

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

UNIVERSAL PRECISION)
INDUSTRIES, INC.,)
)
Petitioner,)
)
vs.) Case No. 01-0947BID
)
TAMPA BAY WATER,)
)
Respondent,)
)
and)
)
COMMERCE CONTROLS, INC., and)
TAMPA ARMATURE WORKS, INC.,)
)
Intervenors.)
_____)

RECOMMENDED ORDER

This matter was heard before the Division of
Administrative Hearings by its assigned Administrative Law
Judge, Donald R. Alexander, on April 3, 2001, in Tampa,
Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Tampa Bay Water's award of a contract to Commerce Controls, Inc. to furnish control panel fabrications for a regional water treatment plant under Contract No. 2001-22 was contrary to competition, arbitrary, or capricious, as alleged by Petitioner.

PRELIMINARY STATEMENT

This matter began on February 5, 2001, when Respondent, Tampa Bay Water, advised all bidders, including Petitioner, Universal Precision Industries, Inc., the third lowest responsive bidder, that it intended to award Contract No. 2001-22 to Intervenor, Commerce Controls, Inc., to provide certain control panel fabrications. By a written protest filed on February 13, 2001, Petitioner alleged that the award of the contract was clearly erroneous, contrary to competition, arbitrary, and capricious because the apparent

successful bidder had failed to comply with the bid specifications in three material respects.

On February 21, 2001, Petitioner requested a hearing under Sections 120.569 and 120.57(3), Florida Statutes (2000), to contest the proposed action. The matter was referred by Respondent to the Division of Administrative Hearings on March 7, 2001, with a request that an Administrative Law Judge be assigned to conduct a hearing. By Notice of Hearing dated March 9, 2001, a final hearing was scheduled on April 3, 2001, in Tampa, Florida. On March 19, 2001, Intervenor, Commerce Controls, Inc., was authorized to intervene in this proceeding. On March 30, 2001, the case was transferred from Administrative Law Judge J. Lawrence Johnston, Jr. to the undersigned. Intervenor, Tampa Armature Works, Inc., the second lowest bidder, was authorized to intervene at the final hearing subject to the issues already raised by Petitioner.

At the final hearing, Petitioner presented the testimony of John A. Sessa, its chief financial officer; Joseph Kehoe, instrumentation and control supervisor for Tampa Bay Water; and Sean Gucken, an employee of Commerce Controls, Inc. The parties also offered Joint Exhibits 1-19, which were received in evidence. Exhibits 18 and 19 are the depositions of Karen R. Lawson, an employee of Commerce Controls, Inc., and James L. Hall, a consultant with Parsons Engineering Science,

who assisted in the preparation of the Invitation for Sealed Bids.

The Transcript of the hearing was filed on April 11, 2001. Proposed Findings of Fact and Conclusions of Law were filed by Tampa Armature Works, Inc. on April 20, 2001, and by the other parties on April 23, 2001. These 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 this bid dispute, Petitioner, Universal Precision Industries, Inc. (UPI), contends that Respondent, Tampa Bay Water, acted contrary to competition and in an arbitrary and capricious manner when it proposed to award a contract to Intervenor, Commerce Controls, Inc. (CCI), the lowest responsive bidder. In its petition, UPI alleged that CCI failed to include in its bid documents "catalog cuts and information with complete model number, manufacturer's specifications, and dimension drawings describing the proposed component," as required by the specifications. As further clarified at hearing, UPI alleged that CCI deviated from the specifications in a material respect by submitting a price for

a "customized-made panel" instead of a higher costing Hoffman panel (encloser), and by submitting prices for a mix of AC/DC surge protectors rather than 100 percent DC surge protectors. All other allegations in the petition have been abandoned. UPI goes on to contend that by CCI pricing out the two items in this manner, CCI gained a competitive advantage of around \$36,000.00 over UPI.

2. Tampa Bay Water is a regional water supply authority created and existing pursuant to Sections 163.01, 373.1962, and 373.1963, Florida Statutes, and an interlocal agreement among Pinellas, Pasco, and Hillsborough Counties and the Cities of Tampa, New Port Richey, and St. Petersburg known as the "Amended and Restated Interlocal Agreement Reorganizing the West Coast Regional Water Supply Authority," dated June 10, 1998. In all, Tampa Bay Water is responsible for meeting the potable water needs of approximately two million customers.

3. The controversy began on January 8, 2001, when Tampa Bay Water issued an Invitation for Sealed Bids for Contract No. 2001-22 for the fabrication of certain control panels and associated parts for a regional water treatment plant. In paragraph 2 of the Instructions to Bidders, Tampa Bay Water specifically reserved the right "to waive any and all minor irregularities and technicalities."

4. A mandatory pre-bid conference was held on January 23, 2001. Representatives of UPI, CCI, and Intervenor, Tampa Armature Works, Inc. (TAW), attended the conference and later submitted bids. Thereafter, the sealed bids were opened publicly on January 30, 2001. CCI submitted the lowest bid (\$469,481.00), TAW the second lowest bid (\$486,144.00), while UPI submitted the third lowest bid (\$495,000.00).

5. On February 5, 2001, Respondent announced its intention to award the contract to CCI, who submitted the lowest responsive bid. After efforts to informally resolve the dispute were unsuccessful, this action was filed.

b. The bid documents

6. The Instructions to Bidders required that "[q]uotations for services are to be provided on the Bid Schedule included herein." They further provided that "[p]roposals must be provided on the Bid Schedule included with the contract documents." The Bid Schedule form in the bid documents provided fourteen line items to be completed by the bidders: one line each for each of the seven control panels and one line each for the factory acceptance testing on each panel. The Bid Schedule also provided a pre-determined

Owner's Allowance and then a "Total Contract Price" line for the fifteen line items.

7. The Instructions to Bidders further required that "[a]ll quotations must reflect delivered cost which includes all packing, handling, shipping charges, taxes, discounts and delivery to Tampa Bay Water."

8. In a section of the "Conditions of the Contract," the following requirements were imposed:

The proposal shall include the following:

Catalog cuts and information with complete model number, manufacturer's specifications, and dimension drawings describing the proposed components.

Total cost to Owner of all components including a separately itemized freight cost to the project site.

Per diem costs, expenses included, for supplying an experienced representative to the project site to assist with startup and operator training.

Delivery time of all panels following receipt of purchase order.

9. In the same section of the bid documents, under a heading entitled "Qualifications of Bidders," there is found a requirement that "[t]he Unit Control Panels shall be bid in detail, depicting a base unit price per device, utilizing an Excel spreadsheet supplied to the bidder."

10. Finally, the bid documents contained seven spreadsheets, one for each of the panels, which set forth by

line item a description of each component, its function, the manufacturer's name and model number, and the quantity required. The last column of each spreadsheet was blank and was titled "Costs."

11. The purpose of a bidder submitting spreadsheets was to ensure that Tampa Bay Water was getting the specific components identified in those spreadsheets. Therefore, Tampa Bay Water wanted to ensure that the bidder was furnishing the parts specified, but it was not concerned with the manner in which a bidder may have priced any particular components.

12. The specifications also called for a number of surge protectors for each of the seven panels. However, they did not specify whether the protectors would be AC or DC, or the number of each. Because there is a significant difference in price between the two, a few days before the bids were to be submitted, a UPI employee, Frank Dressel, made a telephonic inquiry with James L. Hall, an outside consultant who assisted in the preparation of the specifications, seeking clarification. Hall advised Dressel that he should price out his proposal using all DC surge protectors, even though the specifications were not clear on that point, and he was unsure of the exact number of DC surge devices that would ultimately be used. Hall later conveyed this same advice to all bidders before the bids were submitted.

c. CCI's bid proposal

13. CCI's bid proposal did not include the catalog cut sheets (product specification sheets) or the spreadsheets in its proposal. However, CCI provided a cover letter with its proposal which stated that

The bid requirements asked for several items, for which there was no line on the bid form. This proposal addition serves to provide the additional information required.

1. The equipment we are providing is the exact model as specified by Tampa Bay Water, therefore, we have not included the catalog cut sheets or major equipment listing with our bid. We can, if necessary, provide the information.

2. Per diem expenses for an electrician for wiring field terminations to the control panels \$336.00, based on an 8 hour day.

3. Per diem expenses for a CCI start-up technician would be \$900.00, based upon a 40 hour work week.

4. Freight expenses are \$7,000.00.

14. After reading the letter, a Tampa Bay Water representative, Joseph Kehoe, "felt comfortable" with that statement and treated it as a representation by CCI that it would supply the exact parts specified by Tampa Bay Water. In an abundance of caution, however, Kehoe sought guidance from his General Counsel regarding the apparent irregularities in the CCI bid, as well as apparent irregularities in the second

lowest bid submitted by TAW. The General Counsel advised that the irregularities appeared to be minor and could be waived, but that further clarification could be sought from the bidders with respect to any of the omitted information.

15. Kehoe then sought clarification from CCI regarding the freight charges and delivery schedule. He also requested the spreadsheets and catalog cut sheets previously offered by CCI in its response. By letters dated February 2 and 5, and March 1, 2001, and a "Supplemental Information" submittal containing the spreadsheets and catalog sheets, CCI provided the necessary clarification. That information confirmed the accuracy of the representations in CCI's January 30, 2001, letter, which indicated that CCI would supply all of the required equipment at the price stated in its bid.

d. UPI's concerns

16. According to UPI's chief financial officer, John Sessa, CCI "did not provide pricing or part numbers to indicate that they were supplying" some of the items required by the specifications. More specifically, three of the seven panels required Hoffman enclosures. In reviewing the CCI proposal, Sessa could find no price quote for a Hoffman enclosure, but he did find a manufacturer's quote for a similar enclosure by another manufacturer, Thermal Designs and Manufacturing (TDM). Also, Sessa was unable to determine

whether CCI's bid was based on all DC surge protectors. Therefore, Sessa concluded that CCI was not supplying the Hoffman enclosures or the required number of DC surge protectors. By CCI using lower costing parts in pricing out its bid, Sessa contended that CCI had obtained a competitive advantage over UPI.

17. The prices used for CCI's bid were prepared by Karen R. Lawson, a sales engineer in CCI's Plymouth, Michigan office. Lawson gathered her estimates from catalogs and vendors and then submitted them to her supervisor, Jerry Zitterman, who in turn forwarded them to a CCI employee in St. Petersburg, Florida.

18. Because she either gave the vendor an incorrect part number for a Hoffman panel, or there was a substantial lead time in obtaining such a unit, Lawson used a price for a customized panel made by TDM, and not the price for a Hoffman panel. That price, however, was later adjusted upward by more than 25 percent in the bid proposal, presumably to take into account the labor component. In pricing out the surge protectors, Lawson used an average unit price, which was derived by taking "both prices and [using] an average of those numbers."

19. Notwithstanding the manner in which it had priced out the panel and surge protectors, CCI unequivocally agreed

that it was obligated to supply all equipment specified by Tampa Bay Water by manufacturer and part number, and that was the intent of its January 30, 2001, letter included in its bid proposal. At the same time, Tampa Bay Water understood that CCI was supplying all of the items specified in the spreadsheets and that CCI would be held to its bid price as to all of the specified components.

20. CCI's failure to supply the spreadsheets and catalog cut sheets at the time the bid proposal was submitted, and its manner of pricing out the required panels and surge protectors, were minor deviations from the specifications, did not give CCI a substantial advantage over other bidders, and did not adversely affect the interests of Tampa Bay Water. This is especially true here since CCI's bid proposal included a letter which indicated that CCI would provide all required equipment at the stated price. Under the terms of the Invitation for Sealed Bids, Tampa Bay Water properly waived the minor irregularities in order to achieve the purpose of securing the lowest responsible bid.

e. UPI's bid proposal

21. There were a number of irregularities in UPI's bid as well. For example, certain items in the spreadsheets had a dash instead of a price in the "Costs" column. UPI's bid proposal also failed to provide any information as to the per

diem costs from an experienced representative to assist with start up and operator training. In addition, UPI changed the indicated quantities for each component in the spreadsheets from whatever Tampa Bay Water had specified to a quantity of one. Finally, as to two of the three different size fuses required for each of its panels, UPI's spreadsheet failed to list a price and showed a quantity of zero.

22. A representative of Tampa Bay Water established that had UPI been the lowest bidder, the agency would have sought clarification from the bidder as to the above items in the same manner that it sought clarification from CCI.

f. TAW's bid proposal

23. TAW's bid also omitted the catalog cut sheets and the spreadsheets, and it failed to provide any information as to freight charges, per diem start up expenses, or delivery schedule. Clarification regarding these items would also have been required, had TAW submitted the lowest bid.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(3), Florida Statutes (2000).

25. Tampa Bay Water is a regional water supply authority established pursuant to Sections 373.1961 and 373.1962,

Florida Statutes (2000). Thus, it is not a state agency and subject to the competitive bidding requirements found in Section 287.057, Florida Statutes (2000).

26. There are no provisions in Sections 373.1961 and 373.1962, Florida Statutes (2000), pertaining to burden of proof, grounds for overturning a regional water supply authority's preliminary decision, or the standard of proof. In the absence of specific statutory requirements, public entities such as Tampa Bay Water have the obligation to engage in contracting procedures in a manner which is not arbitrary and capricious. See, e.g., Volume Services Div. of Interstate United Corp. v. Canteen Corp., 369 So. 2d 391, 394 (Fla. 2d DCA 1979); Eagle Tire & Service Center v. Escambia County Utilities Authority, DOAH Case No. 00-0661BID (Escam. Cty. Util. Auth., July 14, 2000).

27. However, by Rule 49B-3.002, Florida Administrative Code, Tampa Bay Water has submitted to, and adopted, the procedures and substantive requirements of Section 120.57(3), Florida Statutes (2000), for purposes of resolving contract bid disputes. Therefore, that statute 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 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.

28. Under the foregoing statute, the undersigned is first obliged to determine, in a de novo setting, whether Respondent's action is contrary to governing statutes, rules, policies, or bid specifications. Within that factual framework, it must then be determined if the Board's action is clearly erroneous, contrary to competition, arbitrary, or capricious. In its Proposed Recommended Order, UPI contends that Tampa Bay Water's decision to award the contract to CCI was arbitrary, capricious, and contrary to competition. The contention that the decision was clearly erroneous has apparently been abandoned.

29. Under long-standing principles, an arbitrary decision is one not supported by fact or logic while a decision is capricious if it is taken without thought or reason. The inquiry to be made in determining whether an agency has acted arbitrarily or capricious is whether the agency has (1) considered all relevant factors; (2) given

actual, good faith consideration to those factors; and (3) used reason rather than whim to progress from consideration of those factors to its final decision. Adam Smith Enterprises, Inc. v. State Dep't of Envir. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). At the same time, if a decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary or capricious. Dravco Basic Materials Co., Inc. v. State, Dep't of Trans., 602 So. 2d 632, 634, fn. 3 (Fla. 2d DCA 1992).

30. An act is contrary to competition when it offends or subverts the fundamental policies underlying competitive procurement. Empower, Inc. et al. v. Tampa Bay Water et al., DOAH Case No. 99-3398BID (Tampa Bay Water, Nov. 15, 1999). Those policies have been described as protecting the public against collusive contracts; securing fair competition on equal terms for all bidders or proposers; removing not only collusion, but the temptation for collusion and the opportunity for private gain at public expense; closing all avenues to favoritism and fraud in whatever form; securing the best value for the public at the lowest possible expense; and affording an equal advantage to all persons desiring to do business with the government. Wester v. Belote et al., 138 So. 721, 723-24 (Fla. 1931).

31. Finally, Tampa Bay Water has specifically reserved the right "to waive any and all minor irregularities and technicalities." In doing so, it cannot accept a bid that is materially at variance with the specifications. But not every deviation from the bid specifications is material. A deviation is only material if it gives a proposer a substantial advantage over the other proposers and thereby restricts or stifles competition. Tropabest Foods, Inc. v. Dep't of Gen. Svcs., 493 So. 2d 50 (Fla. 1st DCA 1986). If a deviation does not provide a proposer with such a palpable competitive advantage, it constitutes a minor irregularity that should be waived. Robinson Electrical Co., Inc. v. Dade Co., 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982). See also Intercontinental Properties, Inc. v. Dep't of Health and Rehab. Svcs., 606 So. 2d 380, 387 (Fla. 3d DCA 1992)(there is a "strong public policy against disqualifying the low bidder for technical deficiencies which do not confer an economic advantage on one bidder over another").

32. UPI contends that Tampa Bay Water acted arbitrarily and capriciously and in a manner which is contrary to competition by accepting a letter from CCI as an assurance that the required parts would be supplied, and as a substitute for the spreadsheets and catalog cut sheets required by the specifications.

33. Tampa Bay Water's actions were not shown to be contrary to any statute, rule, or policy. Neither did they sanction a material variance from the bid specifications. In the Invitation for Sealed Bids, Tampa Bay Water reserved the right "to waive any and all minor irregularities and technicalities." The irregularities in CCI's bid did not give it a substantial advantage over the other bidders, restrict competition, affect the price of the bid, or adversely impact the interests of the agency. Under these circumstances, the irregularities were clearly minor, and Tampa Bay Water could waive them in order to secure the lowest responsible bid.

34. The evidence further shows that Tampa Bay Water's bid reviewer (Kehoe) acted reasonably under the circumstances by immediately recognizing the apparent deficiencies in CCI's bid, seeking guidance from his General Counsel, and requesting clarification from CCI as to certain items in its bid. Based on its evaluation of the information, Tampa Bay Water confirmed the accuracy of CCI's representation in its proposal that it would supply all of the requested equipment at the stated price. Therefore, the agency did not act arbitrarily or capriciously, as alleged by UPI.

35. Finally, the award of the contract to CCI was not shown to be contrary to competition. More specifically, there was no evidence of collusion, unfair competition by the

bidders, favoritism, or one bidder having an unequal advantage over the others. Indeed, in awarding the contract to CCI, Tampa Bay Water merely secured the best value for the public at the lowest possible expense.

RECOMMENDATION

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

RECOMMENDED that the Tampa Bay Authority enter a final order awarding the contract to CCI, the lowest responsive bidder.

DONE AND ENTERED this 4th day of May, 2001, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 4th day of May, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.