STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RHC AND ASSOCIATES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-2230BID
	)	
HILLSBOROUGH COUNTY SCHOOL BOARD,	)	
	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 16, 2002, by video teleconference between sites in Tampa and Tallahassee, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: George P. Kickliter, Esquire
Post Office Box 17326
Clearwater, Florida 33762-0326

For Respondent: W. Crosby Few, Esquire
Few & Ayala
501 East Kennedy Boulevard
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue is whether the specifications in the request for qualifications advertised by Respondent on May 21, 2002, are

inconsistent with the provisions of Section 287.055, Florida Statutes, arbitrary, or otherwise contrary to competition.

PRELIMINARY STATEMENT

On May 21, 2002, a request for qualifications (RFQ) was published in the Tampa Tribune by the Hillsborough County School Board (School Board, Respondent, or District). The RFQ announced the School Board's need for professional architecture and/or engineering services, solicited proposals from persons interested in providing such services, and established a deadline of May 31, 2002, for the submittal of proposals.

By letter dated May 24, 2002, Petitioner provided Respondent "notice of [its] intent to file [a] protest pursuant to Florida Statute 120.57(3)." By letter dated June 3, 2002, Petitioner detailed its protest to the process and methods utilized by the School Board for the selection of engineers under the RFQ. Specifically, Petitioner alleged that the process failed to comply with certain provisions of Section 287.055, Florida Statutes.

On June 4, 2002, the School Board referred the matter to the Division of Administrative Hearings (Division) for the assignment of an administrative law judge to conduct the hearing requested by Petitioner. The hearing was originally scheduled for June 27, 2002, but it was subsequently continued pursuant to a stipulation filed by the parties on June 21, 2002. See

Section 120.57(3)(e), Florida Statutes, (requiring competitive procurement protests to be heard within 30 days unless that time period is "waived upon stipulation by all parties").

The hearing was held on July 16, 2002. At the outset of the hearing, Respondent made an ore tenus motion to dismiss on the ground that Petitioner lacks standing. After hearing argument on the motion, the undersigned reserved ruling on the motion until the Recommended Order. As more fully discussed below, the motion is denied.

At the hearing, Petitioner presented the testimony of Joe Robinson, an engineer and the majority owner of Petitioner; Paul Curtis, an engineer and general contractor; and Ray Horner, an engineer and a minority owner of Petitioner. Petitioner's Exhibits P1 through P11 were received into evidence. The undersigned sustained Respondent's relevance objection to Exhibits P12-A, P12-B, and P12-C. Those exhibits have not been considered in the preparation of this Recommended Order, but they are transmitted to the School Board herewith because they were proffered at the hearing.

At the hearing, Respondent presented the testimony of Tom Blackwell, the School Board's Director of Planning and Construction, and Jack Davis, the School Board's Assistant Superintendent for Operations. Respondent's Exhibits R1 and R2 were received into evidence.[1]

At the hearing, official recognition was taken of Section 4.1 of State Requirements for Educational Facilities (SREF), 1999 edition, which is incorporated by reference into Rule 6-2.001, Florida Administrative Code. By Order dated August 7, 2002, official recognition was also taken of Sections 7.29 through 7.33 of the Hillsborough County School Board Policy Manual (Policy Manual), as adopted by the School Board on July 30, 2002.

On August 19, 2002, Respondent filed a certified copy of the transcript of the School Board's July 30, 2002, meeting. Petitioner did not file anything objecting to the submittal, and the parties did not discuss the transcript in their proposed recommended orders. The transcript is received as Exhibit R3, but only for the limited purpose of showing that the revisions to the Policy Manual were, indeed, approved by the School Board.

The Transcript of the hearing was filed with the Division on August 5, 2002. In accordance with Rule 28-106.216, Florida Administrative Code, the parties were given 10 days from the date of the hearing to file their proposed recommended orders. Subsequently, the parties requested an extension of time to file their proposed recommended orders, and they concomitantly waived the requirements of Section 120.57(3)(e), Florida Statutes, regarding the deadline for the undersigned to submit this Recommended Order. By Order dated August 7, 2002, the deadline

for the parties' proposed recommended orders was extended to August 19, 2002.

The School Board timely filed its Proposed Recommended Order on August 19, 2002. Petitioner filed its Proposed Recommended Order on August 20, 2002. The parties' Proposed Recommend Orders were considered by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following findings are made:

Parties

1. Petitioner is an engineering firm. Joe Robinson, a professional engineer, is the majority owner and president of Petitioner.

2. Petitioner is a certified minority-owned business because Mr. Robinson and at least one of his partners are African-American males.

3. Respondent is a local school district, and is responsible for the management and operation of the approximately 200 public schools in Hillsborough County.

4. Respondent's annual budget for construction and renovation of schools is between $160 million and $200 million per year, with an unspecified but large portion of that amount

attributable to the cost of competitively procured architectural, engineering and construction services.

5. Petitioner has done very little engineering work for the School Board in the past. It worked on a study for the School Board in 1986, and worked on a warehouse project for the School Board in 1994. Over the past four years, Petitioner has applied for only one engineering project with the School Board.

6. At the request of the School Board staff, Mr. Robinson provided comments to Ernst & Young, a consulting firm hired by the School Board to conduct "a forensic evaluation and analysis of the District's construction and maintenance policies, practices, and procedures" and to review the School Board's minority business enterprise program.

7. The findings and recommendations in the report prepared by Ernst & Young (discussed below), along with Petitioner's "insights" and input, led to revisions in the School Board's policies and procedures for procuring architectural and engineering services. Those revisions, adopted by the School Board on July 30, 2002, are not at issue in this proceeding; they are being challenged by Petitioner in DOAH Case No. 01-3138RP.

Ernst & Young Report

8. On May 17, 2002, Ernst & Young submitted a 121-page report based upon its evaluation. The report was critical of

many aspects of the School Board's procurement, construction, and maintenance policies, practices, and procedures.

9. With respect to the procurement of architectural and engineering services, the report included the following assessment which is pertinent here:

> Our review of [the District's] vendor's [sic] selection process indicates, in many respects, that the process follows traditional requirements established by SREF and Florida Statute [sic]. Furthermore, in many instances, the procedures mirror those utilized by peer and contiguous school districts. However, we have identified significant shortcomings related to ranking the professional service providers that have submitted bids for either architectural design, engineering, or construction management services.
>
> * * *
>
> Interviews with the A/E/C [architectural/engineering/construction] community have indicated that the vendor selection process is generally understood by the professional community. However, the architects and construction managers within the community do not understand how vendors are evaluated or ultimately rank ordered [sic] by the District to arrive at a list of the three highest ranked respondents. As a matter of fact, the District has moved away from using a score sheet or "score card" with pre-established evaluation criteria and a weighted point structure, and toward a rather subjective process whereby a selection committee simply appoints professional service providers either based upon past performance on a similar type of project (i.e. replicate design) or based upon the District's desire to equitably distribute work amongst the A/E/C community.

> This type of evaluation and selection process, as currently utilized by the District, while effective at distributing work amongst the A/E/C community, does not ensure that the best or most qualified vendor will be selected for each of the proposed school district projects. The current vendor selection process could permit abuse and favoritism as the selection committee could be influenced by School Board input, personal relationship [sic] and lack of objective criteria. Although we found no evidence of undue influence, the subjective nature of the process offers the District little credibility.
>
> * * *
>
> E&Y [Ernst & Young] found that the vendor selection process being utilized by [the District] lacks credibility in that it remains highly subjective as new projects are allocated without respect to numerical analysis of prior performance, company financial condition, proposed project management team, etc. Moreover, the selection committees do not rotate sufficiently to eliminate the possible influence from senior [District] Administrators or Board Members.

Ernst & Young Report, at 27-29 (emphasis supplied).

10. On these points, the report concluded:

> Upon comparison to each of the peer and contiguous school districts, Ernst & Young found that only [the District] engages in a vendor selection process in the absence of pre-established or pre-determined evaluation criteria and a numerically-based scoring system which permits a numerical ranking of each interested professional service provider. E&Y found that the vendor selection process being utilized by [the District] lacks credibility in that it remains highly subjective as new projects

> are allocated without respect to numerical analysis of proper performance, company financial condition, proposed project management team, etc. . . .

Ernst & Young Report, at 107 (emphasis supplied).

11. The report's description of the School Board's current evaluation and selection process is consistent with the testimony at the hearing, as more fully discussed below.

12. The report included the following recommendations relevant to the procurement of architectural and engineering services:

> The District's vendor selection process can be more objective and better understood within the A/E/C community by developing standard evaluation criteria and a numerically-based scoring system. Such a system will permit the District to numerically rank each interested professional service provider and thus eliminate bias and potential favoritism of the [District] selection committee. Evaluation criteria should include, among other things, prior performance, company financial condition, proposed project management team, etc. Moreover E&Y recommends that the District augment its vendor selection committees with community members, business leaders, school principals, and other external stakeholders as appropriate. In conjunction, [the District] should also increase its rotation of the selection committees [sic] members to eliminate possible influence from senior Administrators or Board Members.

Ernst & Young Report, at 117.

The Request for Qualifications

13. The School Board has five in-house architects and six in-house inspectors who are responsible for overseeing all of the District's planning and construction projects.

14. The primary function performed by the architects is project management, i.e., "rid[ing] herd" over construction schedules and overseeing the work of the project architects and construction managers. The primary functions of the inspectors are code enforcement, quality assurance management, and contract compliance.

15. In addition to the recommendations quoted above, the Ernst & Young report recommended that the School Board augment its in-house staff to provide more on-site supervision and inspection of construction projects. Specifically, the report recommended:

> [T]o protect the District's interest, it would be beneficial to have a full-time on-site owner's representative, which could be either a District employee, a licensed architect, independent engineer or experienced construction manager with a demonstrated history of successfully completing quality construction projects. The result of the full time [sic] on-site representative is better control of the quality of the work being performed, a working knowledge of the project, the ability to identify and solve problems when they first arise, and promotes the accountability amount the parties involved to deliver the highest quality product. Since capital project expenditures are

> expected to peak within the next three years, E&Y recommends using either an outsourcing strategy or contract employee to serve this need.

Ernst & Young Report, at 118-19.

16. In an effort to implement this recommendation, the School Board published the following notice in the Tampa Tribune on May 21, 2002:

> THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, Florida, announces that professional architectural and/or professional engineering services will be required. These services will consist of providing architectural and/or engineering project management personnel to supplement existing district staff. Duties may include design reviews, project coordination, administration, on-site observation and quality control. Applicants will be expected to provide personnel possessing recent relevant project management experience on K-12 educational facilities.
>
> Any applicant interested in providing services shall submit a completed G.S.A. Form 254. Said form shall be separate and apart from any accompanying materials.
>
> All material must be submitted to J. Thomas Blackwell, Director of Planning & Construction, 901 East Kennedy Boulevard, Tampa, Florida 33602 by 4:00 p.m. on May 31, 2002. Applicants are encouraged to submit electronically by emailing pdf documents to tom.blackwell@rossac2.sdhc.k12.fl.us.

17. No additional information was made available to potential respondents regarding the nature or extent of the services sought to be procured by the RFQ. However, at the

hearing, it was explained that the School Board expected to procure the services of five project coordinators or project managers through the RFQ. The five positions could be filled by different firms on a full-time or half-time basis or by a single firm, depending upon the submittals and the outcome of the evaluation process.

18. The G.S.A. Form 254 referenced in the advertisement solicited general information about the applicant, including whether the applicant is a "small disadvantaged business." The form also required the applicant to provide a list of its projects over the past five years, including information relating to the type of project, cost of the project, and completion date.

19. Neither the RFQ nor any other information provided to potential respondents in advance explains how the responses will be evaluated.

20. Neither the RFQ nor any other information provided to potential respondents in advance identifies the factors that the School Board will consider in evaluating the response or the weight that the School Board will give to such factors.

Petitioner's Protest

21. Petitioner received notice of the RFQ on May 21, 2002, through the newspaper advertisement. The evidence does not establish the time of day that Petitioner received such notice.

22. By letter dated May 24, 2002, Petitioner provided the School Board notice of its intent to protest the specifications in the RFQ.

23. By letter dated June 3, 2002, Petitioner formally protested the "selection methods" for the RFQ.

24. The record does not reflect when the School Board received the letters. However, Mr. Robinson testified that he "filed" the notice of protest letter on May 24, 2002, and "filed" the formal protest letter on June 3, 2002.

25. Petitioner, as an engineering firm, is qualified to submit a response to the RFQ. However, Petitioner did not submit a response to the RFQ. The record does not reflect how many, if any, firms responded to the RFQ by the May 31, 2002, deadline.

26. As a result of Petitioner's protest, the School Board put the RFQ "on hold."

The School Board's Procurement Process

27. At the time the RFQ was advertised, the School Board did not have an adopted policy prescribing the procedure by which it procured professional services in accordance with the Consultants' Competitive Negotiation Act (CCNA) in Section 287.055, Florida Statutes. Moreover, the policies and procedures that were in place (discussed below) did not explain to potential respondents how the responses to the RFQ will be

evaluated, nor did they prescribe the factors that the School Board will consider in evaluating the responses or the weight that will be given to each factor.

28. Section 7.14 of the Policy Manual simply authorizes the superintendent or his or her designee to "contract for professional or educational services to complete projects or activities authorized or approved by the school board."

29. The only other document describing the School Board's procurement process is a document entitled "Capital Projects Standard Procedures." That document was presented to but never adopted by the School Board.

30. The document references the CCNA in connection with the selection of architects and construction managers, but not engineers; and, it only provides a general outline of the selection process:

a. Publish legal advertisement for Professional Services (CCNA)
b. Screen (interview/presentation) applicants
c. Present "Order of Priority" to School Board
d. Negotiate contract terms and identify consultants
e. Present compensation package to School Board
f. Prepare contract documents
g. Secure signature of Architect and Board Chair

31. Despite the absence of an adopted policy, the selection process described by the School Board's witnesses at

the hearing generally complies with the requirements of the CCNA. That process would be used to evaluate the responses to the RFQ.

32. The process begins with publication of the RFQ in three local newspapers, the Tampa Tribune, the Florida Sentinel Bulliten, and La Gaceta. The RFQ is also posted on a website maintained by Tom Blackwell, the Director of Planning and Construction for the School Board. In the past, Mr. Blackwell also sent e-mails to firms which had previously applied for work from the School Board or which had shown interest in obtaining such work, but he no longer does so.

33. All of the applications received in response to the RFQ are referred to a committee for evaluation and interviews. In the past, the School Board utilized a list of certified vendors and interviewed only those applicants which had been certified. However, the School Board now interviews every applicant and uses the interview process to verify the applicant's credentials.

34. The committee is composed of five to seven members selected by Mr. Blackwell and Jack Davis, the School Board's Assistant Superintendent for Operations. The committee members include representatives of each of the District's administrative divisions, e.g., instructional, operations, and administrative.

35. Mr. Blackwell acts as a facilitator for the committee, but typically does not function as a voting member.

36. Mr. Blackwell provides the committee members a copy of the CCNA, and reviews with them the factors set forth therein. Mr. Blackwell also provides the committee members "tally sheets" which are used to evaluate the applicants in specified areas.

37. The sample "tally sheet" introduced at the hearing (Exhibit R2), identified 10 different "topics" for evaluation and assigned points to each topic:

Topic	Points
Experience in projects of similar size, scope and quality	15
History of adherence to budget constraints and cost control mechanisms	10
History of adherence to schedule constraints and delivery dates	10
References	10
Established quality control mechanisms	5
Established scheduling program	5
History of minority business participation	10
Qualifications of key personnel, support staff and resources	5
Organization of project team	5
Interview / Presentation	25

38. The committee members are not required to complete the "tally sheets" in any particular manner. Indeed, there are no written guidelines prescribing the manner in which the "tally sheets" must be completed by the committee members. Mr. Blackwell and Mr. Davis both testified that committee members

are given discretion as to the manner in which they record their observations of the applicants. In this regard, some committee members assign points to each applicant (as the sample "tally sheet" seems to contemplate), others use anecdotal notes, grades (i.e., A, B, C, D, or F), pluses and minuses, or check marks.

39. The committee reviews the materials submitted by the applicants in response to the RFQ (the completed G.S.A. Form 254) and formulates questions for the applicants based the criteria in the CCNA, e.g., the applicant's minority status or its minority participation history, its experience in completing projects on-time and within budget, its quality control and assurance measures. These questions are typically provided to the applicants in advance to enable them to prepare for their presentations and interviews.

40. Each applicant is given an opportunity to make a presentation to the committee. No guidelines are provided for the presentations. The types of presentations range from computerized presentations to display boards to bound books of information. As part of the presentation, the committee asks questions and interviews the applicant.

41. The committee is responsible for ranking the applicants based upon their qualifications. The committee does not consider compensation issues in formulating its ranking.

42. The committee formulates its ranking through a "consensus or group decision making process" rather than through a compilation of individual numerical scores. The decision-making process includes a discussion of each applicant's strengths and weaknesses by the committee members based upon their individual evaluations, input from District staff who worked with the applicant in the past, and visits to prior projects in which the applicant has been involved.

43. The committee's ranking is submitted to the School Board for approval.

44. After the School Board approves the ranking, Mr. Blackwell and his staff begin negotiations with the top-ranked applicant. The negotiations include discussion of the parameters of the project in greater detail as well as the compensation package.

45. If the negotiations with the top-ranked firm fail, then negotiations are commenced with next highest ranked firm. Typically, however, the negotiations with the top-ranked firm are successful.

46. Once the negotiations are completed, a contract is presented to the School Board for approval.

The Revised Procurement Policy

47. On July 30, 2002, the School Board approved revisions to its procurement policy and procedure. The revisions will be codified in Sections 7.29 through 7.33 of the Policy Manual.

48. The new Section 7.29 establishes the following policy for the acquisition of professional services:

> The acquisition of professional architecture, engineering, landscape architectural, land surveying, or construction management services shall be procured in accordance with Florida Statute 287.055 with the object of effecting an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms.

49. The other new sections establish the policies and procedures for the steps in the acquisition process, i.e., public announcement (Section 7.30), competitive selection (Section 7.31), competitive negotiation (Section 7.32), and standardized agreements (Section 7.33).

50. As noted above, Petitioner has challenged the validity of the revised policies in DOAH Case No. 02-3138RP. However, both Mr. Robinson and the School Board's witnesses agree that the revised policy is an improvement on the School Board's existing policy.

CONCLUSIONS OF LAW

Jurisdiction

51. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 120.57(3), Florida Statutes. (All references to Sections are to the Florida Statutes. All references to Rules are to the Florida Administrative Code.)

Standing

52. Respondent argues that Petitioner lacks standing to protest the RFQ specifications because it did not submit a response to the RFQ. This argument is rejected for the reasons that follow.

53. Standing to contest an agency's procurement decision is prescribed by Section 120.57(3)(b) which states that "[a]ny person who is adversely affected by the agency decision or intended decision" may file a notice of protest and formal written protest within the times specified by the statute. While this language appears to provide broad standing to protest competitive procurement decisions, case law has considerably narrowed standing in cases involving challenges to the intended award of the contract.

54. Standing to protest an agency's intended award of a contract is limited to bidders except in "exceptional

circumstances." See Ft. Howard v. Dept. of Management Services, 624 So. 2d 783, 785 (Fla. 1st DCA 1993); Westinghouse Elec. v. Jacksonville Transp. Authority, 491 So. 2d 1238, 1241 (Fla. 1st DCA 1986).

55. By contrast, potential bidders have standing to challenge the specifications in the procurement document, whether it is a bid solicitation, a request for proposals, or a RFQ. See Fairbanks, Inc. v. Dept. of Transportation, 635 So. 2d 58 (Fla. 1st DCA 1994); Florida Overland Express, L.P. v. Dept. of Transportation, DOAH Case No. 98-2172BID, Recommended Order, at 25-27 (Aug. 6, 1998). And cf. Advocacy Center for Persons with Disabilities, Inc. v. Dept. of Children & Family Services, Inc., 721 So. 2d 753 (Fla. 1st DCA 1998) (affirming dismissal of protest for lack of standing, but explaining that potential bidders have standing to challenge the specifications of a RFP as being vague, arbitrary, or unreasonable).

56. Underlying these different rules is the assumption that a specification protest will typically be filed before the responses to the bid solicitation, the request for proposals, or the RFQ are due. In such circumstances, it will likely be too early to determine whether the protestor will be a bidder; it can only be determined that the protester is a potential bidder. See Florida Overland Express Recommended Order, at 25-27.

57. The facts of this case belie that assumption. Here, Petitioner's formal written protest, while timely under Section 120.57(3)(b), was filed after the deadline for responding to the RFQ. Had Petitioner filed its formal written protest prior to the RFQ deadline, the solicitation process would have been stopped until the protest was resolved. See Section 120.57(3)(c). Under such circumstances, the time for submitting responses to the RFQ would have effectively been tolled pending resolution of the protest, and Petitioner could still have been considered a potential respondent to the RFQ because it is a qualified engineering firm. However, because the deadline for responding to the RFQ passed without Petitioner's submitting a response, it is now clear that Petitioner is not a respondent and, hence, not a potential respondent.

58. A similar circumstance was addressed in Florida Overland Express, supra. There, the formal written protest alleged that the petitioner was a potential respondent to the request for proposals (RFP). Id. at 25-26. However, the facts adduced at the final hearing demonstrated that the petitioner actually had no intention of responding to the RFP. Id. at 26. Despite the fact that the petitioner could no longer be considered a potential respondent, the administrative law judge concluded that the petitioner still had standing to challenge the RFP based upon the presence of "exceptional circumstances."

Id. at 26-27 (noting that the petitioner was the state's exclusive provider of high-speed rail transportation which was the subject of the request for proposals in that case).

59. Although Petitioner's interests in this case are not as exceptional as those of the petitioner in Florida Overland Express, it is nevertheless concluded that Petitioner's interests are sufficient to give it standing to challenge the specifications of the RFQ despite its failure to respond to the RFQ. Specifically, Petitioner's majority owner, Mr. Robinson, has been consistently critical of the School Board's procurement policies and procedures, and he provided comments in connection with Ernst & Young's evaluation of those policies and procedures. The same policies and procedures that were criticized in the Ernst & Young report four days prior to the issuance of the RFQ are at issue in this proceeding, albeit indirectly as part of the specifications of the RFQ. Under these circumstances, it would be inequitable to preclude Petitioner from protesting the specifications simply because the RFQ response time was less than the time allowed for filing a protest under Section 120.57(3)(b), particularly where the School Board was aware of Petitioner's notice of intent to protest prior to the deadline for responding to the RFQ.

60. In sum, Petitioner's failure to submit a response to the RFQ does not affect his standing as a "potential bidder" to

challenge the specifications to the RFQ. However, Petitioner's failure to submit a response along with its failure to file the formal written protest before May 31, 2002 (which would have stopped the solicitation process prior to the submittal deadline), will preclude Petitioner from submitting a response to the RFQ should the School Board determine in its final order that, contrary to the recommendation herein, Petitioner lacks standing or that the specifications of the RFQ are not deficient.

Timeliness

61. Section 120.57(3)(b) establishes strict timeframes for challenging the specifications in a bid solicitation, a request for proposals, or an RFQ. The statute provides:

> 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 72 hours after the receipt of notice of the project plans or specifications or intended project plans or 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.

(emphasis supplied).

62. The requirement that the notice of protest and the formal written protest be "filed" within specified periods

requires actual receipt of those documents by the procuring agency (here, the School Board) within the time specified in the statute. See, e.g., Environmental Resource Associates of Florida, Inc. v. Dept. of General Services, 624 So. 2d 330, 332 (Ervin, J., concurring) ("The term 'filed,' when used to denote a limitation period, is a legal term generally understood to mean that the agency must receive the matter required no later than the date stated"). Indeed, the Uniform Rules of Procedure which implement Section 120.57(3) specifically require the notice of protest to be "received by the agency before the 72-hour period expires." See Rule 28-110.003(2). And see Rule 28-110.003(4) ("The 72-hour period is not extended by service of the notice of protest by mail."); Rule 28-110.004(3) ("The time allowed for filing a [formal written protest] is not extended by mailing . . . .").

63. The evidence does not establish the time of day that Petitioner received notice of the RFQ, nor does it establish the time of day that the School Board received Petitioner's notice of protest. The evidence only establishes that Petitioner received notice of the RFP at some point on May 21, 2002 (the date the notice was published in the Tampa Tribune); and that Petitioner's notice of protest letter was dated May 24, 2002; and, based upon Mr. Robinson's testimony, that the letter was "filed" at some point on that date.

64. Similarly, the evidence does not establish when the School Board received Petitioner's formal written protest. The evidence simply establishes that Petitioner's formal written protest letter was dated June 3, 2002 (which is 10 days after the date of the notice of protest letter) and, based upon Mr. Robinson's testimony, that the letter was "filed" on that date.

65. The School Board did not contest the timeliness of Petitioner's protest at the hearing or in its Proposed Recommended Order. Accordingly, the School Board waived any objection to the timeliness of the protest. Alternatively, it is concluded that Mr. Robinson's unrebutted testimony that he "filed" the notice of protest and the formal written protest letters on May 24 and June 3, 2002, respectively, is sufficient to establish the timeliness of Petitioner's protest.

Mootness

66. The School Board argues that Petitioner's protest is moot as a result of the adoption of the revisions to the Policy Manual on July 30, 2002. This argument is rejected for the reasons that follow.

67. First, this proceeding is not a direct challenge to the existing policy. It is a challenge to the specifications of the RFQ which incorporate that policy.

68. The only relief available to the Petitioner in this proceeding is a determination that the specifications are

invalid which, in turn, would require the RFQ to be reformulated and re-advertised. See, e.g., Florida Overland Express, Recommended Order, at 27 (purpose of a specification protest is to refine the proposal's specifications); Capeletti Bros., Inc. v. Dept. of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1986) ("The purpose of the bid solicitation protest provision is to allow an agency, in order to save expense to the bidders and to assure fair competition among them, to correct or clarify plans and specifications prior to accepting bids."). This proceeding does not involve the validity vel non of either the School Board's existing policies and procedures or its revised policies and procedures. Accordingly, the School Board's adoption of the revised policies and procedures does not provide Petitioner the relief that it would be entitled if its protest of the RFQ specifications is successful.

69. Second, the revised policies and procedures are not yet in effect. Although they were "adopted" by the School Board on July 30, 2002, Petitioner has filed a challenge to them pursuant to Section 120.56(2). See RHC & Associates, Inc. vs. Hillsborough County School Bd., DOAH Case 02-3138RP (petition filed on Aug. 9, 2002; final hearing set for Sept. 11, 2002). The revised policies and procedures cannot be become effective until that proceeding is concluded. See Sections 120.56(2)(a) (proposed rule may be challenged within 10 days after date of

final public hearing on the rule), 120.54(3)(e)2. (rule may not be filed for adoption while administrative challenge is pending), and 120.56(2)(b) (same).

70. Third, the School Board's argument appears to presume that the revised policies and procedures will govern the award of the contract under the RFQ. However, it is well-settled that a bid must be awarded based upon the process and the specifications set forth in the bid solicitation, as advertised. See, e.g., Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931). Accordingly, if contrary to the recommendation herein, Petitioner's challenge to the specifications is rejected, the School Board must evaluate the responses to the RFQ under the existing policies and procedures (which were effectively incorporated into the RFQ), not the revised policies and procedures.

71. Certainly, the parties could have achieved through settlement the result effectively mandated by the recommendation herein -- i.e., withdrawal of the May 21, 2002, RFQ and re-advertisement under revised policies and procedures -- since both parties agree that the revised policies and procedures are an improvement on the existing policy which was criticized in the Ernst & Young report issued just four days prior to the publication of the RFQ. However, because the parties failed to reach a settlement and because the adoption of the revised

policies and procedures did not in and of itself effectuate that same relief, this case is not moot.

Burden of Proof and Scope of Proceeding

72. The burden of proof is on Petitioner in this proceeding. State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1998).

73. The scope of this proceeding is prescribed by Section 120.57(3)(f) which provides in pertinent part:

> 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.

(emphasis supplied). And see Advocacy Center, 721 So. 2d at 755:

> A challenge to an RFP must be directed to specifications that are so vague that bidders cannot formulate an accurate bid, or are so unreasonable that they are either impossible to comply with or too expensive to do so and still remain competitive.

74. Petitioner's protest, as detailed in its June 3, 2002, letter and through Mr. Robinson's testimony at the hearing, is based upon the premise that the School Board's existing procurement policy (which is effectively part of the

specifications for the RFQ) is inconsistent with Section 287.055 in several respects, and that the policy (and, hence, the specifications for the RFQ) is arbitrary and contrary to competition because it does not advise potential respondents in advance of the factors that that the School Board will consider in making its decision or of the weight that will be given to each factor. As discussed below, Petitioner met its burden of proof on the latter issue.

Merits of Petitioner's Protest

75. Section 287.055, the CCNA, governs the procurement of engineering and other professional services by local school boards. See Section 287.055(2)(b) (defining "agency" for purposes of the CCNA to include school districts and school boards); SREF, Section 4.1(1) ("Policies and procedures shall be adopted for selecting professional services in conformance with the Consultant's [sic] Competitive Negotiation Act (CCNA) pursuant to Section 287.055, F.S.").

76. Under the CCNA, the agency is first required to publicly announce its need for professional services. Section 287.055(3)(a). The public notice must include "a general description of the project and must indicate how interested consultants may apply for consideration." Id.

77. An individual or firm desiring to provide services must be certified by the agency as "fully qualified." Section

287.055(3)(c). In making that determination and in evaluating professional services under the CCNA, the agency is required to consider factors such as the capabilities, adequacy of personnel, past record, and experience of the firm or individual, and "other factors determined by the agency to be applicable to its particular circumstances." Id.

78. In the competitive selection phase, the agency is required to evaluate the qualifications of firms on file, as well as those submitted by other firms regarding the proposed project. See Section 287.055(4)(a). The agency is required to have discussions with no fewer than three firms as to their "qualifications, approach to the project, and ability to furnish the required services." Id. Then, no fewer than three firms deemed to be the "most highly qualified" are selected in order of preference. Section 287.055(4)(b). The factors an agency considers in making the selection are:

> the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the firms; and the volume of work previously awarded to each firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms.

Id.

79. An agency may request and consider proposals for the compensation to be paid under the contract only during the competitive negotiation phase of the process. Id. In this regard, Section 287.055(5)(a), Florida Statutes, states:

> The agency shall negotiate a contract with the most qualified firm for professional services at compensation which the agency determines is fair, competitive, and reasonable. In making such determination, the agency shall conduct a detailed analysis of the cost of the professional services required in addition to considering their scope and complexity. . . .

80. Should an agency be unable to negotiate a satisfactory contract with the most qualified firm at a price it deems fair, competitive and reasonable, negotiations with that firm must be terminated and the agency must undertake negotiations with the second-most qualified firm, and so on until an agreement is reached. Section 287.055(5)(b)-(c).

81. The purpose of the CCNA is to "promot[e] competition among firms supplying professional services to public agencies . . . and requiring negotiation of these professional services contracts with the view of obtaining the most qualified firm for a particular project upon the best terms." See Attorney General Op. 74-191 (July 1, 1974). Similarly, the general purpose of competitive procurement is:

> to protect the public against collusive contracts; to secure fair competition upon

> equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the county at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the county, by affording an opportunity for an exact comparison of bids.

Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977) (quoting Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931)) (emphasis supplied). Accord Section 287.001.

82. It is important to have uniform standards for evaluating the proposals and for such standards be published at the outset of the process. Otherwise, there is no way to determine whether each proposal is being measured by the same yardstick. This principle was succinctly summarized by another administrative law judge as follows:

> Part of the reciprocity achieved under the competitive bidding process is achieved in the bid specifications and weighted bid evaluation criteria. Potential bidders are advised in advance of the requirements to be met in order to receive the contract award, as well as the standards by which each bid will be evaluated by the agency and each standard's relative importance to the agency. In essence, this advance notice enables a potential bidder to gauge the agency's notions of the type of bid best suited to its purpose for the money involved. A potential bidder can then determine whether he can meet the bid specifications and criteria and thereby determine whether he wishes to go to

> the time, expense and trouble of preparing and submitting a fairly lengthy and detailed bid proposal. Therefore, central to the integrity and reciprocity of the competitive bidding process is the requirement that an agency's action on a bid can be expressed within the bid specifications and evaluation criteria which it created. In other words, should an agency reject a bid for reasons not given weight in the bid evaluation criteria, that action would go to the integrity of the competitive bidding process and would be arbitrary and capricious.

Deloitte & Touche LLP v. Dept. of Health & Rehabilitative Servs., DOAH Case No. 95-0727BID, Recommended Order (May 12, 1995) (citations omitted)(quoting Courtney v. Dept. of Health & Rehabilitative Servs., 12 F.A.L.R. 2226 (1990)). And cf. Wester, 138 So. at 724 ("[I]t has been generally recognized and held by the courts that it is the duty of public officers charged with the responsibility of letting contracts under the statute to adopt, in advance of calling for bids, reasonably definite plans or specifications, as a basis on which bids, may be received. . . . . Neither can they include other reservations which by their necessary effect will render it impossible to make an exact comparison of bids.") (citing Clark v. Melson, 89 So. 495 (Fla. 1921)); Aurora Pump v. Gould Pumps, 424 So. 2d 70 (Fla. 1st DCA 1982); Advocacy Center, 721 So. 2d at 755.

83. Although the above-cited cases arose in the competitive bidding context, the principles underlying the

decisions in those cases are equally applicable to the competitive negotiation process under Section 287.055. Indeed, each of the first two steps in the process under Section 287.055 -- i.e., qualification and competitive selection -- require the agency to evaluate competing firms based upon statutory criteria. While the statute gives the agency flexibility in determining and weighting the factors used to evaluate the qualifications and the "most highly qualified" firm, see Section 287.055(3)(c), the statute does not relieve the agency of its obligation to ensure fairness in the process. See Attorney General Op. 2002-03 (Jan. 7, 2002) (suggesting that it would be contrary to the process established by the CCNA and potentially arbitrary and capricious for a school board to give undue weight to any single factor in the competitive selection phase). Moreover, as described above, a critical aspect of a fair process is that the evaluation criteria and their relative importance to the agency (and, hence, their weight in the evaluation process) are specified in advance.

84. The evidence demonstrates that the School Board's current selection process, although not detailed in a formally-adopted rule or policy, is consistent with the procedural requirements of the CCNA. The only material difference is that the School Board has consolidated the second and third steps in the process -- i.e., qualification and competitive selection --

by interviewing every respondent and not just three pre-qualified firms as required by Section 287.055(4)(a). Accordingly, Petitioner failed to show that specifications of the RFQ are contrary to the School Board's governing statutes (i.e., Section 287.055) or its rules or policies. See Section 120.57(3)(f).

85. However, the evidence does demonstrate that the School Board's current selection process is deficient because neither the RFQ or the School Board's existing policies and procedures specify in advance the factors upon which the responses will be evaluated nor do they identify the weight which the School Board will give to each criteria. The process is also deficient because the selection committee members do not utilize a uniform method of evaluating the respondents. These deficiencies affect the integrity of the School Board's selection process and subvert the policies underlying Section 287.055 and competitive procurement generally. Accordingly, Petitioner met its burden of showing that the RFQ specifications are arbitrary and contrary to competition. See Advocacy Center, 721 So. 2d at 755 and Section 120.57(3)(f).

RECOMMENDATION

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

RECOMMENDED that the School Board issue a final order that rescinds the request for qualifications published May 21, 2002, and reformulates the specifications of the request in a manner that, at a minimum, advises potential respondents in advance of the factors upon which the responses will be evaluated and the weight that will be uniformly given to each factor by the selection committee.

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

T. KENT WETHERELL, II
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 September, 2002.

ENDNOTE

1/ By agreement of counsel, these exhibits were actually submitted after the hearing because copies were unavailable at the hearing. The exhibits were filed by Respondent on August 7, 2002.

COPIES FURNISHED:

W. Crosby Few, Esquire
Few & Ayala
501 East Kennedy Boulevard
Suite 1401
Tampa, Florida 33602

George P. Kickliter, Esquire
Post Office Box 17326
Clearwater, Florida 33762-0326

Honorable Charlie Crist
Commissioner of Education
Department of Education
The Capitol, Plaza Level 08
Tallahassee, Florida 32399-0400

Daniel Woodring, General Counsel
Department of Education
The Capitol, Suite 1701
Tallahassee, Florida 32399-0400

Dr. Earl J. Lennard, Superintendent
Hillsborough School Board
Post Office Box 3408
Tampa, Florida 33601-3408

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.