STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA BLACKTOP, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent,	)	Case No. 02-2187BID
	)	
	)	
and	)	
	)	
WEEKLEY ASPHALT PAVING, INC.,	)	
	)	
Intervenor.	)	
_____	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Lauderdale, Florida, on June 20, 2002.

APPEARANCES

For Petitioner: Joseph W. Lawrence, II
Vezina, Lawrence & Piscitelli, P.A.
360 East Las Olas Boulevard, Suite 1130
Fort Lauderdale, Florida 33301

For Respondent: Barbara Gasper Hines
Assistant General Counsel
Department of Transportation
605 Suwanee Street, Mail Station 58
Tallahassee, Florida 32399-0458

For Intervenor: F. Alan Cummings
Smith, Currie & Hancock LLP
1004 DeSoto Park Drive
Post Office Box 589
Tallahassee, Florida 32302-0589

STATEMENT OF THE ISSUE

The issue is whether Respondent's proposed award of a contract to Intervenor is contrary to statutes, rules, policies, or the specifications, pursuant to Section 120.57(3)(f), Florida Statutes.

PRELIMINARY STATEMENT

By Formal Protest and Request for Hearing filed April 17, 2002, Petitioner alleged that, on March 8, 2002, it timely submitted a bid, with a bid bond, in response to an invitation to bid Respondent's Project Number 222457, FIN Number 32822925201, Contract Number E4D18. Petitioner alleged that it submitted the lowest bid, but, on April 3, 2002, Respondent posted its notice of intent to accept Intervenor's bid and reject Petitioner's bid because Petitioner's bid lacked the required bid bond. Petitioner alleged that its notice of protest and formal written protest were timely.

At the hearing, Petitioner called three witnesses and offered into evidence 11 exhibits: Petitioner Exhibits 1-11. Respondent called four witnesses and offered into evidence five exhibits: Respondent Exhibits 1-5. Intervenor called no

witnesses and offered into evidence no exhibits. All exhibits were admitted except Petitioner Exhibit 4, which was proffered.

The court reporter filed the transcript on July 12, 2002. The parties filed their proposed findings of fact and conclusions of law by August 1, 2002.

FINDINGS OF FACT

1. On February 15, 2002, Respondent advertised for bids for Contract E4D18 (ITB). The ITB requires bidders to submit their bids with a bid bond and power of attorney no later than 11:00 a.m. on March 8, 2002.

2. Petitioner and Intervenor timely submitted bids at the specified location. Petitioner's bid price was $2,094,748.99, and Intervenor's bid price was $2,095,530.00. Petitioner and Intervenor have standing to participate in this case.

3. In preparing its bid, Petitioner obtained a bid bond and power of attorney from Great American Insurance Company through its local bonding agent, Nielson, Alter and Associates. (All references to bid bonds shall mean the bid bond and accompanying power of attorney.) Nielson, Alter and Associates and its predecessor has provided bid bonds for Petitioner for 12 years.

4. Pursuant to its standard business practice, Petitioner received the bid bond from Nielson, Alter and Associates the day prior to the deadline for submitting bids. The bond was in

proper form, duly authorized, and validly executed, so it was enforceable upon delivery from Petitioner to Respondent. If Petitioner in fact delivered the bond with the bid on the following day, Respondent would have no basis to reject Petitioner's bid as unresponsive.

5. Petitioner's employee responsible for assembling and delivering Petitioner's bid has been so employed by Petitioner for three and one-half years. She testified that she placed the bid bond in the package with the bid itself, sealed the package, drove it to the assigned location, and submitted the sealed bid package to Respondent by 10:30 a.m. on March 8, 2002.

6. Respondent's employees accepted Petitioner's sealed bid package and, without opening it, placed it in a locked filing cabinet, where they placed the three other timely submitted bids for the subject project. At 11:00 a.m.--the time specified for the opening of bids--one of Respondent's employees removed the four sealed bid packages and took them to the conference room for the opening of the bids in response to the ITB. At the same time and place, Respondent's employees were opening 21 other bids in response to five other invitations to bid on projects unrelated to the subject project.

7. The conference room was small and contained a table. On one side of the table sat three of Respondent's employees, who remained with the bid packages continuously from when they

arrived in the conference room until, after they were opened, they were taken upstairs to a data processing center. On the other side of the table sat Petitioner's employee and a representative of another bidder. The 25 bid packages were in six separate piles, divided by project.

8. One of Respondent's employees opened each bid and handed it to a second employee who announced the name of the bidder and the amount of the bid. The second employee then passed the bid to the third employee who recorded the bid. As was consistent with Respondent's past practice, no one announced whether each bid was complete.

9. At the end of the opening of the bids in response to the ITB, Respondent's employee announced that Intervenor had submitted the lowest bid. Due to a mathematical error in Intervenor's bid, it appeared from the cover sheets that Intervenor's bid was the lowest. Only later, after the mathematical error was corrected, did Respondent's employees discover that Petitioner had submitted the lowest bid.

10. After Petitioner's employee and the representative of the other bidder had left the conference room, Respondent's three employees examined the bid packages more closely. They could not find the bid bond in Petitioner's bid package, nor could they find the bid bond in the bid package of a bidder for one of the other contracts.

11. The first of Respondent's employees to discover that she could not find the bid bond in Petitioner's bid package reexamined Petitioner's bid package in search of the documents. The three employees then checked inside every envelope for the documents that were missing from the bid packages of Petitioner and the other bidder, but they could not find the missing documents.

12. It was highly unusual for a bid bond to be missing from a bid package and probably unprecedented for bid bonds to be missing from two bids for separate jobs opened at the same time.

13. Consistent with their practice then and now, Respondent's employees separated the bidders' checks from the bid packages and placed the checks in a secure location. Consistent with their practice then and now, one of Respondent's employees then delivered the remainder of each bid package to the data processing center upstairs. Consistent with their practice then, but not now, Respondent's employees did not document that the bid bond was missing for several days after the bid opening.

14. Petitioner contends that Respondent's employees did not discover that the bid bond was missing until days after the bid opening. Petitioner reasons, in part, that Respondent's employees were not as attentive to Petitioner's bid because they

thought that it was only the second lowest bid. Petitioner contends that the discovery of the missing bid bond several days after its submittal provides Respondent's employees with considerable opportunity to mishandle the bid package and inadvertently misplace the bid bond.

15. In support of its contention that Respondent's employees did not immediately discover the missing bid bond, Petitioner offered the testimony to this effect of its president and proffered similar testimony of another witness. The bases of this testimony were separate statements from the employee who supervised the three employees who opened, announced, and recorded the bids. However, this testimony, even from both witnesses, could not overcome the clear and unequivocal testimony of all three of Respondent's employees that they discovered that Petitioner's bid package was missing the bid bond on the day of the bid opening. Any statement to the contrary by Respondent's supervisory employee may have been based on her misrecollection or ignorance of the facts or misunderstanding of the questions posed to her, although it is also possible that both listeners separately misunderstood what she was saying.

16. A bid bond is a crucial component of a bid. Its omission confers a competitive advantage upon a bidder, which, after bid opening, could elect not to cure the omission and thus

be relieved of the obligation that it otherwise appeared to have offered to undertake by submitting its bid.

17. Intervenor's post-hearing memorandum adds a perceptive discussion of the dullness of memory when attesting to a matter of routine, as was the testimony of Petitioner's employee who "always" attached bid bonds to bids, compared to the vividness of memory when attesting to a rare deviation from routine, as was the testimony of Respondent's three employees who were startled to find that bid bonds were missing from two bid packages, looked for the missing documents, and could not find them. On the present record, it would be slightly less troubling to find that Petitioner's bid package lacked the bid bond, but, as noted below, the burden of proof is on Petitioner, so it suffices to find that Petitioner has failed to prove that its bid package contained the bid bond.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes.)

19. Section 120.57(3)(f) provides:

> . . . 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.

20. Section 120.57(3)(f) states that the ultimate issue in an award case is whether the proposed agency action is contrary to statutes, rules, policies, or the specifications. Section 120.57(3)(f) states that the standard of proof in an award case is whether the proposed agency action is clearly erroneous, contrary to competition, arbitrary, or capricious (Clearly Erroneous Standard).

21. Section 120.57(3)(f) also states that an award case, but not a nonaward case, is a de novo proceeding. In the typical de novo proceeding, pursuant to Section 120.57(1)(j), the administrative law judge finds facts using the preponderance standard, not a standard more deferential to the agency. In the typical de novo proceeding, the administrative law judge determines the basic and ultimate facts, as long as they are determinable by ordinary methods of proof and are not infused with policy considerations. See, e.g., Holmes v. Turlington,

480 So. 2d 150 (Fla. 1st DCA 1985); Bush v. Brogan, 725 So. 2d 1237 (Fla. 2d DCA 1999); Gross v. Department of Health, __ So. 2d __, 27 Fla. L. Wkly. D1492, 2002 WL 1389304 (Fla. 5th DCA 2002); South Florida Cargo Carriers Association, Inc. v. Department of Business and Professional Regulation, 738 So. 2d 391 (Fla. 3d DCA 1999); and Belleau v. Department of Environmental Protection, 695 So. 2d 1305 (Fla. 1st DCA 1997).

22. Whether the facts are denominated basic or ultimate, the factfinding responsibility of the administrative law judge in the typical de novo hearing encompasses all of the facts that are necessary to reduce the remaining issues to pure questions of law. Cf. Pierce v. Piper Aircraft Corp., 279 So. 2d 281 (Fla. 1973). These facts include direct facts and reasonable inferences drawn from these direct facts. See, e.g., Southpointe Pharmacy v. Department of Health and Rehabilitative Services, 596 So. 2d 106 (Fla. 1st DCA 1992), and Heifetz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985).

23. The Clearly Erroneous Standard, which applies to the assessment of the proposed agency action, does not conflict with the requirement of Sections 120.57(3)(f) and 120.57(1)(j) that the administrative law judge apply the preponderance standard to the basic and ultimate facts. The court in Asphalt Pavers, Inc. v. Department of Transportation, 602 So. 2d 558 (Fla. 1st DCA

1992), held that the administrative law judge retained typical factfinding responsibility even after Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988), in which the Supreme Court held that the hearing officer occupied a deferential role in a nonaward case. (Maintaining the Groves-Watkins deferential standard for a nonaward case, Section 120.57(1)(j) establishes a less-deferential standard for an award case.)

24. The Asphalt Pavers court rejected the agency's attempt, in reliance upon Groves-Watkins, to preempt the hearing officer's typical factfinding responsibilities. In Asphalt Pavers, the agency overturned a finding by the hearing officer that a bid package had included a disadvantaged business enterprise (DBE) form. The Asphalt Pavers court reaffirmed the post-Groves-Watkins responsibility of the hearing officer--as to factual matters susceptible to ordinary methods of proof and not infused with policy considerations--to engage in typical factfinding, including drawing permissible inferences and making ultimate findings of fact.

25. In addition to applying the Clearly Erroneous Standard to the determination whether the proposed decision to award is contrary to statutes, rules, policies, or the specifications, the administrative law judge applies the Clearly Erroneous Standard to questions of fact requiring the application of the

agency's technical expertise, such as whether a specific product or service qualitatively complies with the specifications; questions infused with agency policy; and all questions of law within the substantive expertise of the agency, such as the meaning of its nonprocedural rules.

26. The administrative law judge also applies the Clearly Erroneous Standard in addressing mixed questions of fact and law. In a legal action, a judge resolves mixed questions of fact and law as a matter of law if only one resolution is reasonable; if more than one resolution is reasonable, the trier of fact resolves the issue. See, e.g., Adams v. G.D. Searle & Co., Inc., 576 So. 2d 728 (Fla. 2d DCA 1991), and Hooper v. Barnett Bank of West Florida, 474 So. 2d 1253 (Fla. 1st DCA 1985).

27. Similarly, in a case requiring the interpretation of a contract susceptible to more than one interpretation, a judge determines as a matter of law whether the contract is ambiguous and, if so, the trier of fact resolves the ambiguity. See, e.g., North Star Beauty Salon, Inc. v. Artzt, __ So. 2d __, 2002 WL 1431916 (Fla. 4th DCA 2002), and Barclays American Mortgage Corp. v. Bank of Central Florida, 629 So. 2d 978 (Fla. 5th DCA 1993). The trier of fact may have to resolve factual disputes to enable the legal determination of whether a contract is ambiguous. Board of Trustees of the Internal Improvement Trust

Fund v. Lost Village Corp., 805 So. 2d 22 (Fla. 4th DCA 2001). These legal principles governing the interpretation of contracts are applicable to the interpretation of an agency's specifications, bidder's bid, or offeror's proposal--all of which are forms of offers to contract.

28. The question often arises whether a deviation in a bid or offer constitutes a material variance, which the agency may not waive, or a minor irregularity, which the agency may waive. Although the ultimate question of responsiveness requires the application of a deferential standard, as discussed below, the fact-intensive determination of such issues as competitive advantage, which underlie most determinations concerning the significance of deviations, requires the application of the preponderance standard, except in situations in which the agency's determination concerning the significance of a deviation is infused with agency policy or agency expertise.

29. This dual approach to the standard of proof is consistent with State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998). In State Contracting, the court affirmed the agency's final order that rejected the recommendation of the administrative law judge to reject a bid on the ground that it was nonresponsive. The bid included the required disadvantaged business enterprise (DBE) form, but, after hearing, the

administrative law judge determined that the bidder could not meet the required level of participation by DBEs. The agency believed that responsiveness demanded only that the form be facially sufficient and compliance would be a matter of enforcement. Rejecting the recommendation of the administrative law judge, the agency reasoned that the administrative law judge had failed to determine that the agency's interpretation of its rule was clearly erroneous.

30. In affirming the agency's final order, the State Contracting court quoted the provisions of Section 120.57(3)(f) for evaluating the proposed agency action against the four criteria of contrary to statutes, rules, policies, and the specifications and against the Clearly Erroneous Standard. Addressing the meaning of a de novo hearing in an award case, the court stated, at page 609:

> In this context, the phrase "de novo hearing" is used to describe a form of intra-agency review. The [administrative law judge] may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency.

31. The State Contracting court applied the Clearly Erroneous Standard to the agency decision to award, the agency's interpretation of one of its rules, and the agency's determination that the bid was responsive. The State

Contracting case did not feature prominently factual disputes concerning the basic and ultimate facts.

32. In the present case, the main issue is whether Petitioner's bid package included the bid bond when it was submitted to Respondent. All of the required facts are determinable by ordinary methods of proof, and none of the required facts is infused with policy or requires the application of agency expertise. Finding the basic facts and making permissible inferences based on these facts supply the factual foundation upon which this case may be resolved. Therefore, these determinations require the application of the preponderance standard of proof.

33. As noted in the Findings of Fact, Petitioner has failed to prove that the bid bond accompanied its bid package when submitted to Respondent. There were opportunities for Respondent's employees to lose the bid bond, and there were opportunities for Petitioner's employee to lose the bid bond. It is very odd that two bid packages in one day lacked bid bonds, but very odd events happen, just not often. The most persuasive evidence in this case is the testimony of Respondent's three employees that they could not find the bid bond while they were still in the conference room.

34. Petitioner relies on two cases similar to the present case. In Overstreet Paving Company v. Department of

Transportation, 608 So. 2d 851 (Fla. 2d DCA 1992), and Asphalt Pavers, cited above, the bid packages of both bidders, which were bidding on different portions of the same project, lacked the subcontractors' DBE forms. The agency declared both bids nonresponsive for their failure to include this required item. In both cases, the courts, applying the deferential standard of Groves-Watkins, held that the agency lacked the authority to reject the bids as nonresponsive for the missing DBE forms.

35. As noted above, the Asphalt Pavers hearing officer found that the DBE form accompanied the bid package when it was submitted to the agency and was lost sometime while in the agency's possession. In Asphalt Pavers, no agency employee could recall opening the subject bid package, and no employee discovered that the DBE form was missing until two and one-half hours after bid opening and after a number of agency employees had handled the opened bid package. Determining that the agency's rejection of the bid was arbitrary because it was based on a missing form that the agency had lost, the court reversed the agency's final order rejecting the bid as nonresponsive.

36. The Overstreet Paving hearing officer did not expressly find that the agency lost the DBE form, but did find that the omission of the form did not give the bidder a competitive advantage; thus, the deviation was a minor irregularity rather than a material variance. Rejecting the

agency's argument that the bidder must establish that the agency lost the DBE form in order, effectively, to force the agency to exercise its discretion to waive a minor irregularity, the court held that, given the relative unimportance of the DBE form, the bidder need only establish a prima facie case that it had included the form in its bid package. Once the bidder made such a case, the agency had to refute the prima facie case, or else its acceptance of a higher bid would be arbitrary. In assessing the evidence, the court stressed that the agency's employees did not discover that the bid package was missing the DBE form for some time after the bid opening.

37. These cases are not as similar to the present case as they initially appear. First, a bidder obtains competitive advantage by the omission of a bid bond, but not by the omission of a DBE form. Second, the agency's delay in discovering the missing items raises the likelihood that the agency lost the item, but the agency's immediate discovery of a missing item raises the likelihood that the bidder lost the item.

38. Here, Petitioner has failed to prove that Respondent lost Petitioner's bid bond. Thus, Petitioner has failed to prove that Respondent is responsible for the missing bid bond, whose omission is a material variance. Therefore, Respondent properly rejected Petitioner's bid as nonresponsive and awarded the contract to Intervenor.

RECOMMENDATION

It is

RECOMMENDED that the Department of Transportation enter a final order dismissing the bid protest of Petitioner and awarding the contract to Intervenor.

DONE AND ENTERED this 6th day of August, 2002, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of August, 2002.

COPIES FURNISHED:

Thomas F. Barry, Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399-0450

James C. Myers, Clerk of Agency Proceedings
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

Barbara Gasper Hines
Assistant General Counsel
Department of Transportation
605 Suwanee Street, Mail Station 58
Tallahassee, Florida 32399-0458

Joseph W. Lawrence, II
Vezina, Lawrence & Piscitelli, P.A.
360 East Las Olas Boulevard, Suite 1130
Fort Lauderdale, Florida 33301

F. Alan Cummings
Smith, Currie & Hancock LLP
1004 DeSoto Park Drive
Post Office Box 589
Tallahassee, Florida 32302-0589

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.