

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LONNIE JACKSON REVOCABLE TRUST,)
)
 Petitioner,)
)
 vs.) CASE NO. 96-4762BID
)
 DEPARTMENT OF CORRECTIONS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on November 6, 1996, in Fort Lauderdale, Florida, before Stuart M. Lerner, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gregory L. Jackson
Howard Craft
Lonnie Jackson Revocable Trust
601 Andrews Avenue
Fort Lauderdale, Florida 33301

For Respondent: Daniel Te Young
Assistant General Counsel
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500

STATEMENT OF THE ISSUE

Whether the Department of Corrections (Department) should sustain Petitioner's challenge to the Department's decision to reject all proposals (including Petitioner's) submitted in response to the Department's request for proposals for Lease No. 700:0754?

PRELIMINARY STATEMENT

On or about September 26, 1996, Petitioner submitted to the Department a signed and dated Notice of Protest which read as follows:

Lease Number 700:0754
Probation and Parole Office 17-0
Authority: Florida Statute 120.53(5) 1/

To: Maria L. Cortes
District General Services Manager
3810 Inverrary Blvd. C-101
Lauderhill, FL 33319

Protest Deadline: 5:00 PM, September 26, 1996
Today's Date: September 26, 1996 (Hand Delivered)

Bidder: Lonnie Jackson Revocable Trust

The undersigned protests the decision by the Department of Corrections to reject all bids submitted for the above referenced lease, as our bid meets all requirements.

On October 10, 1996, the Department referred the matter to the Division of Administrative Hearings (Division). Along with a referral letter and a copy of Petitioner's Notice of Protest, the Department filed with the Division a Motion to Dismiss for Failure to File the Protest Bond, and a Motion to Dismiss, or in the Alternative, for a More Definite Statement (Respondent's Motions). In its Motion to Dismiss for Failure to File the Protest Bond, the Department contended that, because Petitioner did not post, at the time it submitted its Notice of Protest to Respondent, a bond in accordance with the provisions of Section 255.25(3)(c), Florida Statutes (Supp. 1996), 2/ the Notice of Protest should be dismissed. In its Motion to Dismiss, or in the Alternative, for a More Definite Statement, the Department argued that Petitioner's Notice of Protest did not comply with the law governing the contents of a formal bid protest. 3/

On October 14, 1996, the undersigned Administrative Law Judge issued an order directing that Petitioner, "[n]o later than October 22, 1996, . . . file with the undersigned . . . , and serve on Respondent [the Department] , a written response to Respondent's Motions." 4/ On October 22, 1996, Petitioner filed a More Definite Statement, in which it made the following assertions:

- 1) Petitioner's Bid meets all requirements in the R.F.P.
- 2) Florida Department of Corrections staff committed error in measuring Petitioner's building, as clearly shown in the documents attached hereto. 5/

On October 29, 1996, the undersigned Administrative Law Judge issued an order: (1) denying Respondent's Motion to Dismiss, or in the Alternative, for a More Definite Statement; and (2) giving Petitioner until 4:00 p.m. on Friday, November 1, 1996, to post the bond required by Section 255.25(3)(c), Florida Statutes (Supp. 1996). 6/ During a telephone conference call held on November 1, 1996, (following the 4:00 p.m. posting deadline), the parties advised the undersigned that Petitioner had timely posted the requisite bond. Accordingly, the undersigned announced that the Section 120.57(1) hearing on the merits of Petitioner's protest (which had been scheduled for November 6, 1996) would be held as scheduled.

On November 4, 1996, the parties filed a Joint Prehearing Stipulation in which they stated their respective positions as follows:

1. Petitioner
As in earlier ([Sept.]. 26) response to the D.O.C., our bid meets all bid specs; D.O.C. staff committed error in measuring our building.

2. The Department

The Department issued a request for proposals to lease office space for a probation and parole office in Fort Lauderdale. The request stated that the net square footage required was 9,169, within a plus three percent tolerance, and that restrooms and mechanical rooms were not to be included in calculating the square footage. No responsive proposal was received. The proposal submitted by Petitioner was non-responsive because it did not meet the minimum net square footage required. Because no responsive bids were received, the Department, by letters dated 19 September 1996, notified all bidders that it was rejecting all bids and that a new request for proposals would soon be issued. The rejection of all bids was proper; it was neither fraudulent, arbitrary, illegal, or dishonest.

The disputed issues of fact and law were described as follows in the parties' Joint Prehearing Stipulation:

VII. ISSUES OF FACT TO BE LITIGATED

Whether Department staff committed error in measuring Petitioner's bid building at 609 South Andrews Avenue, Ft. Lauderdale, Florida.

VIII. ISSUES OF LAW FOR [ADMINISTRATIVE LAW JUDGE] TO DETERMINE

Whether the Department's rejection of all bids was arbitrary.

The hearing on the merits of Petitioner's protest was held, as scheduled, on November 6, 1996. At the outset of the hearing, the Department requested that the undersigned take official recognition (pursuant to Section 120.569(2)(g), Florida Statutes (Supp. 1996) 7/) of the final order issued in Preferred Services, Inc. v. Department of Health and Rehabilitative Services, DOAH Case No. 94-4890BID (HRS January 23, 1995), a bid protest case in which the Department of Health and Rehabilitative Services (HRS), adopting the recommendation of the Hearing Officer, concluded that "[i]t was reasonable for [it] to conclude that the [protestant's] bid [to lease space to HRS] was unresponsive by failing to provide the minimum number of restroom sets, or that by deducting another two sets of restrooms, the bid was unresponsive as not meeting the minimum square footage requirements [set forth in the Invitation to Bid]." The undersigned advised Petitioner that, if it contested the Department's request for official recognition, it so advise the undersigned in writing no later than Tuesday, November 12, 1996. On that date (November 12, 1996), Petitioner filed a written "objection" to the undersigned taking official recognition of the final order issued in DOAH Case No. 94-4890BID. Having carefully considered the matter, the undersigned is of the view that no useful purpose would be served by granting the Department's official recognition request and adding the final order issued in DOAH Case No. 94-4890BID to the record in the instant case. See Mercedes Lighting and Electrical Supply, Inc., v. Department of General Services, 560 So.2d 272, 278 (Fla. 1st DCA 1990). Accordingly, the request is hereby DENIED.

A total of two witnesses (Douglas Sweredoski and Aubrey Hutchison, Jr., P.E.) testified at the November 6, 1996, final hearing held in the instant case. In addition to the testimony of these two witnesses, seven exhibits (Petitioner's Exhibits 1 and 3 and Respondent's Exhibits 1 through 5) were offered and received into evidence. (Petitioner's Exhibit 2 was also offered and received into evidence, but it was subsequently withdrawn.)

At the close of the evidentiary portion of the November 6, 1996, final hearing, the undersigned, on the record, advised the parties of their right to submit proposed recommended orders and established a deadline (ten days from the date of the close of the hearing) for the filing of these proposed recommended orders. The Department timely filed a proposed recommended order on Monday, November 18, 1996. The Department's proposed recommended order has been carefully considered by the undersigned. To date Petitioner has not filed a proposed recommended order.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

The Request for Proposals

1. Through the issuance and distribution of a Request for Proposal and/or Proposal Submittal Form (RFP), the Department's Region IV solicited the submission of proposals from prospective lessors interested in leasing to the Department office space in an area (more particularly described in the RFP) in Broward County.

2. The RFP contained the following "General Specifications and Requirements," among others:

1. Net square footage required: 9,196 (within plus 3 percent tolerance) measured in accordance with the Standard Method of Space Measurement (Attachment A). NOTE: restrooms and mechanical rooms are not to be included in calculating net rentable square footage.

BIDDER RESPONSE: Net square feet available _____
(Space offered must be within the +3 percent required) . . .

2. Space to be located in the County of Broward, Florida depicted in the following boundaries:

NORTH: N.W. 2nd Street,
N.E. 2nd Street
SOUTH: Davie Boulevard
EAST: Federal Highway, U.S. 1
WEST: S.W. 4th Avenue,
N.W. 7th Avenue

(See attached map (Attachment B).)

Proposals (bids) shall be considered responsive if the space is within or abutting the specified boundaries. Space for purpose of this paragraph means the net square footage to be leased.

BIDDER RESPONSE: _____ (address of proposed location- mark location on Attachment B also).
Include zip code.

The offered space represents ____ percent of the entire building.

4. Space to be made available on July 1, 1997 or within 90 days after notification of award of proposal, whichever occurs last. . . .

5. Term of lease: Five (5) years with an option to renew for an additional Five (5) Years.

6. Services: Full Services to be provided by lessor, including utilities, interior and exterior maintenance, recycling services, garbage disposal, janitorial services and supplies as specified in Attachment C. . . .

10. Photographs and Floor Plans: As part of the bidder's submittal, bidders are to provide:

a) A clear photograph or prospectus showing exterior front, sides and rear of the proposed facility.

b) A floor plan to scale . . . showing present configurations with measurements that equate to the net rentable square footage. The final floor plan will be as described in the specifications and as identified through consultation with the Department.

BIDDER RESPONSE: Floor Plan and _____ Photograph(s) are included as a part of this proposal. . . .

12. Existing building. The proposed space must be an existing building. To be considered as existing the proposed space must be dry and measurable (capable of being physically measured). To be considered as "Dry and Measurable" the construction area of all floors of the building including bathrooms, basement, mechanical equipment rooms, stairways, penthouses, and the like must be enclosed with floor, finished roof and exterior walls with windows and doors installed, so that the interior of the building will remain dry during adverse weather conditions. The areas mentioned must be clearly defined within the building, but are not required to be completed, to allow the actual occupiable (rental) area of the building to be measured at the time of proposal submittal. Renovations to bring the facility

into compliance with all applicable Federal, State and local codes and regulations and/or to meet the desired arrangements are permitted, if carried out in accordance with prescribed procedures.

a) The facility must comply or be renovated to comply with the requirements for Accessibility by Handicapped Persons as mandated by Chapter 553, Sections 553.501-553.513, Florida Statutes, and the latest Accessibility Requirements manual published by the Department of Community Affairs, (DCA) Florida Board of Building Codes and Standards, as well as the requirements of Public Law 101-336, July 26, 1990 known as the "Americans with Disabilities Act of 1990" Appendix A to Part 36, "Standards for Accessible Design." The Lessor agrees that the de[v]ised premises now conform, or that, prior to Lessee's occupancy, that said premise[s] shall, at the Lessor's expense, be brought into compliance with all specified requirements. (Attachment D).

Successful bidder will provide a floor plan including a site plan of the parking areas for ADA review. . . .

3. The RFP contained the following "Space Requirement Criteria," among others:

1. Plans review fees for State leased buildings:

Floor plans are to be a joint effort of departmental staff and the successful bidder. The successful bidder is to provide architectural services by a licensed architect to prepare renovation plans per the 1991 Edition of NFPA 101. The final floor plan is subject to department determination and State Fire Marshall review and approval. . . .

See floor plan, Attachment H, for suggested configuration of offices and rooms.

5 Offices not to exceed 120 sq. ft. each-
600 net sq/ft
55 Offices not to exceed 64 sq. ft each-
3,520 net sq/ft
File Areas- 84 net sq/ft
Reception Areas- 300 net sq/ft
Conference Room- 550 net sq/ft
Storage Areas with floor to ceiling shelves-
180 net sq/ft
Copy and Mail Distribution Room- 100 net sq/ft
Employee Lounge with sink/cabinets/counter top-
90 net sq/ft
Inactive File Room w/open shelves- 2,000 net sq/ft
Drug Testing Room*- 100 net sq/ft
MIS & Office Automation Terminals and Printers-

255 net sq/ft
Firearm Storage- 40 net sq/ft
Internal Circulation- 1,377 net sq/ft

*Must include: Adjoining restroom, stainless steel sink, viewing window between testing room and restroom, storage shelves and cabinets, and dead bolt lock on testing room. This bathroom is additional to restrooms referenced under "Restrooms" . . .

8. Restrooms: (must meet requirements of Americans with Disability Act of 1990 and the requirements of the Accessibility by Handicapped Persons, Section 553.504(12-13), Florida Statutes- Attachment D):

Waterclosets- 1 Men's (Public); 1 Men's (Staff);
1 Women's (Public); 1 Women's (Staff)

Urinals- 1 Men's (Public); 1 Men's (Staff)

Lavatories w/mirrors- 1 Men's (Public); 1 Men's (Staff); 1 Women's (Public); 1 Women's (Staff)

Note: If space is offered on more than one floor, restroom facilities must be provided to code on each floor in conformance with occupancy and code requirements whichever is greater. . . .

4. The RFP contained the following "General Provisions," among others:

2. All bids accepted by the State are subject to the State's terms and conditions and any and all additional terms and conditions submitted by bidders are rejected and shall have no force and effect. . . .

5. All Proposal sheets must be executed and submitted in a sealed and titled envelope, enclosed in an outer envelope. The face of the inner envelope shall contain, in addition to the Department's address . . . , the date and time of the bid opening and the lease number. PROPOSALS NOT SUBMITTED ON THIS PROPOSAL SUBMITTAL FORM SHALL BE REJECTED. All proposals are subject to the conditions specified herein. Those which do not comply with these conditions are subject to rejection. Each proposal shall be signed by the owner(s), corporate officers, or legal representative(s). The corporate, trade, or partnership title must be either stamped or typewritten beside the actual signature(s). . . .

7. The Department agrees to enter into a lease agreement based on submission and acceptance of the proposal in the best interest of the Department and the State.

8. The Department reserves the right to reject any and all proposals for reason which shall include, but not be limited to, the agency's budgetary constraints; waive any minor information or technicality in proposals, to accept the proposal deemed to be the lowest and in the best interest of the State, and if necessary, to reinstate procedures for soliciting competitive proposals. . . .

10. Late proposals, modification of proposals, or withdrawal of proposals:

(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered and will be returned unopened.

(b) A proposal may be withdrawn in person by a proposer or his/her authorized representative provided his/her identity is made known and he/she signs a receipt for the proposal, but only if the withdrawal is made prior to the exact time set for the receipt of proposals. . . .

13. Sealed proposals will be received until 10:00 a.m. on August 21, 1996 by Maria L. Cortes at 3810 Inverrary Blvd., Bldg. C, Suite 101 Conference Room, Lauderhill, FL 33319, at which time all proposals will be publicly opened and read aloud. Notification of award will be made within 30 calendar days and shall be given either by posting the proposal tabulation at the location where the bids were opened or by certified United States mail, return receipt requested. . . .

14. A preproposal conference . . . will be held at 10:00 a.m. on July 17, 1996 at 3810 Inverrary Blvd., Bldg C, Suite 101, Conference Room, Lauderhill, FL 33319

5. "Attachment A" to the RFP was the "Standard Method of Space Measurement," which was referenced in the "Net square footage required" provision of the RFP's "General Specifications and Requirements." "Attachment A" read as follows:

STANDARD METHOD OF SPACE MEASUREMENT

The purpose of this standard is to permit communication and computation on a clear and understandable basis. Another important purpose is to allow comparison of values on the basis of a generally agreed upon unit of measurement (net square footage).

It should also be noted that this standard can and should be used in measuring office space in old as well as new buildings, leased office space as well as State-owned office space. It

is applicable to any architectural design or type of construction because it is based on the premise that the area being measured is that which the agency may occupy and use for its furnishings and its people.

This standard method of measuring office space measures only occupiable space, undistorted by variance in design from one building to another. It measures the area of office building that actually has usable (rental) value and, therefore, as a standard can be used by all parties with confidence and with a clear understanding of what is being measured. Area measurement in office buildings is based in all cases upon the typical floor plans, and barring structural changes which affect materially the typical floor, such measurements stand for the life of the building, regardless of readjustments incident to agency layouts.

All usable (rentable) office space, leased or State-owned, shall be computed by:

Measuring to the inside finish of permanent outer building walls to the office side of corridors and/or other permanent partitions, and to the center of partitions that separate the premises from adjoining usable areas. This usable (rentable) area shall EXCLUDE: bathrooms, stairs, elevator shafts, flues, pipe shafts, vertical ducts, air-conditioning rooms, fan rooms, janitor closet, electrical closets-- and such other rooms not actually available to the tenant for his furnishings and personnel--- and their enclosing walls.

No deductions shall be made for columns and projections necessary to the building.

Pre-Proposal Conference

6. A pre-proposal conference was held, as scheduled, to give prospective lessors the opportunity to receive from the Department answers to questions they had regarding the RFP.

7. The Department emphasized to those prospective lessors who attended the pre-proposal conference that, as indicated in the "Net square footage required" provision of the RFP's "General Specifications and Requirements," it would not accept a proposal offering space with a "net square footage" of less than 9,196 square feet.

8. Petitioner did not send a representative to the pre-proposal conference.

Petitioner's Proposal

9. Two proposals were submitted in response to the RFP.

10. One of these proposals was submitted by Petitioner, which offered the Department the entire space in a two-story building located at 609 South Andrews Avenue in Fort Lauderdale, Florida (Petitioner's Building). In its proposal, Petitioner indicated that the "net square feet available" in its building was 9,370.

11. Along with its proposal, Petitioner submitted to the Department existing and proposed floor plans.

12. There are currently two restrooms on the first floor of Petitioner's Building and two restrooms on the second floor of the building.

13. None of these restrooms meets the accessibility requirements prescribed in the RFP.

14. It is Petitioner's intention, if it is awarded the lease by the Department, to eliminate these existing restrooms and replace them with restrooms to be constructed adjacent to the existing structure in space that is not now, nor was it at the time of the submission of Petitioner's proposal, "Dry and Measurable," as that term is defined in the "Existing building" provision of the RFP's "General Specifications and Requirements."

15. These intentions of Petitioner's were reflected in the materials Petitioner submitted to the Department along with its proposal.

The Department's Initial Evaluation of the Responsiveness of the Two Proposals

16. Douglas Sweredoski is the Facilities Services Manager Assistant for the Department's Region IV. He is a certified real estate appraiser.

17. On or about September 15, 1996, Sweredoski went to Petitioner's Building and measured the dimensions of the building (and certain of its component parts), using an electronic measuring device, to ascertain whether the building had the "net square footage required" by the RFP.

18. Employing the "Standard Method of Space Measurement," Sweredoski reasonably determined that Petitioner's Building had less than the "net square footage required" by the RFP and that therefore Petitioner's proposal was not responsive to the RFP.

19. The other proposal that the Department received was also deemed to be non-responsive (a determination that has not been challenged).

The Department's Notice of Rejection of Proposals

20. Having determined that both proposals it had received were materially non-responsive, the Department, by letter dated September 19, 1996, informed Petitioner of the following:

This letter is to inform you that the Department of Corrections has determined that it is in the best interest of the State of Florida to reject all bids submitted for the above referenced lease [Lease No. 700:0754]. A new Request for Proposal will be issued soon.

This letter constitutes agency action concerning the referenced bid. You have seventy-two (72) hours from receipt of this letter to file a written notice of protest to this action, and ten (10) days after filing such written notice of protest to file a formal written protest. All documents should be addressed to the undersigned at 3810 Inverrary Boulevard, Building C, Suite 101, Lauderhill, Florida 33319. Failure to file a protest within the times prescribed in Section 120.53(5), Florida Statutes, shall constitute a waiver of proceedings under Chapter 120, Florida Statutes.

Petitioner's Protest

21. Petitioner timely protested the Department's decision to reject Petitioner's proposal and to issue a new RFP.

Sweredoski's Return to Petitioner's Building

22. On or about October 1, 1996, Sweredoski returned to Petitioner's Building to verify the accuracy of the measurements that he had obtained (using an electronic device) during his earlier visit to the building.

23. On this follow-up visit to the building, Sweredoski used a mechanical device (more specifically, a tape measure) to measure the dimensions of the building (and certain of its component parts).

24. The measurements he obtained during this second visit were "very close" to the measurements he had obtained during his previous visit.

25. Sweredoski, employing (as he had during his earlier visit) the "Standard Method of Space Measurement," reasonably determined that Petitioner's Building had a "net square footage" of 8,731 net square feet (a "gross square footage" of 9,369 square feet minus: 271 square feet for the existing stairway leading from the first to the second floor; 110 square feet for the existing telephone/mechanical closet on the second floor; and 257 square feet for the existing bathrooms on the first and second floors).

Referral of Petitioner's Protest to the Division

26. On October 10, 1996, the Department referred Petitioner's protest to the Division.

CONCLUSIONS OF LAW

27. With certain exceptions not applicable to the instant case, state agencies (including the Department) may not "enter into a lease as lessee for the use of 3,000 square feet or more of space in a privately owned building except upon advertisement for and receipt of competitive bids and award to the lowest and best bidder." Section 255.25(3), Fla. Stat. (Supp. 1996); Rule 60H-1.015, Fla. Admin. Code.

28. It has been said on more than one occasion that competitive bidding requirements, such as those imposed upon state agencies seeking to lease 3,000 square feet or more of space in privately owned buildings, 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 and Associates, Inc. v. City of Cape Coral, 352 So.2d 1190, 1192 (Fla. 2d DCA 1977).

29. In soliciting and accepting competitive bids/proposals for space of 3,000 square feet or more in privately owned buildings, a state agency has wide discretion. See D.O.T. v. Groves-Watkins Constructors, 530 So.2d 912, 913 (Fla. 1988); Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So.2d 505, 507 (Fla. 1982).

30. Its discretion with respect to these matters, while broad, is not unbridled. It must exercise its 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 and Son, Inc., 354 So.2d 446, 450 (Fla. 1st DCA 1978).

31. In soliciting competitive bids/proposals from prospective lessors, an agency must provide specifications to prospective lessors which should set forth, among other things, (as did the RFP in the instant case) the "[a]pproximate net square footage required [by the agency], to be measured in compliance with the Department of Management Services' Standard Method of Space Measurement, pursuant to Rule 60H-2.003(2), Florida Administrative Code." Rule 60H-1.015(3)(b)1, Fla. Admin. Code. (Rule 60H-2.003(2), Florida Administrative Code, provides as follows:

Usable space is floor space that has usable value. It does not include outer building walls but includes space covered by interior walls. If an interior wall separates spaces occupied by two tenants, half of the wall is included in each tenant's measurement. Usable space does not include bathrooms, stairs, exit stair passageways, public corridors, main entrance lobbies, elevator lobbies, elevator shafts, flues, furnaces, pipe shafts, vertical ducts, air conditioning rooms, fan rooms,

janitor closets, and such other equipment and building support rooms not actually available to the tenant for furnishings and personnel and their enclosing walls. Usable space includes columns and projections necessary to the building. Any other corridors are usable, chargeable space and, if shared by agencies, shall be prorated.)

32. Bids/proposals submitted by prospective lessors must "specifically respond but need not be limited to each item included in the specifications." Rule 60H-1.015(4)(a), Fla. Admin. Code.

33. The agency has the discretion "to accept or reject any or all bids[/proposals] submitted and if necessary [to] reinstate procedures for soliciting competitive proposals." Rule 60H-1.015(5), Fla. Admin. Code.

34. In determining whether to accept or reject a bid/proposal, the agency may not use criteria that were not set forth in the invitation to bid/request for proposals. See *Air Support Services International, Inc. v. Metropolitan Dade County*, 614 So.2d 583, 584 (Fla. 3d DCA 1993)("[p]ublic bid requirements may not be materially altered subsequent to the submission of bids").

35. Furthermore, the agency may not accept a bid/proposal that is materially at variance with the bid/proposal specifications. "[A]lthough a bid/proposal containing a material variance is unacceptable, not every deviation from the [bid/proposal specifications] 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 agency. See *Robinson Electrical Co., Inc. v. Dade County*, 417 So.2d 1032, 1034 (Fla. 3d DCA 1982).

36. An unsuccessful bidder/proposer may file a protest with the soliciting state agency challenging the agency's lease award or, if no award has been made, the agency's decision to reject all bids/proposals. The protest must be resolved in accordance with the rules adopted by the agency pursuant to Section 120.57(3), Florida Statutes (Supp. 1996), which provides, in part, as follows:

An agency which enters into a contract pursuant to the provisions of . . . chapter 255 . . . shall adopt rules specifying procedures for the resolution of protests arising from the contract bidding process. Such rules shall at least provide that:

(a) The agency shall provide notice of its decision or intended decision concerning a bid solicitation or contract award as follows:

1. For a bid solicitation, notice of a decision or intended decision shall be given by United States mail or by hand delivery.

* * *

3. For any other agency decision, notice of a decision or intended decision shall be given either by posting the bid tabulation at the location where bids were opened or by

certified United States mail or other express delivery service, return receipt requested.

(a) The notice required by this paragraph shall contain the following statement: "Failure to file a protest within the time prescribed in s. 120.57(3), Florida Statutes, shall constitute a waiver of proceedings under chapter 120, Florida Statutes."

(b) Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the bid tabulation or after receipt of the notice of the agency decision or intended decision and shall file a formal written protest within 10 days after filing the notice of protest. With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for proposals, and the formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based.

* * *

(d)1. The agency shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7 days, excluding Saturdays, Sundays, and legal holidays, after receipt of a formal written protest.

2. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and legal holidays, after receipt of the formal written protest, and if there is no disputed issue of material fact, an informal proceeding shall be conducted pursuant to subsection (2) and applicable agency rules before a person whose qualifications have been prescribed by rules of the agency.

3. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and legal holidays, after receipt of the formal written protest, and if there is a disputed issue of material fact, the agency shall refer the protest to the [D]ivision [of Administrative Hearings] for proceedings under subsection (1).

(e) Upon receipt of a formal written protest referred pursuant to this subsection, the director of the [D]ivision shall expedite the hearing and assign an administrative law judge within 30 days after the receipt of the formal written protest by the [D]ivision and render a recommended order within 30 days after the hearing or within 30 days after receipt of the hearing transcript ^{8/} or hearing videotape by the administrative law judge, whichever is later. The provisions of this paragraph may be waived upon stipulation by all parties.

(f) In a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

37. Section 120.57(3)(f), Florida Statutes (Supp. 1996), represents: (1) a codification of the holding in *D.O.T. v. Groves-Watkins Constructors*, 530 So.2d 912, 913 (Fla. 1988) that, where a state agency's decision to reject all bids/proposals is challenged, "the hearing officer's ^{9/} sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, ^{10/} illegally, or dishonestly" in making its decision; and (2) a rejection of the view (expressed in such post-Groves-Watkins cases as *Moore v. Department of Health and Rehabilitative Services*, 596 So.2d 759, 761 (Fla. 1st DCA 1992)) that, in bid/proposal protest cases not involving the rejection of all bids/proposals, the scope of inquiry is similarly limited and that "[d]e novo consideration" is inappropriate.

38. In the instant case, Petitioner is challenging the Department's decision to reject (as materially non-responsive) all proposals (including Petitioner's) submitted in response to the Department's request for proposals for Lease No. 700:0754. Petitioner contends that the Department's decision was arbitrary inasmuch as its proposal met all of the requirements of the RFP, including the "Net square footage required" provision of the RFP's "General

Specifications and Requirements." According to Petitioner (which has not challenged the Department's decision to reject the other proposal submitted in response to the RFP), the Department's "staff committed error in measuring Petitioner's building."

39. Pursuant to Section 120.57(3)(f), Florida Statutes (Supp. 1996), the burden was on Petitioner (at the Section 120.57(1) hearing held in this case) to prove (by a preponderance of the evidence 11/) its allegation that the Department acted arbitrarily in rejecting all proposals submitted in response to the RFP and that therefore the Department's action should be overturned.

40. Petitioner failed to meet its burden of proof.

41. There has been no showing that the Department's decision to reject (as materially non-responsive) Petitioner's proposal on the ground that the building offered by Petitioner had less than the "Net square footage required" by the RFP was anything other than the product of the honest exercise of the Department's discretion which was based upon a reasonable interpretation of the pertinent provisions of the RFP, as well as reasonably accurate measurements of the dimensions of Petitioner's Building and its component parts.

42. By all appearances, the Department acted within the bounds of reason and logic, and not arbitrarily, in rejecting Petitioner's proposal. 12/

43. Accordingly, the Department's decision to reject Petitioner's proposal and "to reinitiate procedures for soliciting competitive proposals" for Lease No. 700:0754 should not be overturned.

RECOMMENDATION

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

RECOMMENDED that the Department of Corrections enter a final order denying Petitioner's protest of the Department's decision to reject all proposals (including Petitioner's) submitted in response to the Department's request for proposals for Lease No. 700:0754.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 21st day of November, 1996.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(904) 488-9675 SUNCOM 278-9675
Fax Filing (904) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of November, 1996.

ENDNOTES

1/ Effective October 1, 1996, the provisions in Florida's Administrative Procedure Act applicable to bid protests were revised and moved from Section 120.53(5) to Section 120.57(3), Florida Statutes.

2/ Section 255.25(3)(c), Florida Statutes (Supp. 1996), provides, in pertinent part, as follows:

Any person who files an action protesting a decision or intended decision pertaining to a competitive bid for space to be leased by the agency pursuant to s. 120.57(3)(b) shall post with the state agency at the time of filing the formal written protest a bond payable to the agency in an amount equal to 1 percent of the estimated total rental of the basic lease period, or \$5,000, whichever is less, which bond shall be conditioned upon the payment of all costs which may be adjudged against him or her in the administrative hearing in which the action is brought and in any subsequent appellate court proceeding. . . .

3/ Section 120.57(3)(b), Florida Statutes (Supp. 1996), mandates that a "formal written protest . . . state with particularity the facts and law upon which the protest is based."

4/ In his order, the undersigned advised that Respondent's Motions would be "treated as motions requesting the entry of a recommended order of dismissal inasmuch as the undersigned does not have final order authority in the instant case." In addition, he made the following comments:

Referring a bid protest that, on its face, is legally insufficient to the Division of Administrative Hearings for the entry of a recommended order of dismissal results in unnecessary delay. When an agency is presented with such a facially insufficient bid protest, it should, in keeping with the intent of the Legislature (expressed in Section 120.57(3), Florida Statutes [Supp. 1996]), that bid protests be resolved expeditiously, act swiftly to dispose of the protest and not seek a recommendation from the Division of Administrative Hearings before deciding what action to take. See *D.A.B. Contractors, Inc., v. Department of Transportation*, 656 So.2d 940, 942 (Fla. 1st DCA 1995).

5/ These attached documents included: an October 20, letter from Aubrey B. Hutchison, Jr., PE, to Petitioner's representative in this case; an October 21, 1996, letter from Petitioner's representative to the Department's counsel of record in this case; and an October 22, 1996, letter from Howard Craft, Petitioner's real estate broker, to the Department's counsel of record.

6/ In imposing this deadline, the undersigned noted that "[t]he requirement of Section 255.25(3)(c), Florida Statutes [Supp. 1996], that a bond be posted at the time of the filing of the formal protest . . . is not jurisdictional and therefore Respondent [the Department] is required to give a protestant like Petitioner 'notice and a reasonable opportunity to post the bond before denying the protest solely because of failure to post the bond.' *ABI Walton Insurance Company v. Department of Management Services*, 641 So.2d 967, 968-69 (Fla. 1st DCA 1994)."

7/ Section 120.569(2)(g), Florida Statutes (Supp. 1996), provides as follows:
When official recognition is requested, the parties shall be notified and given an opportunity to examine and contest the material.

8/ In the instant case, the hearing transcript was received by the undersigned on November 15, 1996.

9/ Pursuant to Chapter 96-159, Laws of Florida, the title of the undersigned and of all other Hearing Officers of the Division was changed to Administrative Law Judge, effective October 1, 1996.

10/ "An arbitrary decision is one not supported by facts or logic, or despotic." *Agrico Chemical Company v. Department of Environmental Regulation*, 365 So.2d 759, 763 (Fla. 1st DCA 1978). "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is [not] arbitrary." *Dravo Basic Materials Company, Inc., v. Department of Transportation*, 602 So.2d 632, 634 n.3 (Fla. 2d DCA 1992).

11/ "'As a general rule the comparative degree of proof by which a case must be established is the same before an administrative tribunal as in a judicial proceeding- that is, a preponderance of the evidence. It is not satisfied by proof creating an equipoise, but it does not require proof beyond a reasonable doubt.'" *Florida Department of Health and Rehabilitative Services v. Career Service Commission*, 289 So.2d 412, 415 (Fla. 4th DCA 1974); see also Section 120.57(1)(h), Fla. Stat. (Supp. 1996)("[f]indings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute"); Cf. *Board of Trustees of the Internal Improvement Trust Fund v. Levy*, 656 So.2d 1359, 1363 (Fla. 1st DCA 1995)("[t]he burden of proving abuse of agency discretion is upon the challenger of the rule, who must meet that burden with a preponderance of the evidence").

12/ If the Department had accepted Petitioner's proposal, notwithstanding the proposal's "net square footage" deficiency, it would have been unfair to any prospective lessors who did not submit proposals in response to the RFP, but who would have done so had they known that, contrary to what had been indicated in the RFP, the Department would accept a proposal which, like Petitioner's, offered less than 9,196 net square feet of space, as measured in accordance with the "Standard Method of Space Measurement" set forth in "Attachment A" to the RFP. Should the Department now be willing to lease space which, like Petitioner's Building, has a "net square footage" of less than 9,196 net square feet, it should issue a new RFP so indicating in order to afford other prospective lessors interested in leasing such space to the Department a fair opportunity to compete with Petitioner for the lease.

COPIES FURNISHED:

Gregory L. Jackson
Lonnie Jackson Revocable Trust
601 Andrews Avenue
Fort Lauderdale, Florida 33301

Howard Craft
108 Southeast 8th Avenue, Suite 116
Fort Lauderdale, Florida 33301

Daniel Te Young
Assistant General Counsel
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500

Harry K. Singletary, Jr., Secretary
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500

Louis A. Vargas, General Counsel
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500

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.