

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PHOENIX MOWING AND )  
LANDSCAPING, INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 01-0371BID  
 )  
DEPARTMENT OF TRANSPORTATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case in Tallahassee, Florida on March 16, 2001, before the Division of Administrative Hearings by its duly-designated Administrative Law Judge, Stephen F. Dean.

APPEARANCES

For Petitioner: Julius F. Parker, III, Esquire  
Pennington, Moore, Wilkinson,  
Bell & Dunbar, P.A.  
215 South Monroe Street, Suite 200  
Tallahassee, Florida 32301

For Respondent: Brian A. Crumbaker, Esquire  
Department of Transportation  
Haydon Burns Building  
605 Suwannee Street  
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STATEMENT OF THE ISSUES

The issues in this case are whether the Department of Transportation ("Department") erred by considering Willeby

Construction, Inc. ("Willeby") a qualified bidder; whether the requirement to submit a bid bond or certified funds check or draft (hereafter "security on the bid") with the bid was a material requirement; whether the Department erred in treating Willeby's failure to include security on the bid with its bid proposal as a minor, and, thereby, an irregularity which could be waived; and whether said decision of the Department was contrary to the terms of the bid, contrary to law, or arbitrary and capricious.

#### PRELIMINARY STATEMENT

Phoenix Lawn and Landscape Service, Inc. ("Phoenix") petitions for a formal administrative proceeding pursuant to Section 120.57(3) Florida Statutes (2000), protesting the Department's rejection of its bid and its intent to award Financial Project No. 40509417201/Contract No. E3A78 for the mowing and litter removal of roadsides in Gadsden and Leon Counties to another bidder. Phoenix alleges that, contrary to the Department's determination, the winning bidder was unqualified and did not present a valid bid because it did not submit a bid bond or certified funds in the bid package. Further, Phoenix alleges that the Department improperly permitted the winning bidder to cure its defective bid after all bids had been opened, thereby giving the winning bidder an unfair advantage over all other bidders, and that this action by

the Department was clearly erroneous, contrary to competition, arbitrary or capricious pursuant to Section 120.57(3)(f), Florida Statutes (2000).

The Department forwarded this case to the Division of Administrative Hearings which noticed the case for hearing on March 16, 2001. The case was heard as noticed.

The Petitioner called two witnesses: (1) Kelly Herman Pullam, owner and president of Phoenix Lawn & Landscaping Service, Inc., and (2) Richard Norris, contracts administrator, Florida Department of Transportation. The Petitioner placed five exhibits in evidence.

The Respondent called four witnesses: (1) Wilson Carraway, vice-chairman, Farmers & Merchants Bank, in Thomasville Georgia; (2) Ben "Billy" Willeby, owner, Willeby Construction; (3) Richard Norris; and (4) Patty Vickers, assistant contracts engineer, Florida Department of Transportation. Respondent placed five exhibits in evidence.

Both parties submitted proposed findings which were read and considered.

#### FINDINGS OF FACT

1. On November 14, 2000, the Department issued a bid solicitation notice for Financial Project No. 40509417201/Contract No. E3A78, a contract for routine mowing of grassed and vegetated roadside areas and litter removal from

within the Department's highway right-of-way in Gadsden and Leon Counties.

2. The invitation to bid stated:

In a letter dated November 17, 2000 from Richard Norris of the Department District Contracts Office to all prospective bidders, the Department reiterated the bid bond requirement stating "[i]f your bid is over \$150,000, a Bid Bond of 5 percent of the bid amount is required and must be attached to your bid proposal. Failure to submit this with your bid will result in your bid being rejected." (Emphasis is in original.)

3. The invitation to bid further stated:

BID OR PROPOSAL BOND (If bid is over \$150,000):

1. Must be completely executed if bid is over \$150,000. This 5 percent bid bond is required and must be included in your bid package. If bid is less than \$150,000 no bid bond shall be necessary, however, the successful bidder shall be required to obtain a performance bond upon execution of the contract.

4. The purpose of the requirement for security on the bid is to compensate the Department for damages in the event the low bidder fails to enter into the contract.

5. The Department received bid proposals from six firms in response to its bid solicitation by the due date of December 7, 2000.

6. The lowest bidder for Contract No. E3A78 was Willeby. Willeby submitted a business check drawn on Willeby's business

account no. 02-140168-01 with Farmers & Merchants Bank. This was an unsecured, personal check.

7. At the time the bids were opened, Willeby's Account No. 02-140168-01 contained insufficient funds to cover the check Willeby submitted as its bid bond in the amount of \$11,996.52 for Contract No. E3A78.

8. Willeby failed to submit the required security on the bid in the form of a cashier's check, bank money order, bank draft of any national or state bank, or surety bond, payable to the State of Florida, Department of Transportation as required by the solicitation.

9. The Petitioner, Phoenix, was the second lowest bidder. Phoenix submitted a bid bond equal to 5 percent of its total bid with its bid package. Phoenix fully complied with all the requirements of the invitation to bid.

10. Bids for Contract No. E3A78 were opened on Thursday December 7, 2000. At that time, the Department's personnel discovered that Willeby had failed to submit security on bid as required by the terms of the bid solicitation.

11. On December 15, 2000, eight days after the Department discovered that Willeby's bid submittal was deficient, Starsky Harrell, the contract specialist with the District III office of the Department, telephoned W.J. Willeby, the president of Willeby Construction. Harrell informed Mr. Willeby that

Willeby's bid was non-conforming, and gave Willeby the opportunity to cure its non-responsive bid by submitting a check for certified funds or a bid bond as required by the bid solicitation.

12. Willeby, at this point, had the opportunity to cure the defect or refuse to cure the defect, thereby, negating his bid. This gave Willeby an advantage not enjoyed by the other bidders. Willeby chose to cure its non-responsive bid, and submitted a certified check as its security on the bid. Willeby, thereafter, entered into the contract with the Department on Monday, December 18, 2000, eleven days after the bids were opened.

13. The Department posted its intent to award Contract No. E3A78 on December 21, 2000, indicating its intent to award the contract to Willeby Construction.

14. Phoenix timely filed this formal protest in opposition to the award of Contract No. E3A78 as contrary to Section 120.57(3)(f), Florida Statutes (2000).

15. Regarding the requirements for security on the bid required in the solicitation for the bid and accompanying materials, Richard Norris, the contracts administrator, made the decision to emphasize the language by having it in bold-face type and underlined. His purpose for underlining and placing in

bold-face type this language was to "put some accent on it, to make it stand out."

16. A basic tenet of competitive procurement is to protect the integrity of the bidding process and ensure open and fair competition.

17. A responsive bid is one which meets all the requirements of the proposal documents.

18. Mr. Willeby has entered bids on Department contracts seventeen times in the past. Willeby is an experienced participant in the bid process.

19. A bidder who has the option of taking a contract or not taking a contract after the bidder knows what the other bids are on a project has a competitive advantage over other bidders. If the bidder has bid too close to the profit margin, the bidder can refuse to cure the bid defect and avoid performance on the unprofitable contract.

20. It is not only less expensive for a person to submit a personal check for security on a bid, but a stop payment order can be issued on a personal check.

21. The bid bond posted by the Petitioner cost \$800.00. This amount is not refundable. However, the proposal provides alternatives to a bid bond to establish security on the bid; therefore, paying the cost of the bond is not a competitive disadvantage.

22. It is noted that a personal check is not among the alternatives, and the bid proposal's provisions for bid security specifically provide that checks or drafts for less than 5 percent of the bid amount will invalidate the bid. The only checks or drafts permitted under the terms of the bid proposal are those checks secured by the banking institution's funds and not subject to stop payment orders of the person in whose behalf the check is issued.

23. It is consistent with the stated terms of invalidation, that, in addition to an insufficient amount, that an instrument not meeting the stated terms of the provision would also invalidate the bid. If being a dollar short on the secured amount is disqualifying, being short the entire amount in secured funds would be similarly disqualifying.

24. Evidence was received regarding whether Willeby was a qualified bidder. This information related to the nature and amount of the equipment which Willeby had, and its financial ability to obtain additional equipment. Although Willeby did not have some of the equipment necessary to handle this job and its other contract obligations, he had ordered this equipment and his bank indicated that it would loan him the money. It was not developed whether the bank's willingness was dependent upon the pendency of the challenged contract award, and it is concluded that Willeby is a qualified bidder.



CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this case, pursuant to Section 120.57, Florida Statutes (2000).

26. Subsection 120.57(3), Florida Statutes (2000), governs the dispute at issue in the case. Subparagraph 120.57(3)(f), Florida Statutes, provides the standards for determining a bid dispute. It provides as follows:

(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 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.

27. The Petitioner has the burden of proof.

28. The Agency's proposal provides as follows:

### Bid Bond Requirements

A proposal Guaranty of not less than five percent of the total actual bid in the form of either a certified check, cashier's check, trust company treasurer's check, bank draft of any national or state bank, or a Surety Bid Bond made payable to the Florida Department of transportation must accompany each bid in excess of \$150,000. A check or draft in an amount less than five percent of the actual bid will invalidate the bid. Bid bonds shall conform to DOT Form 375-020-09 furnished with the proposal forms.

29. The provisions of the proposal are quite specific. By the proposal's own terms the failure to provide security for the bid by the submittal with the bid package of a bid bond or check for 5 percent of the bid amount invalidates the bid.

30. In context, "check" refers to a cashier's check, certified check, trust company treasurer's check, or bank draft of any national or state bank. The tender of a personal check is not a stated option. Additionally regarding this bid's security provision, because non-compliance invalidates the bid, it is a material provision.

31. As stated in the Findings, above, the failure to present a check of the type stated was as much a failure to present sufficient security, in fact more so, as the failure to be a dollar under the 5 percent limit. In the latter case, the security was only shy one dollar. In the case of the personal check, the security was shy the entire 5 percent.

32. It is well settled law in Florida that a cashier's check is the same as cash. See Warren Finance, Inc. v. Barnett Bank, 552 So. 2d 194 (Fla. S. Ct. 1989). A stop-payment order may be issued on a personal check, and it is much less secure. Id. In fact, substitution of a cashier's check for a personal check has been determined to be consideration in a contract case. See Langel v. Hastings, 537 So. 2d 1113 (Fla. 4th DCA 1989). Where the terms of the contract or agreement specify payment by cashier's check or certified check, tender of a personal check maybe rejected. See Summa Investing Corp. v. Resolution Trust Corp., 586 So. 2d 1278 (Fla. 3d DCA 1991) and Hudgins v. Fla. Fed. Sav. and Loan Ass'n, 339 So. 2d 990, 991 (Fla. 5th DCA 1981).

33. Therefore, under the terms of the proposal, the Willeby bid should have been invalidated.

34. Further, as stated in the Findings, above, there is a notable advantage to a bidder who is permitted to "cure" a material defect. The bidder gets to opt to cure and perform, or not cure without penalty because technically the bid was never conforming and the bidder's security on the bid was never in jeopardy. The bidder gets a double benefit at no risk.

35. Because the Department permitted Willeby to cure the material defect, the Department's action was clearly erroneous, contrary to competition (it gave unfair advantage to Willeby),

and was arbitrary and capricious because it violated the stated standards of the bid proposal.

36. Where the Department has elected not to reject all bids, but instead has chosen to award the contract to one bidder to the detriment of the Petitioner, the role of a Hearing Officer (now Administrative Law Judge) is to sit on behalf of, and in the place of, the agency head and should examine the bid evaluation process de novo. See Capeletti Bros. v. Department of General Services, 423 So. 2d 1359 (Fla. 1st DCA 1983). This standard differs from the standard of review in place where an agency elects to reject all bids, as was the case in Dept. of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988), where the court stated that hearing officers are to inquire if the purpose of competitive bidding has been subverted and to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.

37. Although the Department has broad discretion to waive minor or technical irregularities encountered in the course of evaluating competitive bids for public procurement of services and materials, see Liberty County v. Baxter's Asphalt, 421 So. 2d 505, 507 (Fla. 1982), the failure of a bidder to submit enforceable security on a bid is not a minor or technical irregularity that the Department may waive. The Department's actions were contrary to the agency's governing statutes, the

agency's rules or policies and the bid or proposal specifications.

38. The standard in Florida to determine what is a material or substantial irregularity in a bid proposal on the one hand, or a minor or technical irregularity on the other, was articulated in Robinson Electrical Co, Inc. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982). The Robinson test asks: (1) whether the effect of a waiver would be to deprive the entity requesting bids of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements; and (2) whether the waiver is of the nature that, if granted, would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition. Id. A variance is material if it gives the bidder a substantial competitive advantage over the other bidders, and thereby restricts or stifles competition. See Id.

39. Although the Florida courts have held that a certified check submitted instead of a bid bond does not constitute a material variance, see Robinson Electrical, 417 So. 2d at 1034, the Florida courts also recognize a significant difference between a certified check and a personal check. Because a stop payment order may be issued on a personal check, it is not the

same as cash, which the Florida courts recognize a certified check to be.

40. The question of whether a public agency may waive strict compliance with bid specifications that require a bid bond or certified funds as a bid guaranty, and accept an uncertified business check or personal check is one which has not been decided by any Florida court.

41. Decisions from appellate courts in other states support the conclusion that failure to submit a binding bid guaranty is not a minor irregularity, but a material, non-waivable defect. In Gaeta v. Ridley Sch. Dist., 757 A.2d 1011 (Pa. Comm. Ct. 2000), the bid specification stated that bid bonds must come from a surety with an "A-" rating or better. The low bidder, IBE Construction, submitted a bid from a "B" rated surety. After the bids were opened, IBE was told by the school district of the deficiency in its bid, and was allowed to submit a new bond from an "A" rated company which was then accepted by the school board. The Commonwealth Court held that: (1) the trial court erred in determining that IBE's bid proposal was responsive and (2) the trial court erred by holding that the school board was allowed to enable IBE to cure its defective bid after bids were opened. See Id. at 1014. In so holding, the court stated that where a competitive advantage is gained by a non-responsive bidder, the defect is material. The competitive

advantage gained there, the court noted, was that a bid bond was easier to obtain from a "B" rated surety than an "A" rated surety and some bidder may have been discouraged from bidding at all because it could not obtain the required grade of bid bond. The court concluded by stating that "[t]he preservation of the integrity of the competitive bidding process far outweighs the potential cost differential between the lowest bid and the lowest responsive bid." Id. at 1016.

42. In Bodine Electric of Champaign v. City of Champaign, 711 N.E.2d 471 (III. App. 4th 1999), the 4th District Court of Appeal of Illinois considered the question of whether submission of a bid bond covering 5 percent of the base bid was a material variance where a 10 percent bid bond was required by the bid specification. The Petitioner, Bodine Electric, originally submitted the 5 percent bid bond on a bid that was \$78,000 less than the next lowest bidder. Five days after the bids were opened, Bodine was allowed to correct the problem and submitted a 10 percent bond to comply with the bid specification.

43. In Bodine, the bid review authority that received the corrected bid bond expressed three concerns about accepting the amended bond after the opening of bids: (1) future bidders would not have any reason to submit the required 10 percent bid bond if lower amounts were accepted; (2) contractors would take more risks with their bids by submitting smaller bid bonds or no

bond at all, if amendment after opening of bids were allowed; and (3) future bid bonds and requirements would be suspect in that any amount could be submitted and accepting lower amounts might undermine the city's ability to require a 10 percent bid bond. See Id. at 473.

44. As noted by the court in Bodine, the test in Illinois as to the materiality of a variance is virtually identical to the standard in Florida, that is "whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders." See Id. at 475, citing Leo Michuda & Son Co. v. Metro. Sanitary Dist. of Greater Chicago, 422 N.E.2d 1078 (III. App. 3d 1981). Also in Illinois, as in Florida, a bid that contains a material variance is an unresponsive bid and may not be corrected after bids have been opened. See Id. The court ultimately reasoned with respect to the variance that Bodine did receive a substantial advantage because it stood to lose significantly less money if it walked away from the deal compared with other bidders and "[j]ust because Bodine did not actually realize these advantages by breaching its offer does not mean that Bodine could not exercise these advantages if it desired." Id. at 477.

45. This is a clear statement of what is implied in Florida decisions, i.e., that it is the option to walk without penalty that matters, not the actual act of walking away from



the deal. Because Willeby's bid was not responsive, he enjoyed the benefit of being able to take a second look and decide whether or not to accept the contract. That he chose to stand by his bid does not cure the fact that he gained a substantial competitive advantage over all the other bidders for this contract, including the Petitioner.

46. The final analogous out-of-state case is DeSapio Constr., Inc. v. Township of Clinton, 647 A.2d 878 (N.J. Super. Ct. 1994). In DeSapio, bids were taken for alterations to the town hall building. The bid specification specifically required a bid bond, certified check, or cashiers check for 10 percent of the bid amount and a "proposition of surety" assuring the Township that if the contract were awarded, the surety would provide a performance bond and maintenance bond. The bid proposal submitted by DeSapio contained a letter from its surety stating that "they did not anticipate any difficulty in providing bonds" for the project. Id. The court applied a two prong test identical to the test set forth in Robinson Electrical Co, Inc., 417 So. 2d at 1034, supra. See Id. at 880. The court found the conditional language in the bond letter from DeSapio to be a material defect and further found that the municipality had "no assurance" the bond would be provided and that this gave the bidder a competitive advantage in that "DeSapio was free to bid and, even if awarded the contract,

could unilaterally 'cancel' the award by failing to obtain the bid bond." Id. at 880-81. The court reasoned that while the taxpayers would benefit by getting the lowest price for services if DeSapio were allowed to amend his bid package, the greater public good is in ensuring the integrity of the bidding process by enforcing strict standards so that there is "no opportunity for unfettered discretion or favoritism in the public bidding process." Id. at 881.

47. From the foregoing authorities, it is clear that Willeby's tender of a personal check with the invitation to bid was a material defect which could not be waived by the Department. By allowing Willeby to cure this material defect in its bid, the Department subverted the competitive bidding process. Its actions were contrary to the bid or proposal specifications, and therefore, contrary to competition. Section 120.57(3)(f), Florida Statutes (2000).

#### RECOMMENDATION

Based upon the findings of fact and conclusions of law, it is

RECOMMENDED:

That the bid of Willeby Construction on Contract No. E3A78 be rejected, and the contract be awarded to the Petitioner.

DONE AND ENTERED this 25th day of April, 2001, in  
Tallahassee, Leon County, Florida.

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STEPHEN F. DEAN  
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Filed with the Clerk of the  
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this 25th day of April, 2001.

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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.