

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PCL/CENTREX ROONEY,)
)
 Petitioner,)
)
 vs.) Case No. 01-2704BID
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES and DEPARTMENT OF)
 TRANSPORTATION,)
)
 Respondents,)
)
 and)
)
 TURNER CONSTRUCTION COMPANY,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 6-7, 2001, in Miami, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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and

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STATEMENT OF THE ISSUES

Whether the Respondents' decision to rank the Intervenor, Turner Construction Company (Turner) first for purposes of entering into contract negotiations was clearly erroneous, arbitrary, capricious, or contrary to competition as alleged by the Petitioner, PCL/Centex Rooney, a joint venture comprised of PCL Civil Contractors, Inc. and Centex Rooney Construction Company, Inc. (PCL/Centex or Petitioner).

PRELIMINARY STATEMENT

The Florida Department of Transportation (Department) in conjunction with the Department of Management Services (DMS) issued a Request for Statement of Qualifications, Construction Management-at-Risk Services (RFQ) on January 29, 2001. The purpose of the RFQ was to select an entity to become a

Construction Manager-at-Risk for the Miami Intermodal Center (MIC) project. The proposers submitting responses to the RFQ were "short-listed," and the Petitioner and Turner were deemed eligible to submit technical proposals for the project.

Following the presentations on the technical proposals, Turner and the Petitioner were ranked first and second. Thus the Department proposed to enter into negotiations with Turner for the Construction Manager-at-Risk for the MIC project. Subsequently, the Petitioner timely filed a challenge to the ranking. When efforts to resolve the dispute proved unsuccessful, the case was forwarded to the Division of Administrative Hearings for formal proceedings on July 10, 2001.

At the final hearing, the Petitioner presented testimony from Larry Coleman, Tom Berley, Steven Thompson, Nick Serianni, Kouroche Mohandes, and Gary Glenewinkel. The Department presented testimony from Nicholas Serianni, Kourouche Mohandes, Steve Thompson, and Gary Glenewinkel. DMS offered testimony from Thomas Berley. The Intervenor presented testimony from Thomas Berley, Larry Coleman, Gary Glenewinkle, Patrick Klein, Kouroche Mohandes, Nicholas Serianni, Jose Hevia and Scott Skidelsky.

The parties pre-marked all exhibits and those received in evidence were numbered 1, 3, 3A, 3B, 4, 6, 7, 11-17, 30-32, 36-

39, 50, 52, 55-61, 63, 65, 66, 76-79, 82, 83, 102-105, 126 (with the deletion of pages 43 and 44); and 131-133.

The Transcript of the proceedings was filed with the Division of Administrative Hearings on August 21, 2001. Thereafter, all parties timely filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order. On September 19, 2001, the Department joined by DMS and the Intervenor filed a Motion for Order Authorizing the Entry of a Single Final Order. That request was opposed by the Petitioner. The response to the motion was filed on September 20, 2001, and included the Petitioner's Motion to Strike. Such Motion to Strike is hereby denied. Ruling on the Department's request is more fully addressed in the Conclusions of Law set forth below.

FINDINGS OF FACT

1. Prior to December of 2000, the Department of Transportation and the Department of Management Services entered into negotiations whereby DMS would assist the Department by providing project management services for a program known as the Miami Intermodal Center to be located in Miami, Florida.

2. DMS was to assist the Department in securing a Construction Manager-at-Risk (CMAR) for the project.

3. On December 26, 2000, the Department and DMS entered into an agreement that more fully detailed the terms of how DMS would assist in the procurement of the CMAR.

4. Article 4 of the agreement specified that the Department would be considered the owner of the project and that all payments to any "architects, engineers, contractors, etc., will be paid under the control of The Florida Department of Transportation." Additionally, such section provided that all payments "under this contract, as prescribed hereinabove, will be made by The Florida Department of Transportation."

5. The agreement authorized DMS to assist with agreements for architects, engineers, contractors, etc. and recognized DMS forms and procedures for the design, bidding and construction of the project. The complete agreement is identified as Exhibit 4 in this record.

6. After entering the agreement, employees of DMS met with members of the Department's MIC Management Group to coordinate efforts on the procurement of a CMAR for the MIC project.

7. DMS in concert with the Department developed the guidelines for the project, and on January 29, 2001, the Department of Management Services and the Department of Transportation issued a Corrected Legal Notice advertising a Request for Statements of Qualifications for the MIC CMAR.

8. On February 14, 2001, the MIC management group held a meeting for prospective bidders to present information about the Statement of Qualifications.

9. Seven firms responded to the invitation to submit Statements of Qualifications. Those entities were identified on or about March 6, 2001.

10. Thereafter, the seven applicants were "short-listed" and four were selected to continue in the process. The short-listing review did not rank the applicants. The purpose of reviewing the qualifications at that time was to merely cull the group of applicants down to those most able to continue the process toward selection. Had only four applicants applied, most likely all would have proceeded to the next round of review.

11. The Petitioner and Intervenor were two of the four entities that progressed to the next level. All four were invited to an information meeting on April 6, 2001. At that time the MIC management group made a Power Point presentation concerning the next phase of the selection process. The MIC management group explained the technical review process and were available to respond to any questions that the applicants might raise.

12. Subsequently, each applicant was to provide a written technical proposal and was to give an oral presentation before

the technical review committee (TRC). The written technical proposals from the four entities were due May 1, 2001. The Petitioner and Intervenor timely filed technical responses.

13. The sufficiency of the Intervenor's technical response and oral presentation is not at issue.

14. Instead, the Petitioner maintains that the score from the short-listing process should be averaged with the technical response score to achieve an overall ranking. That average was not done.

15. Subsequent to the four oral presentations from the short-listed applicants, the TRC met for deliberations and ranked the entities based upon the technical responses and the oral presentations. The TRC did not have the authority to make the final selection. In fact, the TRC recommended their rankings to the selection committee.

16. The selection committee met on May 31, 2001, to consider the recommendation of the TRC and selected the Intervenor as the first ranked applicant. Thereafter, the Petitioner timely filed the instant challenge to the selection.

17. Turner Construction Company moved to intervene in the protest and by order entered June 22, 2001, was granted intervention in this case.

18. When efforts to settle the dispute proved unsuccessful, the matter was forwarded to the Division of Administrative Hearings for formal proceedings on July 10, 2001.

19. The RFQ in this case was developed by, and with the cooperation of, personnel from both the Department and DMS. It provided that the policies and procedures of DMS and the Department would apply in the selection process for the MIC CMAR.

20. More specifically, the RFQ provided at page 1:

Pursuant to policies and procedures of the State of Florida Department of Management Services and the Florida Department of Transportation statements of qualifications (SOQs) for Construction Management-At-Risk services for the Miami Intermodal Center (MIC) Program will be received at the Miami Intermodal Center Project Office 3910 NW22nd Street, Miami, Florida 33142, until 4:00 P.M. Eastern Standard Time, on Tuesday, March 6, 2001.

* * *

Beginning Monday, January 29, 2001, a "Request for Statements of Qualifications" will be available free of charge at the reception desk, Miami Intermodal Center Project Office 3910 NW22nd Street, Miami, Florida 33142. This package outlines the scope of the program, the SOQ format, evaluation criteria, submittal instructions, a description of the selection process and general project information.

* * *

Proposers are encouraged to bring all questions concerning this Request for Statements of Qualifications to the informational meeting.

21. Page 2, Section 1.0 of the RFQ, provided, in pertinent part:

The Florida Department of Transportation (FDOT) and State of Florida Department of Management Services (FDMS) jointly intend to select a construction manager-at-risk (Construction Manager) to provide pre-construction services and construction management-at-risk services for the construction of facilities and roadways constituting the Miami Intermodal Center Five Year Work Program. Pursuant to an agreement between FDOT and FDMS dated December 26, 2000, the selection process will be conducted pursuant to the policies and procedures of FDMS. FDOT may contract with the Construction Manager through FDMS and FDMS may provide certain owner representation on behalf of FDOT during the construction process. Therefore, references in this RFQ to FDOT shall also include FDMS when acting as a representative for FDOT.

22. The selection process for the CMAR was set forth in Section 4, page 9 of the RFQ. That provision stated:

The selection of the Construction Manager shall be based upon the qualifications and experience of Proposers as reflected in the statement of qualifications and the technical proposals and oral presentations of short-listed Proposers. The selection process will be a two-phase process. In the first phase, SOQs will be submitted for review and evaluated based on the evaluation criteria identified in Section 5. The most highly qualified Proposers will be short-listed and invited to submit technical proposals and provide oral presentations with the final ranking made in accordance with criteria generally described in Section 6.

23. The Petitioner did not dispute the criteria to be used to evaluate the proposals.

24. The Petitioner did not seek an explanation of the foregoing section of the RFQ and did not dispute the language of the section.

25. Similarly, the Petitioner did not dispute the language of Section 5 that set forth the process to be used for short-listing the proposers.

26. Section 6 was entitled "TECHNICAL PROPOSALS, ORAL PRESENTATIONS AND FINAL SELECTION." That section provided, in pertinent part:

Upon completion of the short-listing, each of the Proposers selected on the shortlist will be invited to prepare a technical proposal and make an oral presentation to the Technical Review Committee.

* * *

All short-listed Proposers will be required to attend a presentation of the Program by the Program Manager on March 22, 2001. The presentation will provide detailed information regarding the design as generated to date and will answer any questions from short-listed firms.

* * *

FINAL SELECTION CRITERIA

Following the technical proposals and oral presentations, the Proposers will be ranked by the Technical Review Committee based on the following criteria:

1. Understanding of the Program and Requirements-
* * *
2. Approach and Method-
* * *
3. Ability to Provide Services-

* * *

The Technical Review Committee will rank short listed Proposers after all the presentations and interviews have been completed. The recommendations of the Technical Review Committee will be presented to the Selection Committee, which, will determine the official ranking of the Proposers.

27. The RFQ did not require that scores from the short-listing process be averaged with the technical presentation phase. In fact, there were no scores from the short-listing process; the short-listed entities were identified in alphabetical order.

28. If an averaging of scores was the Petitioner's understanding of the DMS policy or practice, the Petitioner did not request clarification to confirm such procedure during the time to pose questions to the MIC project manager.

29. Neither the Intervenor nor the fourth ranked proposer understood the RFQ to require an averaging of scores.

30. No one from DMS or the Department contemplated that the instant RFQ would be "scored" on a numerical basis. DMS and the Department had agreed that the recommendation of the TRC would be done on a consensus basis. To that end, members of the TRC rated the applicants using the terms "strong, average, fair, and poor." To provide more flexibility, the ratings were broken down into subgroups as follows: strong, strong/average,

average/strong, average, average/fair, fair/average, fair, fair/poor, poor/fair, and poor.

31. In this case, the Intervenor prevailed as the first-ranked proposer since it had one category noted as Strong/average, whereas the Petitioner had a category ranked Average/strong. Otherwise, the two proposals would have been rated identically. Recognizing this close evaluation, but still compelled to reach a consensus, the TRC recommended the Intervenor to the Selection Committee as the first-ranked proposer. No member of the TRC disputed the result of the consensus selection. No member of the TRC voiced any opposition to the final recommendation to the Selection Committee. Two employees of DMS participated on and with the TRC.

32. The Selection Committee then considered the recommendation of the TRC. The Selection Committee asked questions to the TRC chairman as to how the consensus was reached, as to the ranking of the proposers, as to the considerations given to the proposers, and as to the final determination of the TRC. Had the Selection Committee chosen to disregard the TRC recommendation, it could have done so. Had the Selection Committee sought additional information based upon the closeness of the ranking for the top two proposers, it could have sent the matter back to the TRC for additional consideration and input. It did not. After considering the

recommendation of the TRC, the Selection Committee adopted the consensus recommendation.

33. The TRC consisted of eight individuals who independently ranked the technical proposals and the oral presentations of the short-listed applicants. They met as a group to discuss their individual findings and to compile the individual ratings they ascribed to each entity. All of the deliberations were done in an open meeting that was video-taped and made a part of this record.

34. No one individual controlled the tone or ratings submitted by the TRC members. The TRC chairman compiled the individual ratings and reviewed all consensus rankings with the group. No TRC member was precluded from changing their individual rating. No TRC member was precluded from challenging the consensus reached on any category.

35. The criteria used by the TRC were drafted by DMS and the Department staff to specifically address the needs of the MIC project. Such criteria took into consideration all policies and practices utilized by DMS.

36. The criteria used to evaluate the proposals for the MIC CMAR project considered and addressed the criteria set forth in DMS form DBC-5033.

37. There is no DMS practice, policy or procedure that mandates the use of form DBC-5033. When such form is typically

to be used, it is included in the RFQ package. It was not included in the instant package, and no proposer sought clarification as to whether the form would be utilized in the instant case.

38. DMS did not intend to combine the scores from the short-listing process and the technical review process in this case. When it does require a combination of the two scores, DBC form 5033 is typically used.

39. Although referenced by the RFQ, the agreement between DMS and the Department regarding the MIC project was not made a part of the RFQ.

40. Neither DMS or the Department advised the Petitioner that the scores from the short-listing process and the technical review phase would be combined.

41. DMS does not require that all details of an evaluation or scoring method be disclosed in an RFQ.

42. All parties were aware of the consensus recommendation to rank the Intervenor ahead of the Petitioner and were further cognizant that the Selection Committee would make the final decision in the matter.

CONCLUSIONS OF LAW

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

44. 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.

45. In this case the Petitioner argues that the failure of the TRC to combine scores from the short-listing phase with the results of the technical review phase constitutes a violation of DMS policy and rule. As such, the Petitioner maintains the award to the Intervenor is clearly erroneous and must be reversed. If the RFQ had required a combination of the scores Petitioner's argument would be well-founded. However, it did not. The unambiguous language of the RFQ called for a final ranking based upon the TRC's evaluation of the second phase of the submittals resulting in a recommendation to the Selection

Committee. The Selection Committee and not the TRC made the final determination.

46. The short-listing phase produced a group of applicants eligible to proceed to the next phase. The short-listing process did not result in a score to be carried over to the second phase. The applicants were never advised that a score would be carried over. The Petitioner alleges it made assumptions about the process not supported by the RFQ, the information provided to the applicants, or the Respondents but which were nevertheless valid based upon its prior understanding of DMS policies and practices. In truth, DMS has never had a situation to mirror the instant case. The joint efforts of DMS and the Department to coordinate the massive effort for this project is unprecedented. Instead of confirming its understanding of the evaluation and selection process, the Petitioner did nothing until the rankings were completed. If it believed the RFQ did not comport with DMS rules or policy the Petitioner failed to timely challenge the terms of the RFQ.

47. The burden of proof in this case rests with the Petitioner to establish by a preponderance of the evidence that the proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious. It has failed to meet that burden.

48. In this case the credible evidence supports the Respondents. The Department and DMS worked together to assure that the process comported with DMS guidelines. DMS was involved in the process from the initial efforts to draft the RFQ. All applicants were afforded opportunities to ask questions, seek clarification, or challenge the RFQ terms. No one disputed the evaluation and ranking procedure until after the Selection Committee had reached its decision.

49. The Petitioner submitted no evidence to support that the Selection Committee was obligated to accept the rankings assigned by the TRC. Had the Selection Committee chosen to dispute the ranking and require additional deliberation on the consensus it could have done so. Clearly, it was aware of the closeness of the ranking. Nevertheless, after thorough consideration of the matter the Selection Committee unanimously adopted the TRC's recommendation.

50. Rule 60D-5.0082, Florida Administrative Code, addresses the competitive selection governing DMS contracts. Such rule recognizes that specified evaluation criteria must be utilized. Neither the rule nor the form identified by the rule mandate the weight to be assigned to the criteria or that the form be used or that numerical scoring be utilized. In this case, all evaluation criteria required by DMS policy or rule were utilized. DMS does not require numerical scoring by rule

or policy. DMS does not require that form DBC-5033 be used on all projects. The Petitioner's erroneous assumptions regarding the practices of DMS do not support reversal of the decision reached by the Selection Committee.

51. Finally, as to the Department's Motion for Order Authorizing the Entry of a Single Final Order, the Petitioner correctly points out that the issue of a single final order was not raised until September 19, 2001. Notwithstanding the accuracy of that factual statement, the Department's argument that "the best interests of the parties and that judicial economy would be served" by such entry is unfounded. First, the Division of Administrative Hearings does not have jurisdiction over intra-agency contracts.

52. Second, that the Petitioner filed the instant protest with two agencies is immaterial to the conclusions reached herein. The record in this case concerns the Petitioner's challenge to a ranking that entitled the Intervenor a first opportunity to enter into negotiations with the Department. DMS may stand in the Department's stead as its agent, but the ultimate project was always identified as a Department effort. As such, while DMS may be required to sign-off on the decision as part of its statutory responsibility, the recommendation required of the Division of Administrative Hearings is to

address the Petitioner's protest. The foregoing Findings of Fact and Conclusions of Law amply fulfill that obligation.

RECOMMENDATION

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

DONE AND ENTERED this 21st day of September, 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 21st day of September, 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 must be filed with the agency that will issue the final order in this case.