

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| METCALF & EDDY, INC., |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | Case No. 00-4853BID |
| |) | |
| DEPARTMENT OF TRANSPORTATION, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case by video teleconference on January 24, 2001, with the parties appearing from Fort Lauderdale, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

| | |
|-----------------|---|
| For Petitioner: | Jose Garcia-Pedrosa, Esquire Ruden McClosky Smith Schuster & Russell, P.A. 701 Brickell Avenue, Suite 1900 Miami, Florida 33131 |
| For Respondent: | Brian A. Crumbaker, Esquire Florida Department of Transportation Haydon Burns Building 605 Suwannee Street, Mail Station 58 Tallahassee, Florida 32399-0458 |

STATEMENT OF THE ISSUES

Whether the Respondent's intended action to award the bid to C.G.R. Construction Company, Inc. (CGR), and Cross

Environmental Services, Inc. (Cross) was clearly erroneous, arbitrary, capricious, or contrary to competition as alleged by the Petitioner, Metcalf & Eddy, Inc. (Metcalf).

PRELIMINARY STATEMENT

The Respondent, the Florida Department of Transportation (Department) released an Invitation to Bid (ITB) in connection with District-Wide Demolition Contract(s) of Indefinite Quantity for the Department's District IV. The ITB (identified as ITB-DOT-00-01-4009) solicited responses from contractors interested in performing the work and recognized that two successful bidders would be chosen by the agency. The Department received three responses to the ITB. The Petitioner's response was not selected by the Department.

The Petitioner timely filed a Notice of Protest and Protest Bond with the Department. Its Formal Protest was also timely filed. The successful bidders did not participate in the protest. On December 5, 2000, the Department referred the matter to the Division of Administrative Hearings for formal proceedings. The parties specifically agreed to waive the statutory period set forth in Section 120.57(3)(e), Florida Statutes.

The case was scheduled for final hearing on January 24, 2001. At the hearing, the Petitioner presented the testimony of Mark Blanchard, a Vice-President of Operations for Metcalf in

Florida. The Respondent presented testimony from Susan Day, the Property Management Administrator for the Department's District IV. The parties submitted seven joint exhibits numbered 1-3 and 5-8 that were admitted into evidence. Such exhibits are fully identified in the record.

The transcript of the proceeding was filed with the Division of Administrative Hearings on February 12, 2001. Thereafter the parties timely submitted proposed Recommended Orders that have been considered in the preparation of this order.

FINDINGS OF FACT

1. The Department issued ITB-DOT-00-01-4009 for District-Wide Demolition Contract(s) of Indefinite Quantity for its District IV.

2. The ITB recognized that the Department intended to select two bids from those submitted. The ITB further contemplated that, based upon the best financial interest of the Department, the Respondent would enter into an indefinite quantity contract with each successful bidder.

3. Typically, the Department determines that work encompassed by the ITB is necessary. It then designates a company to do that job based upon three considerations: the total fee to be charged for the assignment (using the bids submitted and giving greater weight to the company with the

lower fee); the time frame within which the bidder can perform the work; and the quality of past work of the bidder.

4. The Respondent disclosed the foregoing information to all companies submitting bids for this ITB. Three companies timely submitted responses to the ITB: CGR, Cross, and the Petitioner, Metcalf.

5. The bids were opened on September 28, 2000. The Department discovered errors on the totals submitted by CGR and Cross. Without correcting or amending any line item, the Department recalculated the totals for those two companies.

6. After the recalculations, the bids were ranked lowest to highest as: Cross (\$2,315,775.00); CGR (\$3,500,167.50); and Metcalf (\$8,511,774.50). The mathematical correction to CGR's bid increased its total but did not make its bid higher than Metcalf's. Metcalf remained \$5,000,000 more than the closest bidder.

7. All bidders provided a bid bond in order to ensure that the bidder would meet all requirements of the ITB and execute a contract as specified by the ITB.

8. The ITB provided that each bidder would submit proof of appropriate Workers' Compensation (WC) insurance in order for the bid to be considered. The ITB further specified that the bidder must submit the certificate of WC coverage with its response to the ITB or have one on file with the Department in

order to be considered. The language requiring WC with the bid submission was subsequently removed from the Department's form ITB.

9. Nevertheless, in the instant ITB package, the bidders were required to complete a form that was captioned "Workman's Compensation Insurance Certification." The form required a certification that the bidder had WC coverage and that the current insurance certificate had been previously submitted to the Department or was attached to the form.

10. CGR submitted the form with the certification checked off that indicated it had previously submitted its WC coverage to the Department.

11. Following the bid opening for this ITB, the Department began its review to verify all documentation was included and signed by the bidders. The Department verified the insurance companies referenced by the bids to ensure that they were authorized to do business in Florida. The Department attempted to locate CGR's current WC insurance certificate.

12. Due to the internal filing systems used by the Department, it could not definitely verify that CGR's current WC certificate was or was not on file with the Respondent.

13. Because the documentation was not readily available to the Department, the Respondent contacted CGR and requested a copy of that company's WC certificate. A copy of a certificate

of liability insurance binder that certified CGR possessed WC insurance effective October 2, 2000, was transmitted by facsimile to the Department. The transmission of this information occurred after September 28, 2000, but before the bid results were posted.

14. After receipt of CGR's WC information, the Department completed its review of the bid responses and the bid tabulation was posted on October 6, 2000. The posting announced the successful bidders for the ITB as Cross and CGR.

15. Metcalf timely gave notice of its intent to challenge the bid award and timely filed its formal protest in this matter.

16. Metcalf maintains that CGR failed to meet the terms of the ITB by not having on file with the Department a current WC certificate on the date the bids for this ITB were submitted. Further, Metcalf maintains that it is contrary to law to allow CGR to supplement its bid with the required information.

17. The ITB provided the following language:

The Department reserves the right to reject any or all bids and to waive minor technical flaws or deficiencies.

18. Whether or not CGR had filed a copy of its current WC coverage with the Department on or before September 28, 2000, is unknown. CGR certified in its response it had. The Department was unable to locate the WC certificate. It is undisputed that

prior to October 6, 2000, the date of posting, the bidder had submitted a current WC certificate.

19. It is further established by the record that CGR is able to obtain WC coverage. Based upon old contract files maintained by the Department (in which CGR had participated and which the Department was able to locate), it is certain CGR had appropriate WC coverage.

20. CGR did not obtain a competitive advantage by being allowed to fax the current WC certificate prior to the bid posting. All bidders were required to provide WC coverage for the term of the contract. Therefore, all bidders would incur the same expense in performance of this contract. Metcalf did not bear an economic hardship because the Department allowed CGR to fax its current WC certificate prior to posting. The cost of WC coverage would not support the \$5,000,000 difference between the two bidders.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings.

22. Section 120.57(3)(f), Florida Statutes, provides:

(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.

23. In this case the Petitioner argues that the submission of the WC certificate after the bid opening was an impermissible amendment or supplement to CGR's bid proposal.

24. The burden of proof rests with the Petitioner to establish by a preponderance of the evidence that the proposed agency award to CGR is clearly erroneous, contrary to competition, arbitrary, or capricious. It has failed to meet that burden.

25. In this case the bidder represented that its current WC coverage was on file with the agency. The Department was unable to locate that information. The Petitioner may have proved the Department has poor filing systems but it has not established that CGR did not provide a certificate to the

Department. In fact, in past dealings with the Department CGR has provided appropriate WC certificates.

26. Moreover, CGR is insurable for WC. Thus the chief requirement of the Department is met. CGR provided a current certificate prior to the posting of the bids.

27. Based upon the foregoing, it cannot be concluded that the Department acted erroneously or capriciously when it allowed the faxed certificate. The Department is entitled to verify the requirements of the ITB and to waive minor deficiencies so long as one bidder does not receive a competitive advantage. In this case, it is concluded that CGR did not obtain a competitive advantage as all bidders were required to provide the WC coverage. The prices submitted by the bidders contemplated the same performance criteria. No bidder was adversely impacted by the Department's actions in this cause.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Transportation enter a Final Order dismissing the Petitioner's Formal Protest.

DONE AND ENTERED this 5th day of April, 2001, in
Tallahassee, Leon County, Florida.

J. D. Parrish
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of April, 2001.

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.