

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

QUALTECH CLEANING, INC.,)
d/b/a ACTION CLEANING,)
)
Petitioner,)
)
vs.) Case No. 00-4420BID
)
FLORIDA STATE UNIVERSITY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was held pursuant to notice, on December 4, 2000, in Tallahassee, Florida, before Barbara J. Staros, assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Daniel W. Hartman, Esquire
Samual J. Ard, Esquire
Ard, Shirley & Hartman, P.A.
Post Office Box 1874
Tallahassee, Florida 32302-1874

For Respondent: Leslei G. Street, Esquire
Florida State University
424 Westcott Building
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STATEMENT OF THE ISSUE

Whether Florida State University's decision to award the contract in its Invitation to Bid, Bid No. K4111-8, to Professional Building Maintenance is contrary to the agency's

governing statutes, the agency's rules or policies, or the bid or proposal specifications.

PRELIMINARY STATEMENT

On September 28, 2000, the purchasing office of Florida State University posted its Notice of Intent to award a contract for carpet cleaning resulting from Bid No. K4111-8 ("the bid") to Professional Building Maintenance. Petitioner, Qualtech Cleaning, Inc., d/b/a/ Action Cleaning, timely filed a Formal Written Protest and Petition for Administrative Hearing. The case was forwarded to the Division of Administrative Hearings on or about October 27, 2000. The parties waived the time frame set forth in Section 120.57(3)(e), Florida Statutes, and a formal hearing was scheduled for December 4 and 5, 2000.

The parties filed a Prehearing Stipulation. At hearing, Petitioner presented the testimony of Barbara Peterson, Cecil Williams, Joyce Cordell, Walter Parramore and James Rush. Petitioner's Exhibits 5, 18, 19, 22, 24-27, 31, and 39 were admitted into evidence. Official recognition was taken of Chapter 6C-18 and portions of Chapter 6C-2, Florida Administrative Code. Respondent presented the testimony of Joyce Cordell and Walter Parramore. Joint Exhibits A, B, and C were admitted into evidence.

A transcript, consisting of two volumes, was filed on January 2, 2001. On January 12, 2001, the parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Stipulated Facts

1. Petitioner has standing as the second lowest bidder.
2. Petitioner's Notice of Protest and Formal Written Protest were timely and complete.
3. Petitioner was under contract to the University to provide carpet-cleaning services through June 30, 2000.

Findings of fact based on the evidence of record

4. Florida State University ("the University") issued an Invitation to Bid No. K4111-8 (ITB) for carpet cleaning services. Four carpet cleaning companies submitted bids including Petitioner and Professional Building Maintenance (PBM).
5. The Invitation to Bid included two pages entitled "General Conditions" and three pages entitled "Specifications for on site, contract carpet cleaning." The first section listed in the "specifications for on site, contract carpet cleaning" is entitled "Scope" which reads as follows:

Provide for carpet cleaning services to provide all labor, supplies, equipment & cleaning chemicals needed to provide on site, quality contract carpet cleaning

service within designated buildings on the campus of Florida State University.

Note: We anticipate expending \$100,000.00 per year during the term of this contract, however, this is only an estimate and no amount is guaranteed.

Period of the contract will begin on October 1, 2000 through June 30, 2001 with an option to extend the contract at the same rate annually for two additional years; July 1, 2001-June 30, 2002, July 2002-June 30, 2003. Bidders should allow for any price increases they anticipate during this period and include this in their pricing of this bid. The extension will be valid only upon written notice to and written acceptance from the vendor.

6. Another section in the "Specifications for on site, contract carpet cleaning" is entitled, "Contractor Qualifications and Experience" which reads as follows:

Contractor Qualifications and Experience

1. Bidder shall provide evidence of having a minimum of 2 years experience performing commercial carpet cleaning, including a listing of all commercial contractors held for the part two year period. In addition, bidder must provide verification of past experience cleaning carpet in high rise facilities (over 6 stories) using truckmount equipment.

Note: Award will be based on low bid meeting all specification & past performance evaluation. All contracts are subject to being checked for reference on past performance. Names, title, and phone numbers of individuals with direct involvement in supervision of existing contracts shall be supplied for reference checking. Approximately (5) references from the submitted list will be randomly selected to be checked for performance

evaluation. A past performance evaluation of 20% unsatisfactory shall be grounds for bid rejection.

2. Bidder shall provide evidence that all carpet technicians have received formal training in [sic] certification in carpet cleaning disciplines. Technicians/supervisors assigned to work at FSU must be able to provide proof of certification within 30 days after the award of the contract. A certified technician and or supervisor must be on site at all times while work is in progress. Technician certification by IICRC or through comparable franchise or independent training and testing organizations is required.

3. Bidder must have a minimum of two fully operational truckmounts in their equipment inventory to qualify for this bid.

4. Bidder shall provide a listing of all cleaning equipment, vehicles, truckmount, and other tools that are currently in the vendors inventory and available for use for this contract.

5. Bidder shall provide a listing of all cleaning chemicals that will be used in the performance of this contract along with technical data sheets and MSDS for each chemical.

6. Bidder shall insure that all employees are bonded and that no one under the age of 18 years old will be employed to work under the contract for FSU and no one other than their authorized employees are allowed on site during the performance of contract cleaning.

7. There is no dispute between the parties that these six paragraphs are mandatory requirements of the ITB and that bidders must respond to the requirements in all six

paragraphs. The parties do dispute whether PBM was responsive to all of these requirements.

8. Specifically, Petitioner contends that PBM was not responsive to certain bid requirements: the requirement that the bidder provide a minimum of 2 years' experience performing commercial carpet cleaning; the requirement that a bidder have experience cleaning carpet in high rise facilities (over 6 stories) using truckmount equipment; and the requirement that the bidder's employees be trained and certified, or provide evidence of the same within 30 days. Petitioner also contends that PBM failed to meet what it considers a bid requirement under the portion of the bid entitled, "cleaning specifications" which will be discussed below. Finally, Petitioner challenges the competitiveness of the bidding process.

Two-year minimum commercial Carpet Cleaning Experience

9. In response to the requirement of having 2 years' experience performing commercial carpet cleaning, PBM submitted a certification that stated, "This hereby certifies that Professional Building Maintenance has actively been in business in the state of Florida for over three years." The University accepted this certification on its face. In addition, PBM submitted a list of 12 references entitled, "2 year commercial contract references." Finally, certification

documents which PBM submitted to another bid requirement dated back to 1997, more than two years before the bid opening. PBM was not incorporated until January 1, 1999. However, incorporation was not a requirement of the ITB.

10. Based upon the above factors, the University determined that PBM was responsive to the two-year commercial carpet cleaning experience requirement. This determination was reasonable and is supported by competent, substantial evidence.

Experience in High Rise Facilities

11. In response to the requirement that a bidder must provide verification of past experience cleaning carpet in high rise facilities (over 6 stories) using truckmount equipment, PBM submitted a statement which read, "On 6/22/2000 Professional Building Maintenance successfully cleaned the Florida University Center 6th story using truck mount equipment." PBM's response does not state that it cleaned carpet over the sixth story of any building.

12. The University interprets the six-story requirement to mean that a bidder must show that it cleaned carpet, using truckmount equipment, in a building that is over six stories in height, but a bidder does not necessarily have to have cleaned any floor over the sixth story of that building. Ms. Cordell, Purchasing Coordinator of the University's Purchasing

Department, explained that the University found PBM's answer to be responsive because this response showed that PBM had cleaned carpet in a building that was over six stories in height. When asked if a bidder which had cleaned the second floor of the same high rise building would have met this specification, Ms. Cordell replied that it would.

13. The University's interpretation of the ITB requirement is unreasonable and ignores the plain meaning of the language in the ITB drafted by the University. The ITB clearly defines a high rise facility to be over six stories. The undersigned's reading of this requirement is that it contemplates that a responsive bidder must have cleaned carpet above the sixth story. Interpreting that provision to mean that a bidder could clean carpet on any floor of a building, so long as the building itself was over six stories, is contrary to any reasonable interpretation of that ITB requirement, and renders meaningless the inclusion of the definition of "high rise facility" contained in the ITB.

14. The University's determination that PBM was responsive to the ITB requirement that a bidder provide verification of past experience cleaning carpet in high rise facilities over six stories is not a reasonable one and is contrary to the bid specifications.

15. The carpet cleaning referenced above took place under circumstances that Petitioner argues are contrary to competition. The owner of PBM contacted Barbara Peterson, an Assistant Director of the Physical Plant at the University, about performing a demonstration of its truckmount equipment. This demonstration was done without charge to the University. The demonstration was done in close time proximity to an earlier bid-opening regarding carpet cleaning but more than two months before the ITB in the instant proceeding. The University has a practice of accepting free demonstrations of products and services from vendors.

16. Petitioner argues that PBM was given an opportunity not given to other bidders in that this free demonstration was what PBM relied upon in its response to this requirement of the ITB. Petitioner also asserts that this demonstration was done during the time period when it had a carpet-cleaning contract with the University.

17. There was no competent, substantial evidence presented to establish that any actions of the University regarding this carpet-cleaning demonstration were designed to manipulate the bidding process. Petitioner argues that this free demonstration violates the University's policy of employees not soliciting or accepting gratuities. Policy 4A-10.2, Purchasing Department Policies and Procedures. However,

this policy applies to the individual employee, not to the University. Moreover, whether or not the free demonstration by PBM violated the contract between Petitioner and the University goes beyond the scope of this proceeding.

Training and Certification Requirement

18. In response to the training and certification requirement, PBM submitted a document entitled, "Technician Certification" which stated:

This hereby states that Randal R. Martin is the acting certified carpet technician acknowledged by the IICRC. All other carpet technician employees have received formal training and are currently in the progress of receiving certification. Technicians without certification will not work for Florida State University until certification is completed.

19. Additionally, PBM included certain certification documents including a certification document from the Institute of Inspection, Cleaning, and Restoration C (IICRC) dated 1/19/00 entitled, "Certified Firm 2000" which stated that PBM is firm in good standing with the IICRC and that PBM has implemented an advanced training program and a course of study leading to the certification of all on-location operators actively engaged in providing services to the consumer. PBM also included similar "Certified Firm" documents for years 1997 and 1998.

20. PBM also included another document from the IICRC stating, "be it known that Randal R. Martin is a registrant in good standing with the Institute of Inspection, Cleaning and Restoration Certification, and has qualified by service and examination for certification" in the areas of carpet cleaning and color repair. This document has an expiration date of 02/99, and, thus, had expired at the time of the bid response. However, as quoted previously, the ITB gave a 30-day grace period following the award of the contract to provide proof of certification.

21. The University's determination that PBM met the bid requirement for training and certification was a reasonable one and is supported by competent, substantial evidence.

Cleaning Specifications

22. Another section of the ITB is entitled, "Cleaning Specifications" which reads as follows:

1. Work Schedule

Cleaning will be performed after 4:30 PM Monday through Friday and on weekends as needed to meet the needs of the University. (During breaks and holidays, day time cleaning may be required to meet the needs of the University.)

The vendor must have a representative contact the customer within one business day after receiving a work order to schedule work and or to arrange an on site walk through of the facility.

2. Equipment

- a. Truckmount hot water extractor with capability to provide 600' single wand operation at constant temperatures above 150 degrees F. And 14" Hg. Vacuum.
- b. Pile lifter
- c. Truckmount, rotary extractor
- d. Turbo dryers

3. Chemicals

- a. Pre-spray utilizing a blend of chemicals including surfactants, emulsifiers and solvents specifically formulated to clean a broad range of soils and stains.
- b. Spotters with capability to remove most water soluble and solvent stains.
- c. Soil/stain protectors-3M Scotchgard or equivalent.
- d. Antimicrobials-EPA registered Quat, Phenol

4. Preparation, Security

Prior to cleaning, non fixed and light furnishings shall be tabbed and blocked to prevent stains.

Bidder will make every effort to maintain security of the building and the property within the areas in which cleaning is being performed.

Cleaning Process, Method

Carpet cleaning shall be performed in accordance with IICRC Specifications S001 (November 1, 1991), Section 7.0-Steam Cleaning Method, with the exception that all pre-spray, spotters and other cleaning chemicals shall be removed from the carpet

during the soil extraction process (Step 7.9). In addition, a dry/extraction pass will be required following the injection, soil extraction pass to aid drying time of the carpet.

23. The parties disputed the characterization of the item in paragraph(3)(d) under "cleaning specifications" referencing antimicrobials-EPA registered Quat, Phenol. Petitioner asserts that this section was a bid specification requiring antimicrobials used by a bidder to be EPA-registered. The University asserts that the reference to antimicrobials is merely a guideline and not a mandatory bid specification.

24. Some of the items listed under "Cleaning Specifications" clearly do not require a response by a bidder (i.e., the sections entitled "work schedule" and "preparation, security"). However, other items under "Cleaning Specifications" appear to have a nexus to the six bid requirements discussed above listed under "Contractor Qualifications and Experience." In particular, paragraphs 2 and 5 under "Contractor Qualifications and Experience" require bidders to provide a listing of all cleaning equipment and chemicals that will be used in the performance of this contract along with technical data sheets and MSDS for each chemical. A reasonable reading of the ITB is that the equipment and chemicals specified under "Cleaning

Specifications" are to be included in the listing of equipment and chemicals provided in response to paragraphs 2 and 5 under "Contractor Qualifications and Experience."

25. However, most items listed under "Cleaning Specifications" do not contain the same mandatory directory language as found in the six paragraphs under "Contractor Qualifications and Experience" (e.g., "bidder shall provide," "bidder shall insure," "bidder must have," etc.) In particular, the language at issue regarding antimicrobials does not contain any directory words, either mandatory or permissive.

26. PBM did not list any antimicrobials in its response to the ITB.

27. Finally, the ITB requires the bidder to fill in a blank as to the quote cost (cleaning cost per square foot). Once a bidder was determined to meet the minimum bid requirements, cost per square foot was the sole factor used by the University to determine the low bidder.

28. Ms. Cordell reviewed PBM's bid to determine if it was responsive. PBM's bid was determined to be responsive to the ITB. PBM submitted a bid of \$.0749 per square foot. Petitioner submitted a bid of \$.08 per square foot. Because PBM's cost quote was the lowest, she looked to see if it met the minimum requirements of the bid. While she flipped

through Petitioner's response, she did not review it thoroughly because she determined that PBM was the lowest responsive bidder and that there was no need to go further.

29. At hearing, Ms. Cordell testified that Petitioner's response to the ITB met the bid specification requirements regarding cleaning experience of high rise buildings, two years' commercial cleaning experience, required certification and training, and the listing of chemicals. Additionally, although it was Ms. Cordell's position that the listing of chemicals under "Cleaning Specifications" was merely a guideline and not a bid specification, she acknowledged that Petitioner did provide that information in its response to the ITB.¹

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case pursuant to Sections 120.569, 120.57(1), and 120.57(3), Florida Statutes.

31. Petitioner has challenged the University's proposed agency action of awarding the contract for carpet-cleaning services to PBM.

32. No statutory provision relieves Petitioner of the burden of proving its challenge to the University's proposed award. Therefore, the burden of proof resides with

Petitioner. See Section 120.57(3)(f), Florida Statutes. In accordance with that provision, a de novo proceeding has been conducted to examine the University's proposed action in an attempt to determine whether that action is "contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications."

33. Section 120.57(3)(f), Florida Statutes, establishes the standard of proof in this proceeding to be "whether the agency action was clearly erroneous, contrary to competition, arbitrary or capricious."

34. The de novo hearing in this case was for the purpose of evaluating the action taken by the University. State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998).

35. The underlying findings of fact in this case are based on a preponderance of the evidence. Section 120.57(1)(j), Florida Statutes.

36. Chapter 6C-18, Florida Administrative Code, sets forth rules pertaining to the Administration of the purchasing program for the State University System. Rule 6C-18.040, Florida Administrative Code, delegates authority to each university president to establish a system of coordinated, uniform procurement policies, procedures, and practices to be used in acquiring commodities and contractual services.

37. Rule 6C-18.035(21), Florida Administrative Code, defines "Responsive and Qualified Bidder or Offeror" as "A contractor/vendor who has submitted a bid or proposal that conforms in all material respects to a competitive solicitation."

38. The University adopted Rule 6C2-2.015, Florida Administrative Code, to implement the University's delegated authority. Rule 6C2-2.015(3), Florida Administrative Code, provides definitions in the context of the University's purchasing and procurement:

C2-2.015 Purchasing and Procurement

(3)(k) Shall. Denotes the imperative.

(1) Any description of the physical, performance or functional characteristics of a commodity or contractual service. It may include plans, drawings, samples or a description of any requirement for inspection, testing or preparing a commodity or contractual service for delivery.

* * *

(6)(f) . . . A minor irregularity is a variation from the competitive solicitation terms and conditions, which does not affect the price offered, or give the responder an advantage or benefit not enjoyed by other responders or does not adversely impact the business or educational interests of the University. . . .

39. There is no dispute that the requirements enumerated in the six paragraphs of the section entitled, "Contractor

Qualifications and Experience" are bid specifications. The plain and clear meaning of the requirement that a bidder verify experience of having past experience cleaning carpet in high rise facilities, over six stories, is that a bidder must verify it cleaned above the sixth floor of a high rise facility. Courts favor an interpretation of bid contract provisions using the plain meaning of the words. Tropabest Foods, Inc. v. State, Department of General Services, 493 So. 2d 50 (Fla. 1st DCA 1986).

40. The University's interpretation that the six-story provision means that a bidder only need verify it cleaned any floor of a high rise building is arbitrary and capricious. "A capricious action is one taken without thought or reason or irrationality. An arbitrary decision is one not supported by facts or logic." Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, (Fla. 1st DCA 1978).

41. "Contrary to competition" is best understood by its plain and obvious meaning, i.e., against or in opposition to competition. "The purpose of the competitive bidding process is to secure fair competition on equal terms to all bidders by affording an opportunity for an exact comparison of bids." Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977) (emphasis supplied).

42. While PBM demonstrated that it had truck mount equipment that would enable it to clean up to and including the sixth floor of a building, it did not demonstrate that it had experience, or equipment, that would clean high rise buildings over six stories. This resulted in a competitive advantage to PBM over the other bidders in that it altered the plain meaning of the ITB requirements after the opening of the bids and may well also be adverse to the interests of the University. Indeed, if bidders had been aware of the University's interpretation that a company need only verify it had cleaned any floor of a high rise building, more companies may have responded to the ITB.

43. A variance is material only when it gives the bidder a substantial advantage over other bidders and restricts or stifles competition. See Tropabest Foods, Inc. v, State of Florida, supra. Whether an irregularity in a bid is material or immaterial turns on "whether the variation affects the amount of the bid by giving the bidder an unfair advantage or benefit not enjoyed by the other bidders." Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

44. The ITB required bidders to provide verification of past experience cleaning carpet in high rise facilities over six stories using truckmount equipment. The University's

determination that PBM was responsive to this bid requirement is arbitrary, capricious, and contrary to competition by ignoring PBM's material non-compliance with a bid specification.

45. The ITB required bidders to provide a listing of all cleaning chemicals that will be used in the performance of the contract. The ITB later enumerated those chemicals, including antimicrobials. However, in enumerating those chemicals, the ITB did not use mandatory language as was used in requiring that chemicals be listed. PBM did not include antimicrobials in its response to the ITB.

46. Taking into consideration the lack of mandatory language in the section of the ITB regarding the types of chemicals to be included and applying the above standard, PBM's failure to list antimicrobials among those chemicals listed in their bid is found to be an immaterial deviation from the requirements of the ITB.

47. Petitioner has met its burden of proving by a preponderance of the evidence that the University's proposed action is contrary to the Agency's bid specifications and was arbitrary, capricious, and contrary to competition.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the University enter a final order finding that the proposed award of Bid No. K4111-8 to PBM be rejected as arbitrary and contrary to the bid specifications, and award the contract in a manner wholly consistent with the above Findings of Fact and Conclusions of Law.

DONE AND ENTERED this 1st day of February, 2001, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2001.

ENDNOTE

1/ The University belatedly raised the issue of whether Petitioner met a requirement in the ITB entitled, "Contractors Insurance" which was located at the end of the ITB, following the cost quote. The University did not disqualify Petitioner's bid because of this and, thus, Petitioner was not on notice that it needed to defend this allegation. Moreover, the language in the ITB stated that the contractor could not commence work until it had obtained certain insurance and was required to submit proof of such insurance five days prior to the purchase order. Similar to the ITB requirement regarding certification and training, such information was only required at a later date than bid submission. Additionally, the University's argument that Petitioner did not meet the insurance requirement of the ITB is inconsistent with its own

position that only the six items in the section entitled "Contractor Qualifications and Experience."

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.