

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

RATTLER CONSTRUCTION	)	
CONTRACTORS, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 98-5623BID
	)	
DEPARMENT OF CORRECTIONS,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
A. D. MORGAN CORPORATION,	)	
	)	
Intervenor.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 21 and February 2, 1999, in Tallahassee, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: H. Richard Bisbee, Esquire  
Theresa M. Bender, Esquire  
Post Office Box 11068  
Tallahassee, Florida 32302-3068

For Respondent: Scott E. Clodfelter, Esquire  
Department of Corrections  
Obed Dorceus, Esquire  
2601 Blair Stone Road  
Tallahassee, Florida 32399-2500

For Intervenor: Mark K. Logan, Esquire  
403 East Park Avenue  
Tallahassee, Florida 32301

### STATEMENT OF THE ISSUE

The issue is whether the Department of Corrections' decision to select Intervenor as construction manager on Project No. VO-04-CM was clearly erroneous, contrary to competition, arbitrary, or capricious, as alleged by Petitioner.

### PRELIMINARY STATEMENT

This matter began on November 20, 1998, when Respondent, Department of Corrections, advised Petitioner, Rattler Construction Contractors, Inc., that it had selected Intervenor, A. D. Morgan Corporation, as the construction manager on Project No. VO-04-CM. That project involved the expansion and renovation of the Florida Correctional Institution in Lowell, Florida. On December 2, 1998, Petitioner filed a notice of its intention to protest the award. A Formal Written Protest was then filed by Petitioner on December 14, 1998.

The matter was referred by Respondent to the Division of Administrative Hearings on December 24, 1998, with a request that an Administrative Law Judge be assigned to conduct a formal hearing.

By Notice of Hearing dated December 29, 1998, a final hearing was scheduled on January 14, 1999, in Tallahassee, Florida. At Petitioner's request, the matter was continued to January 21, 1999, at the same location. A continued hearing was held on February 2, 1999. On January 13, 1999, Intervenor, A. D. Morgan Corporation, was granted leave to intervene. On

January 21, 1999, Petitioner's unopposed Motion for Leave to File Amended Formal Written Protest was granted.

At final hearing, Petitioner presented the testimony of James R. Ervin, an agency architect; Raymond L. Bryant, Sr., certification manager of the Minority Business Advocacy and Assistance Office; Edward H. Terry, Jr., an agency architect; Steven Watson, an agency architect supervisor; Frederick Carroll, III, a certified public accountant and accepted as an expert in accounting matters and financial statement preparation; Robert E. Selman, an agency architect supervisor; Robert E. Staney, deputy assistant secretary for administration; and Calvin J. Barber, Petitioner's president. Also, it offered Petitioner's Exhibits 1-18. All exhibits were received in evidence. Intervenor presented the testimony of Deette Preacher, a certified public accountant and accepted as an expert in public accounting; John Kalaf, Intervenor's vice-president of operations; and Rebecca Smith, Intervenor's president and owner. Also, it offered Intervenor's Exhibits 1-6. All exhibits were received in evidence. Finally, the undersigned granted Petitioner's Motion for Official Recognition of Chapter 38A-20, Florida Administrative Code, and certain "Standards for Accounting and Review Services," "Statements of Auditing," and "Generally Accepted Auditing Standards" issued by the American Institute of Certified Public Accountants. The accounting items, however, were never filed by Petitioner, as requested by the

undersigned at hearing, and thus they have not been considered.

The transcript of hearing (three volumes) was filed on February 9, 1999. Proposed findings of fact and conclusions of law were filed by Petitioner on February 19, 1999, and by Respondent and Intervenor on February 22, 1999. Those filings have been considered by the undersigned in the preparation of this Recommended Order.

#### FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

##### A. Background

1. In September 1998, Respondent, Department of Corrections (Department), issued a Request for Qualifications and Evaluations Procedures (RFQ) to select a construction manager for Project No. VO-04-CM, which involved an \$18 million expansion and renovation of the Florida Correctional Institution in Lowell, Florida. The RFQ was directed to qualified minority construction firms as a "minority set aside." The successful firm would serve as a general contractor for the job, guarantee the price, and assume responsibility for any cost overruns on the project.

2. All firms were to submit their qualifications with the Department by 4:00 p.m., October 20, 1998. After a pre-proposal meeting held on October 6, 1998, but prior to October 15, 1998, Addendum No. 1 to the RFQ was issued and clarified that all proposals must be filed by October 15, rather than October 20,

that each firm have a bonding capacity of \$6,000,000.00 for each of the three phases of the project, and that each firm must submit its bonding and insurance costs.

3. The RFQ required that each firm file a letter of interest detailing the firm's qualifications to meet the selection criteria; an experience questionnaire and contractor's financial statement; resumes of proposed staff and staff organizations; examples of project reporting manuals, schedules, past experience, and examples of similar projects completed by the firm; references from past clients; and a reproduction of the firm's current state contractor's license, corporation charter, and Minority Business Enterprise (MBE) certification.

4. Under the selection process established by the Department pursuant to Rule 60D-5.0082, Florida Administrative Code, a five-member selection committee, including four from the Division of Design and Construction, would "review all properly submitted proposals, and determine the three (3) firms with the highest score using the selection criteria established for the project." These criteria included experience, financial, schedule and cost control, office staff, site staff, information system, and location. The highest ranked firm would then be selected to negotiate a contract for the services.

5. On October 15, 1998, applications were filed by five construction firms: Petitioner, Rattler Construction Contractors, Inc. (Rattler or Petitioner); Intervenor, A. D. Morgan

Corporation (Intervenor); Linda Newman Construction Company, Inc. (Newman); Ajax Construction Company, Inc. (Ajax); and Freeman and Freeman Construction Company (Freeman). After an evaluation was conducted by the selection team, the applicants were assigned the following scores: Intervenor (85.6), Newman (75.2), Petitioner (66.2), and Freeman (20.8). Ajax was disqualified as being non-responsive on the ground it was not certified as a MBE. At a later point in the process, Freeman was disqualified for the same reason. Accordingly, as the highest ranked applicant, Intervenor was determined to be the most qualified firm, and the Department issued a letter on November 20, 1998, advising all contractors of its decision.

6. Claiming that its submission was the only "compliant and responsive bid received" by the Department, Petitioner filed its protest on December 2, 1998. In its Formal Written Protest filed on December 14, 1998, as later amended on January 19, 1999, and then narrowed by the parties' prehearing statement, Petitioner contended that Intervenor had failed to comply with two material requirements: that it file audited financial statements and a current MBE certification. It further alleged that the second ranked applicant, Newman, had also failed to submit audited financial statements. Finally, it claimed that one of the members on the selection team was biased against Rattler. Because of the foregoing irregularities, Petitioner asserts that the Department's actions were "clearly erroneous, arbitrary,

capricious, and illegal" in proposing to select Intervenor as its construction manager. As relief, Petitioner asks that Intervenor and Newman be disqualified as non-responsive, and because Rattler filed the "only complete and responsive bid," that the Department select Petitioner as its construction manager. Each of the alleged irregularities will be discussed below.

B. Did the Department Err in Awarding Intervenor the Contract?

a. Audited Financial Statements

8. The RFQ, as amended, required that each minority contractor file, no later than October 15, 1998, an application and a "Contractor's Financial Statement as referenced in Chapter 60D-05 [sic], Florida Administrative Code." More specific instructions as to this latter requirement were found on page 5 of 21 of the Request for Qualification and Experience Questionnaire, which accompanied the RFQ. That document contained general and specific instructions. There, each applicant was directed to file a Financial Statement, which was described as follows:

B. Financial Statement. This statement will be an audited report with comments, and not older than one (1) year. If the most current report has not yet been audited, the previous audited report with comment shall accompany the most recent financial statement.

The RFQ described the foregoing requirement as one of the "REQUIRED SUBMITTALS."

9. In response to this provision, an employee of Intervenor retyped its audited financial statements to conform with the

format contained in the RFQ. In doing so, rather than copying the entire set of statements, she inadvertently copied only three pages, including a cover sheet. The first page was entitled "The A.D. Morgan Corporation Financial Statements, December 31, 1997 and 1996," and it reflected that the statements were prepared by Valiente, Hernandez & Co., P.A. (Valiente), a certified public accounting (CPA) firm. Testimony at hearing established that Valiente had in fact prepared audited financial statements for Intervenor for those two years.

10. Attached to the cover sheet were Balance Sheets for the years ending December 31, 1996 and December 31, 1997. Absent, however, were the opinion letter by the CPA firm, notes to financial statements, income statement, and statement of cash flow. All of these items normally accompany audited financial statements.

11. Even though Intervenor had audited financial statements prepared by a CPA firm, and the three pages submitted with its proposal were drawn from those statements, it is undisputed that the incomplete statements submitted by Intervenor were not "audited financial statements" as that term is commonly understood by accounting professionals.

12. In the case of Newman, it submitted financial statements that had been reviewed, but not audited, by a CPA firm. In a review, there is no testing; no observation of inventory; no requirement for independent verification of cash



balances or investment balances; no requirement for an attorney's letter; and no requirement that the accountants review the corporate minutes and other matters. In short, reviewed financial statements are not audited financial statements as that term is defined by accounting professionals.

13. The Department did not view this requirement as being a material requirement, and thus it determined that Intervenor's and Newman's failure to file audited financial statements was a minor irregularity. This is because the Department measures the financial capability of a firm by looking collectively at its financial statements, bonding capacity, insurance costs, bonding costs, account receivables, and assets and liabilities. In other words, the Department wants sufficient information to verify that

a contractor has the financial ability to undertake and complete the job.

14. In making the above verification, the Department viewed a contractor's ability to secure a bond as one of the most important indicators of financial stability since bonding companies typically make a thorough analysis of a firm's financial capability before issuing a bond on a particular project. This was consistent with the instructions in paragraph B on page 6 of 21 of the RFQ, which stated that, in addition to the financial statement, the "financial capability" of a firm "should also include the bonding capacity of the firm." In the case of Intervenor, it was able to secure a bond capacity in excess of \$20 million for single projects and in excess of \$40 million for aggregate projects.

15. When viewing all of the financial indicators submitted by Intervenor, the selection team was satisfied that Intervenor clearly had the necessary resources, working capital, and financial stability to perform the project.

16. The Department has not strictly enforced the requirement that audited financial statements be filed with a proposal, and there is no record evidence that a vendor has ever been disqualified on this ground. Even so, the filing of audited financial statements is a "required submittal" by the RFQ's own terms, and the failure to do so renders Intervenor's and Newman's submissions as non-responsive.

b. MBE Certification

17. Intervenor has been a certified MBE since 1991. In its proposal, Intervenor submitted a copy of its MBE certification for the year ending September 24, 1998. To independently verify this representation, a member of the selection committee then contacted the Minority Business Advocacy and Assistance Office (MBAAO) of the Department of Labor and Employment Security, which issues certifications, to confirm that Intervenor was certified on a current basis. In response to that inquiry, the member received a list of all current MBE certified contractors. Intervenor was on that list.

18. Petitioner points out, however, that the certification submitted with Intervenor's proposal expired on September 24, 1998, or before the application was filed, and thus the Department waived a material requirement. Relevant to this contention are the following facts.

19. On September 11, 1998, or before its current certification had expired, Intervenor filed an affidavit for recertification with the MBAAO. Because of "computer glitches" and six office moves "in a very short time period," the MBAAO was unable to process all recertification applications before the date on which some certifications expired. However, it considered all businesses as being certified until a decision was

made on all pending recertification applications. In  
Intervenor's case, the MBAAO granted its application for  
recertification on November 6, 1998, and issued Intervenor a new

certification for the one-year period from September 24, 1998, to September 24, 1999.

20. Given the foregoing circumstances, it is found that Intervenor had a current MBE certification when it filed its application, and the Department did not waive a material requirement in accepting Intervenor's certification which reflected an expiration date of September 24, 1998.

c. Bias by a Selection Team Member

21. James R. Ervin, a Department architect, was a member of the selection team. Ervin had served as project administrator on an earlier Department project in Wakulla County on which George Register, III, and his father, George Register, Jr., were involved.

22. Because of two complaints filed against him by the younger Register, Ervin was taken off the Wakulla County project while the Department's Inspector-General conducted an investigation.

23. George Register, III, is listed on Petitioner's application as one of its consulting engineers. Ervin discovered this mid-way through the evaluation process, and he initially considered recusing himself from the team. After mulling over the matter, he decided that he could fairly evaluate Petitioner's proposal.

24. Contrary to Petitioner's assertion, there is no credible evidence that Ervin was biased against Petitioner during

the evaluation process, or that he gave higher scores to Intervenor and Newman because of Register's complaints. Indeed, his scores were comparable to those of the other four evaluators. Even if Ervin's scores were discarded, the scores of the other four evaluators would still result in the same order of ranking. Therefore, the evidence does not support a finding that Ervin's participation on the selection committee was improper, as alleged in the Amended Formal Written Protest.

25. The remaining allegation that certain members of the selection committee exhibited favoritism towards Intervenor and Newman, and bias against Petitioner, is without merit and has been rejected.

#### C. Defects in Petitioner's Proposal

26. Addendum No. 1 to the RFQ added Items 62 and 63, which required that each contractor provide its bonding and insurance costs. This "important information" was added to Addendum No. 1 at the specific request of the Department of Management Services (DMS), from whom many of the RFQ's provisions were drawn. As noted earlier, these items are two of the six items that the Department considers in determining the overall financial capability of a firm. In the Department's view, they are no less significant than the other items, including the financial statements.

27. Intervenor's proposal included these costs. Petitioner, however, did not provide such costs in its proposal.

In fact, Petitioner's representative was not aware of this requirement until after his proposal had been filed.

28. Like the audited financial statements, the Department considered the failure to file this information to be a minor irregularity, and it waived Rattler's and Newman's omission. Because the Department considers these items to be as equally important as audited financial statements, and because they were so significant that the DMS specifically requested that they be placed in the RFQ, the items are found to be material, and a failure to file such information renders Petitioner's and Newman's proposals as non-responsive.

#### CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Section 120.57(3), Florida Statutes (Supp. 1998).

30. In this proceeding, the burden is on the party protesting the award of the contract to establish a ground for invalidating the award. State Contracting and Engineering Corp. v. Dep't of Trans., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

31. Section 120.57(3), Florida Statutes (Supp. 1998), controls this proceeding. Paragraph (3)(f) provides in relevant part as follows:

(f) In a competitive-procurement protest, no submissions made after the bid or proposal opening shall be considered. Unless otherwise provided by statute, the burden of proof shall rest upon 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 . . . 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.

32. Because this case involves a request for qualifications under Section 287.055, Florida Statutes (Supp. 1998), thereby bringing Section 120.57(3), Florida Statutes, into play, the undersigned is first obliged to determine, in a de novo setting, whether the Department's action is "contrary to the agency's governing statutes, the agency's rules or policies, or the . . . proposal specifications." Within that factual framework, it must then be determined if the Department's action is "clearly erroneous, contrary to competition, arbitrary, or capricious." Therefore, the allegation by Petitioner that the Department's action was "improper" or "illegal" need not be considered since these grounds are relevant only when the agency has rejected all bids/proposals.

33. The more credible evidence established that a RFQ specification imposed a requirement that Intervenor and Newman file audited financial statements, that such a requirement was material in nature, and that it could not be waived. Similarly, another RFQ specification imposed the requirement that Petitioner file its bonding and insurance costs, which information was



material, and could not be waived. By waiving these requirements, which was contrary to the proposal's specifications, the Department's proposed action was clearly erroneous, and it was arbitrary.

34. In reaching these conclusions, the undersigned has considered the contention by the Department and Intervenor that the filing of financial statements was not a material requirement, especially under the unique circumstances presented here. As a practical matter, the lack of complete statements may not have hindered the Department in determining the financial capability of Intervenor. This is because Intervenor was an experienced contractor who had previously worked on a number of Department projects, and even with incomplete financial statements, its financial ability to undertake and complete the project was not in doubt. Intervenor's only fault was failing to copy and submit all of the pertinent pages. But the requirement is characterized in the RFQ as a "required submittal," a term the undersigned interprets to mean that the filing is mandatory. To hold otherwise would give the Department the discretion to accept partial or unaudited statements in some cases, but to reject others as being non-responsive. This type of discretion leaves bidders in doubt, will likely engender future disputes such as this one when the requirement is once again waived, and gives those bidders who need not file audited statements an advantage not enjoyed by others. Cf. Consultect, Inc. d/b/a Gen. American

Consultech, Inc. v. State, Dep't of Admin., DOAH Case No.

91-5950BID (Dep't of Admin., Nov. 25, 1992) (vendor's failure to file audited financial statements found to be a material variance from RFP).

35. The undersigned has also considered, and rejected, Petitioner's contention that the waiving of bonding and insurance costs was a minor irregularity. Because of their importance, these items were placed in the RFQ at the specific request of the DMS. They are two of six items that the Department considers in evaluating the financial capability of a firm, and it considers them to be no less significant than the others. A firm not filing those costs enjoys an advantage over other bidders. In sum, the evidence supports a conclusion that they are a material requirement, and they should not be waived.

36. Because the three highest ranked firms are all non-responsive, the Department's proposed award of the contract to Intervenor should be withdrawn, and the Department should again solicit requests for qualifications from interested minority firms for Project No. VO-04-CM.

#### RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department of Corrections enter a final order withdrawing its proposed action, rejecting all proposals as being non-responsive, and advising that it will solicit new

proposals for Project No. VO-04-CM.

DONE AND ENTERED this 4th day of March, 1999, in  
Tallahassee, Leon County, Florida.

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DONALD R. ALEXANDER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 4th day of March, 1999.

COPIES FURNISHED:

Michael W. Moore, Secretary  
Department of Corrections  
2601 Blair Stone Road  
Tallahassee, Florida 32399-2500

H. Richard Bisbee, Esquire  
Theresa M. Bender, Esquire  
Post Office Box 11068  
Tallahassee, Florida 32302-3068

Scott E. Clodfelter, Esquire  
Obed Dorceus, Esquire  
Department of Corrections  
2601 Blair Stone Road  
Tallahassee, Florida 32399-2500

Mark K. Logan, Esquire  
403 East Park Avenue  
Tallahassee, Florida 32301

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 within fifteen days. Any exceptions to this Recommended Order should be filed with the Department of Corrections.