STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SIMPLEX GRINNELL LP,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-2375BID
	)	
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
INTERSTATE FIRE SYSTEMS, INC., and PIPER FIRE PROTECTION, INC.,	)	
	)	
Intervenors.	)	
_____	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tallahassee, Florida, on July 12, 2002.

APPEARANCES

For Petitioner: Karen D. Walker
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For Intervenor: Piper Fire Protection, Inc.:

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For Intervenor: Interstate Fire Systems, Inc.:

No appearance

STATEMENT OF THE ISSUES

The issues are whether Respondent's proposed award of four contracts to Intervenor Piper Fire Protection, Inc., is contrary to statutes, rules, policies, or the specifications, pursuant to Section 120.57(3)(f), Florida Statutes, and, if so, whether Respondent's identification of Intervenor Interstate Fire Systems, Inc., as the next lowest responsive bidder for one of the contracts is also contrary to statutes, rules, policies, or the specifications.

PRELIMINARY STATEMENT

By formal written protest filed on June 3, 2002, and amended on July 12, 2002, Petitioner protested Respondent's proposed award of four contracts to Respondent Piper Fire Protection, Inc. The Administrative Law Judge granted leave to both intervenors to intervene in this case.

At the hearing, Petitioner called two witnesses. Respondent called three witnesses and offered into evidence two exhibits: Respondent Exhibits 1-2. Intervenors called no

witness. The parties jointly offered 13 exhibits: Joint Exhibits 1-13. All exhibits were admitted.

The court reporter filed the transcript on July 26, 2002. The parties filed their proposed recommended orders on August 5, 2002.

FINDINGS OF FACT

1. On February 21, 2002, Respondent issued an invitation to bid under the bid title, "Life Safety Equipment Inspection, Maintenance & Repair Services" (ITB). ITB Section 6.1 provides that Respondent will award a contract to the "responsive, responsible bidder" with the lowest bid; thus, the ITB does not contain business criteria on which responsive bids of responsible bidders are evaluated.

2. ITB Section 2.1 states: "Life Safety Equipment inspection, maintenance and repair services have, in the past, been procured by the individual institution or facility or handled in-house." Electing to centralize the procurement of these services, Respondent "has decided to competitively bid for life safety equipment inspection services by region." ITB Section 2.3 discloses that Respondent intends to contract with a single vendor in each geographical region.

3. ITB Section 2.2 states:

> The successful bidder/contractor shall provide Life Safety Equipment inspection, maintenance and repair services for the following items . . .:
>
> 1. Annual Fire Alarm System inspection, testing, repair and maintenance.
>
> 2. Fire Extinguisher six (6) year recharge and maintenance, twelve (12) year recharge and hydrostatic testing, and fire extinguisher replacement.
>
> 3. Semi-Annual Kitchen Fire Suppression Systems testing, inspection and maintenance.
>
> 4. Annual Sprinkler Systems inspection, repair and maintenance.
>
> 5. Kitchen Exhaust Hood Cleaning on an as-needed basis with a minimum of twice annually.

4. ITB Section 3.1.1 states that the selected contractor shall provide "Life Safety Equipment inspection, maintenance and repair services on the following equipment: Fire Alarm Systems, Kitchen Fire Suppression Systems, Sprinkler Systems and Kitchen Hoods." Section 3.1.1 requires that the "Contractor shall be licensed" under Chapter 633, Florida Statutes.

5. ITB Section 3.7.3 states: "The Contractor's staff shall be fully trained and certified to perform the inspection, maintenance and repair of the equipment specified in this ITB. Acceptable proof of certification shall be in accordance with Chapter 633, Florida Statutes."

6. Chapter 633, Florida Statutes, enumerates the responsibilities of the State Fire Marshall, Department of Insurance. In general, the State Fire Marshall has complete licensing and disciplinary jurisdiction over commercial suppliers of the activities described in subparagraphs 2-4 of paragraph 3, above. Under Section 633.70(1), the State Fire Marshall has nonexclusive jurisdiction over certain violations by alarm system contractors (as used in this recommended order, "alarm system contractors" shall include electrical contractors authorized to perform alarm system services).

7. Although not addressed by the ITB, except possibly the first sentence of Section 3.7.3, alarm system contractors are under the licensing and disciplinary jurisdiction of the Electrical Contractors' Licensing Board, Department of Business and Professional Regulation, pursuant to, respectively, Sections 489.511 and 489.533(2), Florida Statutes. Licensing and disciplinary jurisdiction for the cleaning of kitchen exhaust hood systems in correctional institutions is unclear, but Respondent's Rule 33-20.4003(4)(a), Florida Administrative Code, adopts Rule 64E-11.008(4), Florida Administrative Code, which requires that kitchen ventilation systems comply with applicable fire prevention systems.

8. In contrast to ITB Section 3, which describes the scope of services, ITB Section 4 sets forth the provisions governing

the procurement process. ITB Section 4.3.6 states: "The Department **will** reject any and all bids not meeting mandatory responsiveness requirements. In addition, the Department **will** reject any and all bids containing material deviations."

9. ITB Section 4.3.6.1 defines "mandatory responsiveness requirements" as "[t]erms, conditions or requirements that must be met by the bidder/contractor to be responsive to this ITB. These responsiveness requirements are **mandatory**. Failure to meet these responsiveness requirements will cause rejection of a bid."

10. ITB Section 4.3.6.2 defines "material deviations" as:

> The Department has established certain requirements with respect to bids to be submitted by bidder/contractor. The use of *shall*, *must* or *will* (except to indicate simple futurity) in this ITB indicates a requirement or condition which may not be waived by the Department. A deviation is material if, in the Department's sole discretion, the deficient response is not in substantial accord with this ITB's requirements, provides an advantage to one bidder over other bidders, has a potentially significant effect on the quantity or quality of items or services bid, or on the cost to the Department. Material deviations cannot be waived and shall be the basis for rejection of a bid.

11. ITB Section 4.3.6.3 defines "minor irregularities" as:

> A variation from the ITB terms and conditions which does not affect the price of the bid or give the bidder an advantage or benefit not enjoyed by the other bidders

> or does not adversely impact the interests of the Department.

12. ITB Section 4.3.9 states:

> **All bidders planning to submit a bid must submit a letter stateing this intent by the date and time specified in the "Calendar of Events" (Section 4.2).** This letter may be e-mailed, mailed, faxed or hand delivered; however, the bidder should confirm receipt of the notice of intent in order to ensure continued receipt of procurement materials.

Section 4.3.10 adds that Respondent will mail addenda to the ITB "**only to those bidders submitting a Letter of Intent to Bid**."

13. ITB Section 5.1 identifies four "mandatory responsiveness requirements." Section 5.1.1 requires the bidder to supply an original and one copy of the bid. Section 5.1.2 requires a duly authorized person to sign the supplemental bid sheets. Section 5.1.3 requires the bidder to sign and deliver an acknowledgement of contractual services. Section 5.1.4 requires the bidder to sign an acknowledged certification of six conditions: "business/corporate experience," "authority to legally bind the bidder," "acceptance of terms and conditions," "statement of no involvement," "nondiscrimination statement," and "unauthorized employment of alien workers statement."

14. ITB Section 5.1.4.1 details the requirements of the "business/corporate experience" certification:

> A statement certifying that the bidder/contractor has business/corporate experience of at least three (3) years

> relevant to the provision of life safety equipment services as defined herein, within the last five (5) years.

15. The reference in Section 5.1.4.1 to "life safety equipment services as defined herein" is not to an explicit definition of such services in the ITB. A restatement of Section 5.1.4.1 in the attachments omits "as defined herein."

16. ITB Section 1.6 defines "Life Safety Equipment Inspection, Maintenance and Repair Services" as: "The inspection, maintenance and repair of fire alarm systems, fire extinguishers, kitchen fire suppression systems, sprinkler systems and the cleaning of kitchen exhaust hoods."

17. Petitioner and Intervenors timely submitted bids. Petitioner and Intervenor Piper Fire Protection, Inc. (Piper), submitted bids for all four geographical regions into which Respondent divided Florida. Intervenor Interstate Fire Systems, Inc. (Interstate), submitted a bid only for one geographical region. Petitioner and Piper timely submitted letters of intent to bid, but Interstate never submitted such a letter.

18. Determining that Petitioner and Intervenors' bids were all responsive, Respondent selected Piper's bids for all four geographical regions as the lowest bids. Petitioner submitted the second-lowest bid for three regions and, for the fourth region, Petitioner submitted the third-lowest bid; Interstate submitted the second-lowest bid for this region.

19. Petitioner timely submitted its notice of intent to protest and written protest. Petitioner and Intervenors have standing to participate in this case.

20. Petitioner contends that Piper's bid, which includes an executed certificate of business/corporate experience, was not responsive because Piper lacked the requisite business/corporate experience. Petitioner contends that Interstate's bid was not responsive because Interstate failed to submit a letter of intent to bid.

21. For three of the last five years, Piper presents the requisite experience only in sprinkler systems, not in fire alarm systems, fire extinguishers, or kitchen fire suppression systems. By contrast, Petitioner, which has been in the fire-safety business for over a century, has the requisite experience in all of these items.

22. As used in ITB Section 5.1.4.1, the "provision of life safety services as defined herein" requires consideration of the definition, at ITB Section 1.6, of "life safety equipment inspection, maintenance and repair services" as the "inspection, maintenance and repair of fire alarm systems, fire extinguishers, kitchen fire suppression systems, sprinkler systems and the cleaning of kitchen exhaust hoods."

23. Obviously, Section 1.6 applies the activities of inspecting, maintaining, and repairing only to fire alarm

systems, fire extinguishers, kitchen fire suppression systems, and sprinkler systems. Not only does it not make sense to inspect, maintain, and repair the "cleaning of kitchen exhaust hoods," but ITB Section 3.1.6 limits the scope of work for kitchen exhaust systems to cleaning. The scope of services for kitchen exhaust hoods is thus considerably narrower than the scope of services for the other items.

24. Kitchen exhaust hoods differ from the other items in another important respect. Although, among these items, only the kitchen exhaust hood is a significant source of fire, the licensing regime imposed on the inspecting, maintaining, and repairing of the other items is considerably more elaborate than the licensing scheme imposed upon the cleaning of kitchen exhaust hoods--likely due to the relative degrees of difficulty involved in the two sets of tasks.

25. As confirmed by the testimony of its witness responsible for preparing the ITB, Respondent did not intend to allow a bidder with three-of-the-last-five years' experience in cleaning kitchen exhaust hoods to satisfy this responsiveness criterion solely on the basis of this experience. A close reading of the ITB supports this intention. As noted above, the language of the ITB and common sense justify different treatment for the cleaning of kitchen exhaust hoods than for the inspecting, maintaining, and repairing of the fire alarm

systems, fire extinguishers, kitchen fire suppression systems, and sprinkler systems.

26. Perhaps most importantly, the responsiveness criterion addresses only life safety equipment. Fire alarm systems, fire extinguishers, kitchen fire suppression systems, and sprinkler systems are examples of equipment whose sole purpose is life safety. The purpose of a kitchen exhaust hood is not life safety, but kitchen ventilation. A clean kitchen exhaust hood eliminates a source of fire, but is not, in itself, a form a life safety equipment. The heading of Section 1.6 describes the inspecting, maintaining, and repairing of fire alarm systems, fire extinguishers, kitchen fire suppression systems, and sprinkler systems; the cleaning of kitchen exhaust hoods appears to have been an addition--perhaps a late one--by someone who gave little thought to the effect of this apparently innocuous clause on the grammar or title of Section 1.6 and, thus, the meaning of Section 5.1.4.1.

27. Even though the ITB precludes a bidder's reliance on cleaning kitchen exhaust hoods to meet the criterion of business/corporate experience, the more difficult question remains whether a bidder must present experience across the entire range of remaining items, or whether a bidder may present experience limited to one or fewer than all of the remaining items.

28. As noted above, by regulatory regimes, a line of possible demarcation exists between fire alarm systems, on the one hand, and fire extinguishers, kitchen fire suppression systems, and sprinkler systems, on the other hand. Additionally, the fire-alarm system is a detection system, and the remaining items are fire-fighting devices or systems. However, Piper's sole qualifying experience is in one of the fire-fighting systems, so this case does not directly raise the question of the sufficiency of otherwise-qualifying experience in only a fire-detection system.

29. Section 5.1.4.1 speaks in a general tone. First, the actual requirement is in services--the services here are inspecting, maintaining, and repairing. Second, the extent of the qualifying experience is left open. During the qualifying three years, the bidder needs only "experience." The ITB does not require exclusive experience, nor does it require even substantial experience. Arguably, part-time experience would suffice. Third, the ITB does not qualify the kind of "life safety equipment" for which service experience is required. Given the tone of the relatively relaxed responsiveness requirement, the Administrative Law Judge chooses "any" rather than "all" as a fairer word to precede "life safety equipment." (The close linkage among inspecting, maintaining, and repairing, as compared to the loose linkage among fire alarm systems, fire

extinguishers, kitchen fire suppression systems, and sprinkler systems, strongly suggests that the meaningful distinction is not among the types of services, but rather among the types of equipment receiving services.)

30. The fairest reading of the ITB thus allows a bidder to satisfy the responsiveness criterion with qualifying experience in only sprinkler systems, as Piper has done.

31. Although it is unnecessary to address the contention regarding Interstate, the requirement of filing a letter of intent to bid was clearly to assure that the prospective bidder would receive copies of bid materials, such as addenda. The testimony of Petitioner's witness that Petitioner's "knowledge" that Interstate, a strong competitor, was not going to submit a bid allowed Petitioner more latitude in setting a price is outweighed by the evidence of the purpose of this requirement, as set forth in the ITB and the deposition testimony of one of Respondent's witness, as well as the lower bid of Piper.

CONCLUSIONS OF LAW

32. 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.)

33. 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.

34. 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).

35. 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).

36. 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).

37. 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.)

38. 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.

39. 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.

40. 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).

41. 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.

42. 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.

43. 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.

44. 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.

45. 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.

46. The present case requires an interpretation of the ITB. The ITB is susceptible of more than one interpretation, so it is necessary to enter findings of fact to resolve the dispute concerning the meaning of the ITB. In doing so, the interpretation should be "consistent with reason, probability and the practical aspect of the transaction." Iniguez v. American Hotel Register Co., __ So. 2d __, 2002 WL 881384 (Fla. 3d DCA 2002) (citing with approval Maines v. Davis, 491 So. 2d 1233 (Fla. 1st DCA 1986).

47. The proper reading of the ITB is that a bidder satisfies the responsiveness criterion by providing qualifying service experience in fire alarm systems, fire extinguishers, kitchen fire suppression systems, or sprinkler systems. Piper has the requisite experience in sprinkler systems, so its bid was responsive.

48. Additionally, the failure of Interstate to submit a letter of intent to bid was a minor irregularity, which

Respondent could and did waive. The omission of the letter gave Interstate no competitive advantage.

RECOMMENDATION

It is

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

DONE AND ENTERED this 7th day of August, 2002, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
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 August, 2002.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this