for a "deductive price" for each alternate. Rule 60D-5.0072, Florida Administrative Code provides: "The Agency shall reserve the right to waive any non-material deviation in bids received." On the facts in this case, the Respondent should exercise its reserved right, should waive the non-material deviation in the Petitioner's bid, and should award the contract for the subject Project to the Petitioner. To do otherwise would be to glorify form over substance, which is, of course, arbitrary and capricious.

17. The Respondent argues that under its Rule 60D-5.007, bids with additive alternates cannot be compared and evaluated with bids with deductive alternates because the "base bids" would encompass different scopes of work and it would be like comparing apples to oranges. The Respondent's argument fails because it is based upon an incorrect interpretation and application of the subject rule. Where, as here, the Specifications require the bidders to include prices for one or more alternates, the rule does not require a comparison of just the "base bids" to determine the lowest bid. Instead, the rule provides:

The lowest bid will be the bid from the responsive bidder that has submitted the lowest price for . . . the base bid plus the additive alternates or less the deductive alternates chosen by the Agency to be included in or excluded from the proposed contract. . . .

Once the Agency has determined which alternates it wishes to include in or exclude from the proposed contract, it is a simple process to compare bids in the manner required by the rule and it is irrelevant that some of the bidders may have treated the alternates as additive and others may have treated them as deductive. By means of simple addition and subtraction the bids can be accurately and fairly compared. The process is equally fair and equally accurate regardless of whether the bidder treated the alternates as additive or deductive. Such being the case, it would be arbitrary and capricious to reject all bids solely because some had additive alternates and others had deductive alternates.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Management Services issue a Final Order in this case awarding a contract for the subject project to the Petitioner.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 16th day of December 1994.

MICHAEL M. PARRISH
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 16th day of December 1994.

APPENDIX

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

Proposed findings submitted by Petitioner

Paragraph 1: This is primarily a statement of position and is addressed in the Preliminary Statement.

Paragraphs 2 through 10: Accepted in substance with a few unnecessary details omitted.

Proposed findings submitted by Respondent

Paragraphs 1 through 6: Accepted in substance.

Paragraph 7: First sentence accepted in substance. Second sentence rejected as constituting a conclusion which is not warranted by the evidence. Third sentence is accepted as an accurate statement of how Respondent has been interpreting the subject rule, but is not accepted as constituting a correct interpretation of the rule.

Paragraph 8: Rejected as misleading and confusing because the "scope of work" to be performed under the contract can only be determined after the Respondent decides which alternates to include and which to exclude.

Paragraph 9: The first two sentences are accepted in substance. The last sentence is rejected as constituting a conclusion which is not warranted by the evidence.

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 ten 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.