

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TOWN OF DAVIE,)
)
Petitioner,)
)
and)
)
KEVIN CARMICHAEL,)
)
Intervenor,)
)
vs.) Case No. 01-4263BID
)
DEPARTMENT OF TRANSPORTATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case by video teleconference in Tallahassee, Florida, on November 29, 2001, with parties appearing from Fort Lauderdale, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Intervenor: Joseph W. Lawrence II, Esquire
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STATEMENT OF THE ISSUE

Whether the decision to award the bid for Parcel No. 93S101, State Road 84 Spur, was in accordance with the governing rules and statutes or was arbitrary, capricious, or contrary to competition.

PRELIMINARY STATEMENT

On June 18, 2001, the Respondent, the Florida Department of Transportation (Respondent or Department), issued an intent to award the bid for Parcel No. 93S101, State Road 84 Spur, to the Intervenor, Kevin Carmichael, Trustee (Intervenor). Thereafter, the Petitioner, the Town of Davie (Petitioner or Davie), protested the intended award and sought to acquire the subject property. The Petitioner did not submit a bid for the property, did not intend to offer any financial compensation for the property, and did not challenge the sufficiency of the Intervenor's bid.

At the hearing, the Petitioner presented testimony from Jack R. Leonard, a contract attorney with the Florida Department

of Transportation, Turnpike District (Turnpike District); Robert Bush, a right-of-way manager for the Turnpike District; Adam Russell Stehly, a surplus property manager employed by Post, Buckley, Schuh & Jernigan (PBS&J) doing contract work for the Turnpike District; Brenda Ashe, a consultant employed by PBS&J doing work as a property management administrator for the Turnpike District; Thomas A. Anderson, the deputy right-of-way manager for the Turnpike District; and Thomas J. Willi, the town administrator for the Town of Davie. Exhibits numbered 23, 30, 36-A, 38, 41-43, 45, 47, 56-A, 58, 61, 65, 67, and 73 were admitted into evidence.

The transcript of these proceedings was filed on December 24, 2001. Thereafter the parties requested an extension, which was granted, to allow the parties additional time to file proposed recommended orders. All parties timely filed proposed orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. In October of 1993 the Respondent declared that a spur property located at State Road 84 (the subject matter of these proceedings) was a surplus parcel. Such property is comprised of two identifiable tracts identified in this record as parcel 101-A and parcel 101-B.

2. The Respondent utilizes a manual entitled "Disposal of Surplus Real Property" as its guide for the procedures used to comply with statutory and rule provisions regarding the disposal of surplus parcels.

3. Since 1993 the Department has made several attempts to market the spur property. Such attempts included offering parcel 101-A to the Petitioner for no consideration.

4. As recently as October of 2000 the Department offered the spur property to the Petitioner at no cost. The offer did include some conditions but same did not materially affect whether or not Davie would or could accept the transfer. For whatever reasons, the Petitioner did not accept the offer. Subsequently, the Respondent withdrew the offer in writing.

5. Additionally, the Respondent notified the Petitioner that it intended to make the spur property (both parcels) available to the public through the competitive bid process.

6. It was contemplated that the bid process would allow any person from the public to competitively place bids for the subject property. Nevertheless, the Petitioner was advised that it would be given an opportunity to acquire the property.

7. A letter of February 7, 2001, from the Department to the Petitioner advised the town of its right to acquire the property but did not in any manner prohibit or prevent the Town of Davie from bidding on the spur property.

8. In fact, the Petitioner did not bid on the subject property.

9. Further, the Petitioner did not and does not intend to purchase the subject property. The only way the Intervenor seeks to acquire the property is without cost.

10. The Petitioner had actual knowledge of the Department's intention of making the property available through competitive bid. The Town of Davie did nothing to oppose the bid process.

11. On May 30, 2001, the spur properties were advertised for competitive bidding with sealed bids to be opened by the Department on June 14, 2001.

12. On June 21, 2001, the Town of Davie by and through its town administrator contacted the Department in order to exercise the town's right of refusal on the property.

13. Accordingly, on June 25, 2001, the Respondent posted a notice stating it would reject all bids.

14. On July 12, 2001, the Respondent notified the Petitioner that it had ten days to exercise its right to purchase the property.

15. In connection with the proposed sale the Department offered the property to the Town of Davie at the approved appraised value of \$1.9 million. The Petitioner made no counter-offer.

16. Instead, on July 27, 2001, the Town of Davie responded to the offer stating it would accept the parcel for a public purpose for no consideration.

17. Thereafter, the Respondent posted a "Revised Bid Tabulation" indicating it would award the spur property to the highest responsive bidder, the Intervenor.

18. The Petitioner has not proposed to pay for the spur property.

19. The Petitioner did not have an appraisal of the spur property prepared.

20. The Petitioner did not bid on the spur property.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Sections 120.569, and 120.57, Florida Statutes.

22. Section 120.57(3), Florida Statutes, provides, in pertinent part:

ADDITIONAL PROCEDURES APPLICABLE TO PROTESTS TO CONTRACT BIDDING OR AWARD.-Agencies subject to this chapter shall utilize the uniform rules of procedure, which provide procedures for the resolution of protests arising from the contract bidding process. Such rules shall at least provide that:
(a) The agency shall provide notice of its decision or intended decision concerning a bid solicitation or a contract award as follows:

1. For a bid solicitation, notice of a decision or intended decision shall be given by United States mail or by hand delivery.

2. For any decision of the Department of Management Services concerning a request by an agency for approval of an exceptional purchase under part I of chapter 287 and the rules of the Department of Management Services, notice of a decision or intended decision shall be given by posting such notice in the office of the Department of Management Services.

3. For any other agency decision, notice of a decision or intended decision shall be given either by posting the bid tabulation at the location where the bids were opened or by certified United States mail or other express delivery service, return receipt requested.

The notice required by this paragraph shall contain the following statement: "Failure to file a protest within the time prescribed in s. 120.57(3), Florida Statutes, shall constitute a waiver of proceedings under chapter 120, Florida Statutes."

(b) Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the bid tabulation or after receipt of the notice of the agency decision or intended decision and shall file a formal written protest within 10 days after filing the notice of protest. With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for proposals, and the formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest

shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based. Saturdays, Sundays, and legal holidays shall be excluded in the computation of the 72-hour time periods provided by this paragraph.

* * *

(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 bears the burden of proof to establish that the purpose of competitive bidding has been subverted or that the department acted fraudulently, arbitrarily, illegally, or dishonestly in the proposed award of the subject bid. The Petitioner must establish that the department's proposed action is contrary to the department's

governing statutes, the department's rules or policies, or the bid or proposal specifications. As to this burden, the Petitioner has failed to establish any violation of statute or rule and has further failed to show the department acted erroneously, contrary to competition, arbitrarily, or capriciously. Thus the Petitioner has not met its burden.

24. In this case the Petitioner has been afforded ample opportunity to purchase the subject property, has delayed the competitive process without legal justification, and has failed to exercise its right to acquire the property as provided by law. Accordingly, the Respondent is entitled to award the bid as contemplated by the "Revised Bid Tabulation." Nothing in the law pertaining to the Petitioner's right of first refusal or the bid process entitles the Petitioner to acquire the subject property without consideration.

25. Section 337.25(4), Florida Statutes, provides in part:

The department may sell, in the name of the state, any land, building, or other property, real or personal, which was acquired under the provisions of subsection (1) and which the department has determined is not needed for the construction, operation, and maintenance of a transportation facility. With the exception of any parcel governed by paragraph (c), paragraph (d), paragraph (f), paragraph (g), or paragraph (i), the department shall afford first right of refusal to the local government in the jurisdiction of which the parcel is situated. When such a

determination has been made, property may be disposed of in the following manner:

* * *

(b) If the value of the property exceeds \$10,000 as determined by department estimate, such property may be sold to the highest bidder through receipt of sealed competitive bids, after due advertisement, or by public auction held at the site of the improvement which is being sold.

* * *

(e) If the department begins the process for disposing of the property on its own initiative, either by negotiation under the provisions of paragraph (a), paragraph (c), paragraph (d), or paragraph (i), or by receipt of sealed competitive bids or public auction under the provisions of paragraph (b) or paragraph (i), a department staff appraiser may determine the fair market value of the property by an appraisal.

* * *

(h) If property is to be used for a public purpose, the property may be conveyed without consideration to a governmental entity.

26. The statute does not require the Department to convey the property without consideration to Davie. Once the Respondent determined to sell the property at competitive bid, the Petitioner was obligated to show its public purpose for the property. It had waived its right to acquire the property previously.

27. Rule 14-19.004, Florida Administrative Code, provides:

Real Property Conveyances.

(1) In the event the Department is disposing of surplus property not governed by the exceptions in Section 337.25(4),

Florida Statutes, the Department must first offer such property to the local government in the jurisdiction in which the parcel is situated, prior to either negotiation or competitive sale of the property. The local government shall be allowed 10 working days to determine if there is a need for the subject parcel. If a public purpose is identified by the local government, the property may be conveyed to the local government for no consideration; otherwise, the property shall be sold at the Department's approved appraised value. If an independent appraisal has been performed, the acquiring local government shall reimburse the appropriate party for the cost of the appraisal.

(2) In the event the Department is disposing of surplus property not governed by the exceptions in Section 337.25(4), Florida Statutes, such property will be sold in accordance with Section 337.25(4)(b), Florida Statutes.

(3) When disposing of surplus property by public bid or auction, a minimum bid will be specified when appropriate to ensure that bids received will reflect the fair market value of the property. The Department reserves the right to withdraw the property if the minimum bid is not reached. If a minimum bid is specified, it shall be the amount determined pursuant to Rule 14-19.012(2). If the highest bid is below the specified minimum bid, acceptance of the bid will require the approval of the District Secretary.

(4) For properties valued in excess of \$10,000, the appraisal which is procured by a prospective buyer or lessee is not approved until the Department has examined the appraisal and verified that it is in compliance with Section 475.628, Florida Statutes.

(5) If real property is disposed of through negotiation, sealed bid, or public auction, the buyer or successful bidder shall pay all costs associated with the closing. The

Department shall prepare all necessary closing documents.

(6) The buyer shall record the conveyance of the property in the county of record and provide a copy of the recorded deed, showing the book and page number and the date of recordation, to the Department within 30 days of the closing date.

(7) A governmental entity may request conveyance of real property or personal property for a public purpose in accordance with Section 337.25(4)(h), Florida Statutes, unless legislation or bond provisions provide otherwise. If property is to be conveyed for no monetary consideration, an appraisal is not required.

(8) When transfers are made to a governmental entity for a public purpose, the governmental entity shall furnish a letter identifying the public purpose for the property from the agency head, or, if the public entity consists of a group requiring consensus to take such action, a copy of the resolution confirming such consensus. This documentation shall be furnished to the Department at the time of application for purchase or lease of the Department-owned property.

(9) If real property is conveyed for a public purpose, the governmental entity to which the property will be conveyed shall pay all closing costs associated with the conveyance. The Department shall prepare all necessary closing documents.

(10) If the property transferred is used for other than the identified public purpose by the governmental entity, all property rights shall revert to the Department.

28. In this case it is concluded the Respondent complied with the provisions of Rule 14-19.004, Florida Administrative Code. The Petitioner was afforded all opportunities afforded by the rule and statutes to acquire the subject property. It

failed to offer a bid on the property, it failed to timely exercise its rights to acquire the property for public purpose, and it failed to offer any financial consideration to the Department for the property. Accordingly, it cannot now claim the Department acted illegally or contrary to the rules governing these proceedings.

29. Finally, it is concluded the Petitioner failed to timely challenge the competitive bid process. Davie had actual knowledge of the Department's intention to make the property available through competitive bid. The Petitioner failed to timely challenge that process, the terms of the proposed sale or any specification of the proposed process. It has waived the ability to do so.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Respondent enter a final order confirming the award of the spur property to the Intervenor.

DONE AND ENTERED this 7th day of February, 2002, 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
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this 7th day of February, 2002.

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.