

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALL AMERICA COMPANIES,)
)
 Petitioner,)
)
 vs.) Case No. 02-2776BID
)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondent.)
)
 _____)
 ALL AMERICA HOMES OF)
 GAINESVILLE, INC., a Florida)
 Corporation, individually and)
 d/b/a ALL AMERICA COMPANIES,)
)
 Petitioner,)
)
 vs.) Case No. 02-2777BID
)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION, BUREAU OF DESIGN)
 AND RECREATION SERVICES,)
)
 Respondent.)
)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Charles A. Stampelos, held a hearing in the above-styled case on August 8, 2002, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Allen E. Stine, President
All America Homes of Gainesville, Inc.
818 Southwest 105th Terrace
Gainesville, Florida 32607

For Respondent: Jerome I. Johnson, Esquire
Suzanne B. Brantley, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

At issue in this proceeding is whether the Department of Environmental Protection's decision to reject all bids submitted for the project entitled BDRS 52-01/02 was illegal, arbitrary, dishonest, or fraudulent.

PRELIMINARY STATEMENT

In or around November 2001, the Department of Environmental Protection (Department), by and through its Bureau of Design and Recreation Services (Bureau), prepared an Invitation to Bid (ITB) and published notice of the ITB in the Florida Administrative Weekly. The ITB requested bids from contractors to provide the necessary labor, supervision, equipment and materials to construct a new concession building at the Hillsborough River State Park, along with the alteration of the existing concession building.

Five bids were timely submitted, and the bids were opened on December 18, 2001. The Bid Tabulation Form was posted on

December 20, 2001, at 2:00 p.m. Nelco Diversified, Inc. (Nelco) was the apparent low bidder with a Base Bid of \$355,478.00. Petitioner, All America Homes of Gainesville, Inc. (All America) was second, with a Base Bid of \$362,000.00. Three other companies submitted bids, but their Base Bids far exceeded the bids of Nelco and All America. (No bidders, other than All America, are parties to this proceeding, nor has any other bidder participated in this proceeding in any manner.)

In January, 2002, All America filed a timely written protest to the Department's intended award of the contract to Nelco. The Department did not refer the matter to the Division of Administrative Hearings (Division).

On May 13, 2002, the Department posted notice of its intent to reject all bids. All America filed a timely written protest to this agency action. All America filed two petitions with the Department and both were referred to the Division and assigned Case Nos. 02-2776BID and 02-2777BID, respectively.

On July 26, 2002, and after a pre-hearing conference, All America filed a Petition to Prevent Rejection of Bids and Award Contract to Petitioner, essentially combining and refining the two prior-filed petitions, and alleged that the Department violated Section 120.57(3), Florida Statutes, by allowing additional information from Nelco when determining the low bidder and that the Department's action of rejecting all bids was

contrary to competition and arbitrary. All America requested attorney's fees but did not cite to a specific statutory provision. In its proposed recommended order, All America requested fees and costs up to \$15,000.00.

At hearing, All America called five witnesses: Marvin Allen, an architect and project manager with the Bureau of Design and Recreation Services; Mike Renard, Contracts Manager with the Bureau of Design and Recreation Services; Ed Bowman, Chief of the Bureau of Design and Recreation Services; and Allen E. Stine, President of All America. All America also presented 14 exhibits.

The Department called Marvin Allen, Mike Renard, and Ed Bowman as witnesses. In addition, the Department presented five exhibits.

All of the 19 exhibits offered by the parties were admitted as Joint Exhibit 1.

The two-volume transcript was filed with the Division on September 6, 2002. Each party filed a proposed recommended order, and each proposed recommended order has been considered in preparing this Recommended Order.

FINDINGS OF FACT

Parties

1. Petitioner, All America Homes of Gainesville, Inc. (All America), is a corporation doing business in the State of

Florida. All America submitted a timely written bid in response to the Department's ITB and filed timely protests to the Department's actions.

2. The Respondent, the Department of Environmental Protection, is an agency of the State of Florida which manages and operates state parks under its jurisdiction, and solicits construction projects in state parks, pursuant to Chapter 258, Part I, Florida Statutes, through its Division of Recreation and Parks, Bureau of Design and Recreation Services.

The ITB

3. In November, 2001, the Department issued an ITB on a construction project entitled Hillsborough River State Park Concession Building, project number BDRS 52-01/02. The ITB included the Bid Specifications for the project. Bids were required to be submitted no later than 3:30 p.m. on Tuesday, December 18, 2001, at the Bureau's Tallahassee, Florida, office.

4. The written Specifications define several terms, including, but not limited, to the following:

ADDENDUM: A written explanation, interpretation, change, correction, addition, deletion, or modification, affecting the contract documents, including drawings and specifications issued by the OWNER [Department] and distributed to the prospective Bidders prior to the bid opening.

ALTERNATE BID: Separate optional bid item for more or less project requirement used for tailoring project to available funding. Also

may consist of alternate construction techniques.

BASE BID: Formal bid exclusive of any alternate bids.

BID FORM: The official form on which the OWNER requires formal bids to be prepared and submitted.

ORAL STATEMENTS: Verbal instruction.

NOTE: No oral statement of any person, whomever shall in any manner or degree modify or otherwise affect the provisions of the contract documents.^[1]

SEALED BID: The formal written offer of the Bidder for the proposed work when submitted on the prescribed bid form, properly signed and guaranteed.

5. The Bid Specifications also contained the following relevant sections:

B-8 Alternatives

If the OWNER wishes to learn the relative or additional construction cost of an alternative method of construction, an alternative use of type of material or an increase or decrease in scope of the project, these items will be defined as alternates and will be specifically indicated and referenced to the drawings and specifications. Alternates will be listed in the bid form in such a manner that the Bidder shall be able to clearly indicate what sums he will add to (or deduct from) his Base Bid. The OWNER will judge for himself that such alternates are of comparable character and quality to the specified items.

The Order of the alternate may be selected by the Department in any sequence so long as

such acceptance out of order does not alter the designation of the low bidder.

B-9 ADDENDA

If the Consultant^[2] finds it would be expedient to supplement, modify or interpret any portion of the bidding documents during the bidding period, such procedure will be accomplished by the issuance of written Addenda to the bidding documents which will be delivered or mailed by the OWNER'S Contracts section to all bidders who have requested bidding documents.

B-10 Interpretation

No interpretation of the meaning of the drawings, specifications or other bidding documents and no correction of any apparent ambiguity, inconsistency or error therein will be made to any Bidder orally. Every request for such interpretation or correction should be in writing, addressed to the Consultant. All such interpretations and supplemental instructions will be in the form of written Addenda to the bidding documents.

Only the interpretation or correction so given by the Consultant in writing and approved by the OWNER shall be binding, and prospective Bidders are advised that no other source is authorized to give information concerning, or to explain or interpret, the bidding documents.

B-16 Bid Modification

Bid modification will be accepted from Bidders, if addressed as indicated in Advertisement for Bids and if received prior to the opening of bids. No bid modification will be accepted after the close of bidding has been announced. Modifications will only be accepted if addressed in written or printed form submitted with the bid in sealed envelopes. Telegrams, facsimiles, separate

sealed envelopes, written on printed modifications on the outside of the sealed envelopes will not be accepted. All bid modifications must be signed by an authorized representative of the Bidder. Modification will be read by the OWNER at the opening of formal bids.

B-21 Rejection of Bids

The OWNER reserves the right to reject any and all bids when such rejection is in the interest of the State of Florida, and to reject the bid of a bidder who the OWNER determines is not in a position to perform the work.

B-23 Award of Bid

. . .The qualified Bidder submitting the lowest bid will be that Bidder who has submitted the lowest base bid plus any selected alternates. . . .

The OWNER reserves the right to waive any minor irregularities in bids received when such waiver is in the interest of the OWNER.

The Award of Bid will be issued by the OWNER only with responsible Bidders, found to meet all requirements for Award of Bid, qualified by experience and in a financial position to do the work specified. Each bidder shall, if so requested by the OWNER, present additional evidence of his experience, qualifications and ability to carry out the terms of the Agreement.

(Emphasis in original, except for Section B-10.)

6. The Bid Form is included with the Specifications and provides in part:

Base Bid: Furnish labor, equipment, supervision and material to construct a new concession Lump Sum \$___

building of 2940 square feet located at the Hillsborough River State Park along with the alteration of the existing concession building according to plans and specifications.

Alternate #1: Furnish labor, equipment, supervision and material to renovate the existing concession building according to plans and specifications. Add Amt.\$___

7. There is a separate section for "Allowances," i.e., Section 01210, for the Hillsborough State Park. This section provides in part:

SECTION 01210 - ALLOWANCES

* * *

1.2 SUMMARY

A. This Section includes administrative and procedural requirements governing allowances.

1. Certain materials and equipment are specified in the Contract Documents and are defined by this [sic] specifications as material and labor to be provided against a pre-determined allowance. Allowances have been established in lieu of additional requirements and to defer selection of actual materials and equipment to a later date when additional information is available for evaluation. If necessary, additional requirements will be issued by Change Order.

* * *

3.3 SCHEDULE OF ALLOWANCES

A. Allowance #1: Include in the base bid an allowance for the purchase and installation of. . . kitchen equipment. . . .

The total dollar amount of the allowance to be included shall be \$12,000.00.

8. There is also a separate section for "Alternates," i.e., section 01230, for Hillsborough River State Park, which provides in part:

SECTION 01230 - ALTERNATES

* * *

1.3 DEFINITIONS

A. Alternate: An amount proposed by bidders and stated on the Bid Form for certain work defined in the Bidding Requirements that may be added to or deducted from the Base Bid amount if OWNER decides to accept a corresponding change either in the amount of construction to be completed or in the products, materials, equipment, systems, or installation methods described in the Contract Documents.

1. The cost or credit for each alternate is the net addition to or deduction from the Contract Sum to incorporate alternate into the Work. No other adjustments are made to the Contract Sum.

3.1 SCHEDULE OF ALTERNATES

A. Alternate No. 1: Renovate the existing concession building in its entirety as shown in the drawings and specified herein.

(emphasis added.)

9. At this stage of the bidding documents, the contractor/bidder is requested to provide a Base Bid/Lump Sum on

the Bid Form to "[f]urnish labor, equipment,. . .to construct a new concession building," and to provide an additional and separate amount for Alternate No. 1 to "[f]urnish labor, equipment, . . . to renovate the existing concession building."

10. On December 13, 2001, the Bureau issued "Addendum No. One (1)" (written by the architect) to the ITB on the "Hillsborough River State Park - Concession Building." The Addendum contained the following relevant sections:

A. Specification Section 01210: Allowances

Add the following new paragraph 3.3.B:
"Allowance #2: Include in the base bid an
allowance for the renovations of the existing
concession building; renovations shall be
defined by the Owner.

The total dollar amount of the allowance to
be included shall be \$25,000."

B. Specification Section 01230: Alternates

Modify paragraph 3.1.A. as follows:
"Alternate No. 1: Renovate the existing
concession building as defined by the Owner,
and as provided for under Section 01210,
Allowances."

(emphasis added.) Each contractor was required to sign the Addendum and attach it to the bid.

11. By definition, and pertinent here, an addendum is an additional written instruction to a contractor during the bidding process. Based on the weight of the evidence, the purpose of this Addendum was to require the contractor to include a

\$25,000.00 Allowance (for Allowance # 2) in the Base Bid, for the work which might be performed if the Department requested the work to be performed for Alternate No. 1, i.e., for the renovation of the existing concession building.³ (The Department's architect decided it would cost approximately \$25,000.00 to renovate the existing concession building, hence Allowance # 2.) In other words, the Addendum does not have a specific dollar amount to be included for Alternate No. 1. Rather, the \$25,000.00 is an Allowance for the work described as Alternate No. 1, but the amount is to be included in the Base Bid and not as a separate line item, dollar amount. But, importantly, the Addendum did not delete the potential work to be performed as described in Alternate No. 1, although Mr. Bowman and others believed that the Addendum deleted Alternate No. 1. It deleted the necessity to place a specific dollar amount on the Bid Form for Alternate No. 1. (Mr. Bowman is a registered Professional Engineer and a licensed contractor. He has worked for the Department for 15 years and has served as Bureau Chief for two years. He supervises the contract section and the design section, which was responsible for preparing the technical plans and specifications and bidding out the job.)

12. Mr. Bowman offered the following explanation why he believed the Addendum was confusing:

Okay. I think the confusion that was created, you know, I think the addendum in itself, you know, said add \$25,000 to the base bid, but then on the bid form, it still had the space down there for alternate number one, which alternate number one, which alternate number one had become \$25,000 that was to be allowed for the concession building, and I think that's where the confusion came in because I think they were still confused, that they weren't really sure that they should not put that 25 down there but they knew they had been told in the addendum to do it and I think that's the reason for the notes and we got to the correspondence on the bid form, was they wanted to make sure that that's what we were wanting to do. And I think that's where the confusion came in. Like I said, it's always, if you could go back and do it again, it would be much wiser just to issue a whole new bid form and then we wouldn't be here today. But, we didn't do that. Okay. So, that's why we are here.

13. The language in this Addendum, when read with the original Bid Specifications, apparently caused confusion with some of the bidders on the project. Several bidders called Marvin Allen (an architect and project manager for the Department's Bureau of Design and Recreation Services) prior to the submission of the bids, to clarify how the \$25,000.00 Allowance should be shown on the Bid Form. (Mr. Allen did not author any of the specifications, including the Addendum.) He was listed as a contact person. He did not contact any bidders. But, Mr. Allen recalled telling each bidder who asked that the Allowance of \$25,000.00 should be included in the Base Bid. But,

he does not recall the names or numbers of the bidders who called, "possibly" three, four or five. Mr. Allen believed the Addendum was clear. According to Mr. Allen, the bidders who called him found the Addendum confusing.

14. The oral responses to the bidders can be construed as interpretations of the Addendum. However, pursuant to Section B-10 of the Specifications, any such interpretations were required to "be in the form of written Addenda to the bidding documents." Also, any such questions should have been in writing. If Section B-10 were complied with, all bidders would have been potentially on the same footing, or, at the very least, would have had access to a written clarifying document.

Opening of the Bids

15. On December 18, 2001, the bids were opened by Mike Renard, Contracts Manager with the Bureau of Design and Recreation Services, and Susan Maynard, Administrative Assistant. Mr. Dwight Fitzpatrick, a representative of All America, also attended the bid opening.

16. The Bid Form submitted by Nelco showed a Base Bid of \$355,478.00 (Lump Sum \$355,478.00), and also showed an amount of \$25,000.00 on the Alternate # 1 line (Add Amt. \$25,000.00). See Finding of Fact 6. (It was clear to Mr. Renard that the \$25,000.00 should have been included on Nelco's Base Bid. But Mr. Renard believed that Nelco submitted a responsive bid because

the Department only accepted the Base Bid. Mr. Bowman agreed.) Nelco was the only one of five bidders to have a dollar amount in the Alternate #1 line under "Add Amt. \$___."

17. All America submitted the second lowest Base Bid of \$362,000.00. There was also a hand-written note on the All-America Bid Form that stated: "Addenda # 1 instruction to place \$25,000 allowance in both Base Bid and as alternate # 1." Another hand written note was located below the "Add Amt. \$-0-" line: "amount added in Base Bid with \$25,000 allowance per Marvin Allen." The Department considered All America's bid responsive.

18. It is a fair inference that three out of five of the other Bid Forms contained language indicating that the bidders were relying on Addendum No. One by placing the \$25,000.00 Allowance in the Base Bid.⁴ It is uncertain whether they did so in light of the instructions of Mr. Allen concerning how to complete the Bids Forms. However, given the nature of the calls to Mr. Allen, there is a reasonable inference that there was some confusion among some of the bidders.

19. The Department determined that Nelco submitted the lowest Base Bid, but the Department's staff had a question as to whether Nelco had included the \$25,000.00 in its Base Bid.

20. After conferring with his superiors, Mr. Renard was instructed to call Nelco to make certain that its Base Bid included the Allowance amount (\$25,000.00). Mr. Renard spoke

with Steve Cleveland, Nelco's Project Manager, "to verify the fact that [Nelco] had the allowance in their base bid." Mr. Cleveland orally confirmed that Nelco's Base Bid included the \$25,000.00 Allowance. Mr. Renard asked Mr. Cleveland to send him a letter verifying this statement. Mr. Renard viewed this inquiry as a request for clarification or verification, not an opportunity for Nelco to modify its bid. Mr. Bowman agreed. (Mr. Renard did not believe Addendum No. 1 was confusing.)

21. In a letter dated December 20, 2001, Mr. Cleveland confirmed that Nelco's Base Bid of \$355,478.00 included the Allowance amount and that Nelco could still perform the contract if the \$25,000 Allowance was removed from its Base Bid pursuant to the ITB, i.e., that Nelco would perform the contract for \$355,478.00 less \$25,000.00, or \$330,478.00, if the Department did not accept Alternate # 1 and the Allowance. (An alternate does not have to be accepted by the Department.) According to Mr. Renard, Mr. Cleveland never mentioned modifying, changing, or altering Nelco's bid.

22. The Department only accepted the Base Bid for each bid.

23. Mr. Renard did not consider it unusual to call a bidder or contractor to verify information to determine whether they can or cannot perform the work at the stipulated price. He considered it common to make this inquiry. Also, it was common in Mr. Bowman's experience to call a bidder to get clarification.

Mr. Renard was not aware of any statute or rule which authorizes the Department to request clarification from a bidder after the bids are opened. Mr. Renard was more familiar with the bid forms than Mr. Allen.

24. After receiving Mr. Cleveland's letter, the Department determined that Nelco submitted the lowest Base Bid and that the \$25,000.00 amount that Nelco wrote on the Bid Form Alternate # 1 line, was a minor irregularity in the bid which the Department, as the Owner, could waive pursuant to the ITB.

25. On December 20, 2001, the Department posted the Tabulation of Bids showing the anticipated award of the contract to Nelco.

26. At the hearing, an unsigned letter on Department letterhead was introduced, which was addressed to Nelco and stated that Nelco submitted the apparent low bid. However, Mr. Renard testified that these letters are prepared routinely, but not mailed out without his signature. Mr. Renard did not recall signing the letter or ever sending out such a letter to Nelco.

27. On December 21, 2001, the Department received a Notice of Intent to Protest letter from Allen E. Stine, the President of All America. In his letter, Mr. Stine stated that Nelco's bid should have been rejected for failure to follow the specified format as per Addendum No. 1, or adjusted to have the \$25,000.00 amount added to their Base Bid.

Bid Protests

28. All America filed a written formal bid protest on January 4, 2001. On January 9, 2001, Cindy Otero of All America, notified Mr. Renard by letter, and stated that Mr. Stine was available for a hearing regarding the bid protest.

29. On January 28, 2002, Mr. Renard returned All America's check for the bond, stating that it was unnecessary. Mr. Stine recounted a number of unanswered telephone calls after the first protest was filed. During one conversation, Mr. Renard recalled Mr. Stine saying to him, "You can't do this, you can't do this."

30. After receiving the first formal protest, the Department staff consulted with legal staff and reviewed the documents and bid procedures. Based on the number of questions received concerning the Addendum and the hand-written notes on several of the bid forms, Mr. Bowman, Bureau Chief, determined that the bid documents were confusing and ambiguous. (Mr. Bowman stated that this was their first bid protest in his 15 years with the Department.) Therefore, Mr. Bowman decided that it would in the best interest of the State of Florida to reject all of the bids pursuant to the Bid Specifications. Mr. Bowman felt that the ITB should be re-written in order to make it clearer and allowing all of the bidders to re-bid the project without any confusion or ambiguity.

31. Mr. Stine stated that his "senior estimator" told him that the bid language "could be confusing." He and his "senior estimator" had a discussion about whether the Allowance should have been placed in the Base Bid or not. At the time of submission of All America's bid, Mr. Stine was clear that the Allowance should be placed in the Base Bid, especially after calling Mr. Allen. But, his senior estimator was not so clear. In order to appease him, Mr. Stine placed the hand-written note on All America's proposal. Mr. Stine essentially, "cleaned" up his proposal.

32. At the hearing, Mr. Bowman testified Rule 60D-5.0071, Florida Administrative Code, see Conclusion of Law 59, does not list "confusing or ambiguous bid specifications" as one of the circumstances allowing for the rejection of all bids. However, Mr. Bowman later stated during the hearing that he believed the circumstances listed in Rule 60D-5.0071 were not the only circumstances authorizing the Department to reject all bids. Mr. Bowman testified that he believed that general confusion among the bidders caused by the ambiguous ITB constituted sufficient grounds for rejecting all bids.

33. Mr. Bowman was advised by legal counsel that rejecting all of the bids would probably result in another bid protest by Nelco, All America, or both. Thus, the Department decided to delay addressing All American's first protest until after posting

the rejection of all bids and receiving the subsequent protests, so that all of the protests could be resolved at once in an efficient and economical manner.

34. Notwithstanding the Department's justifications for rejecting all bids and not proceeding on All America's initial protest, the record is unclear why the Department waited several months to reject all bids.

35. On May 13, 2002, the Department posted the rejection of all bids.

36. On May 16, 2002, the Department received a formal written protest of the rejection of all bids filed by All America.

37. On May 17, 2002, Jerome I. Johnson, attorney for the Department, contacted Mr. Robert A. Lash, All America's counsel at the time, concerning the resolution of All America's formal protest. (Before the final hearing, Mr. Lash, with All America's consent, withdrew as counsel for All America.) The parties agreed to suspend formal bid protest procedures until a meeting could be held between the parties in an attempt to resolve the protests. Mr. Johnson sent a letter dated May 21, 2002, to Mr. Lash confirming this conversation.

38. On June 26, 2002, a meeting was held among the Department staff, legal staff, and Mr. Lash and Mr. Stine, representing All America. The parties were unable to resolve the

protests. At the conclusion of the meeting, the parties agreed that formal protest procedures would not be implemented until Mr. Stine could confer further with his counsel.

39. In a letter dated July 5, 2002, Mr. Lash stated that his client wished to proceed with formal protest procedures and requested an administrative hearing on the protests.

Are the Specifications and Bid Documents Ambiguous and Was There Confusion?

40. The parties stipulated that "[t]he Addendum language was confusing," notwithstanding the testimony of several witnesses that they were not confused.

41. The Department's determination that the bid Specifications, including the Addendum, and the Bid Form, which remained unchanged after the Addendum was issued, were confusing and ambiguous, is supported by the weight of the evidence. This is particularly true regarding the Bid Form. The Addendum required the bidder to include an Allowance of \$25,000.00 in the Base Bid for work described as Alternate # 1. But the Bid Form was unchanged to reflect the Addendum changes. The Bid Form retained a line for the bidder to submit an additional amount for Alternate # 1. Further, it appears that several bidders were confused, including, Mr. Stine, who spoke with Mr. Allen and requested and received clarification. Further, it is unclear whether all of the bidders, including Nelco, were aware of the

oral interpretations or clarifications of the Addendum rendered to some of the bidders.

Rejection of All Bids

42. Based upon the foregoing, given the standard of review in this proceeding discussed in the Conclusions of Law, the weight of the evidence indicates that the Department's action, in rejecting all bids, was not illegal, arbitrary, dishonest, or fraudulent. The Department's staff was well-intended and made some mistakes along the way, e.g., by not changing the Bid Form, which they readily admit. But there was a rationale for rejecting all bids under the circumstances.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter. Sections 120.569 and 120.57(3), Florida Statutes.

44. All America alleges that the Department's action of rejecting all bids was arbitrary and contrary to competition. "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. See Section 120.57(3)(f), Florida Statutes. All America has the burden of proof. See Sections 120.57(1)(j) and 120.57(3)(f), Florida Statutes. See also Department of Transportation v.

Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988);
Gulf Real Properties, Inc. v. Department of Health and
rehabilitative Services, 687 So. 2d 1336, 1338 (Fla. 1st DCA
1997).⁵

45. All America did not prove that the Department acted in a way that was illegal, arbitrary, dishonest, or fraudulent.

46. Although the original Bid Specifications called for an Alternate # 1, this Alternate was modified by the issuance of Addendum No. 1, which required the bidder to include an Allowance of \$25,000.00 (for Alternate # 1 work) in the Base Bid. The bidder was no longer required to submit a separate dollar amount for Alternate # 1 on the Bid Form, which remained unchanged after the Addendum was issued.

47. The Department's decision to reject all the bids was rationally based on the facts revealed at the time. After receiving All America's first protest, the Department reviewed all of the documents and procedures related to the bid protest. Mr. Allen provided the first evidence of confusion in the bidding process by discussing the number of calls concerning the Addendum. The manifest problem with this procedure is that it is unclear whether all five bidders were aware of the oral interpretations or clarifications of the Addendum. Further evidence of the confusion on the part of the bidders is demonstrated by the hand-written notes on three of five of the

bidders' forms, and one type-written note. In fact, All America's bid form included a hand-written note stating it was under the impression that the \$25,000 Allowance should be added in its Base Bid ("per Marvin Allen"). All America also provided a handwritten note with an instruction to place the \$25,000 allowance in both the Base Bid and as Alternate # 1, per "Addenda # 1."

48. After reviewing this evidence, and the bid documents, the Department reasonably determined that the language in the ITB and the Addendum, and importantly, the Bid Form, when read together, was ambiguous and confusing to the bidders. Having reached this conclusion, the Department felt that it would be unfair to award the contract to any of the bidders under these conditions. The evidence does not prove that the Department acted fraudulently, arbitrarily, illegally, or dishonestly in rejecting all of the bids.

49. Another issue raised by this case is whether the Department exceeded its statutory authority under Section 120.57(3), Florida Statutes, by rejecting all bids after All America had submitted its first formal protest. The general rule is that "[u]pon receipt of the formal written protest which has been timely filed, the agency shall stop the bid solicitation process or the contract award process until the subject of the protest is resolved by final agency action. . . ." Section

120.57(3)(c), Florida Statutes. But the agency is not generally precluded from rejecting all bids upon discovery of valid grounds to do so. See Caber Systems Inc. v. Department of General Services, 530 So. 2d 325 (Fla. 1st DCA 1988).

50. In Caber, the Department of General Services (DGS) had issued an ITB that contained ambiguous and confusing language. After reviewing the bids submitted, the DGS posted an Anticipated Award to the apparent low bidder. However, after receiving a formal protest, DGS determined the bid documents were flawed and rejected all the bids. The company which had filed the formal protest of award then filed a second protest of the rejection of all bids. Id. at 327.

51. The court held for the DGS. In its opinion, the court stated: "[T]here is no limitation in the statutory language restricting the Department's power to immediately reject all bids and start the bid process anew with a valid ITB, rather than locking up the entire process pending hearing on the protest so that nothing could proceed. Once DGS had decided to reject all bids for the reason specified, to first await the outcome of a hearing on Caber's first protest before taking action would be a complete waste of time and taxpayers' money." Id. at 336. The court stated further that an agency cannot reject all bids for reasons that are arbitrary or capricious, but under then existing Section 125.53, an agency can reject all bids for a valid reason

before a protest to another bidder has been heard in a Section 120.57 hearing. Id. at 338.

52. As previously stated, the Department determined that the confusion caused by the Bid documents constituted valid grounds for rejecting the bids. The Department also felt that rejecting the bids would quite probably result in the filing of one or more additional protests. Thus, the decision to reject all the bids before conducting a hearing on All America's initial formal protest was not arbitrary, but was made in an attempt to streamline the administrative process for all of the parties.

53. All America also contends that the Department's decision to reject all bids should be rejected for the Department's failure to strictly comply with the time requirements specified in Section 120.57(3), Florida Statutes. The Department did not adhere to the time requirements or provide a reasonable explanation for waiting several months to reject all bids. It was not shown that the Department's failure to comply with the time requirements impaired the fairness of the proceeding or the correctness of the Department's decision to reject all bids. See Caber, 530 So. 2d at 338-339.

54. All America also alleges that the Department violated Section 120.57(3)(f), Florida Statutes, by calling Nelco for clarification or verification of its bid.

55. Section 120.57(3)(f) states: "In a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered."

56. It is unnecessary to decide this issue because the issue before the undersigned is whether the Department properly rejected all bids, not whether Nelco's bid was responsive, nor whether Nelco's telephone and written responses were "submissions," nor whether All America should be awarded the contract.

57. Another issue raised by All America concerns Rule 60D-5.0071, Florida Administrative Code, "Rejection of Bid(s)." This Rule states:

- (1) The Agency shall reserve the right to reject any or all bids or portions thereof under any of the following circumstances:
- (2) When the bidding process, including the procedure followed by the agency, involves a material conflict with a rule or statutory or case law;
- (3) When the Agency has evidence to indicate that collusion exists among the bidders;
- (4) When the base bid or the base bid minus all deductive alternates exceeds the funds available for construction;
- (5) When the Agency has evidence to indicate the bidder is not in a position to perform the contract in accordance with Rule 60D-5.004;
- (6) When the Agency has evidence to indicate the bidder has interest in more than one proposal for the same work;

- (7) When the Agency finds the unit price provided with a bid proposal is not approximately the same as the unit cost for the same work provided as a lump sum for a specified quantity in the base bid, or alternate;
- (8) When the Agency determines that the bid is not valid according to the bid specifications;
- (9) When the Agency determines that a conflict of interest exists.
- (10) The Owner also reserves the right to reject a bid that is unreasonably low. "Unreasonably low" means that requiring the contractor to perform the contract at that price would be reasonably expected to result in unacceptable quality of performance or abandonment of the project; however, this subsection is not applicable unless the bid is at least 20% less than the next low bid. . . .

58. All America argues that the ten reasons listed in this Rule are the only circumstances under which an agency can reject all bids. However, Florida case law shows that agency decisions to reject all bids have been affirmed when the evidence supports the agency's determination that it has issued an ITB that is ambiguous and confusing. See, e.g., Caber Systems, Inc. v. Department of General Services, 530 So. 2d 325 (Fla. 1st DCA 1988); Aurora Pump, Division of General Signal Corporation v. Goulds Pumps, Inc., 424 So. 2d 70 (Fla. 1st DCA 1982).

59. In Aurora, an unsuccessful bidder challenged an agency's award of contract on the basis that the bid specifications were vague and confusing. The court stated that the agency's action of awarding the bid based on vague

specifications was arbitrary and capricious and ordered the agency to re-bid if it wished to proceed with the work. In its opinion, the court stated "[t]hose who we hope to encourage are the public agencies and authorities to responsibly prepare and disseminate clear and precise bidding instructions so the public may be protected against collusive contracts; to secure fair competition upon equal terms to all bidders; and to remove temptation for favoritism and fraud at the public expense." Aurora, 424 So. 2d at 75 (citation omitted). This holding makes it clear that the court considered issuing ambiguous specifications much more contrary to competition than rejecting all bids.

60. Further in Caber, the court, quoting from the Hearing Officer's Recommended Order, stated, "[o]n the authority of the Aurora decision, not only was the DGS decision to reject all bids neither arbitrary nor capricious, it may have been arbitrary and capricious for DGS not to have rejected all bids." Caber, 530 So. 2d at 335 (emphasis in original). The court also stated: "The ITB was fatally flawed and obviously must be re-bid. . . . [T]he Department's rejection of all bids for this inherent ambiguity was founded on a rational basis and cannot be characterized as arbitrary and capricious." Id. at 339. (In light of these cases, subsection 60D-5.0071(2) applies here.)

These cases affirm that the ten circumstances listed in Rule 60D-5.0071 are not the only valid grounds under which an agency can reject all bids.

61. The final issue raised in the Petition is All America's request for attorney's fees and costs. Section 120.595(1)(b), Florida Statutes, states in pertinent part: "The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose."

62. All America is not the prevailing party in this proceeding and has not proven that the Department has participated in this proceeding for an "improper purpose."

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department issue a final order dismissing All America's Petition to Prevent Rejection of Bids and Award Contract to Petitioner and denying All America's request for attorney's fees and costs.

DONE AND ENTERED this 24th day of September 2002, in
Tallahassee, Leon County, Florida.

CHARLES A. STAMPELOS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of September 2002.

ENDNOTES

^{1/} The "contract documents" include, but are not limited to, the general and special conditions, the technical specifications, and addenda.

^{2/} The "consultant" is "[t]he Design professional commissioned or employed by the OWNER."

^{3/} The term "Alternate # 1" is referred to in the Bid Form. "Alternate No 1" is referred to in Section 01230-Alternates, and in "Addendum No. One." The Alternate is the same, but is referred to herein in a different manner, depending on the context.

^{4/} Carr's Construction Services, Inc., Grosz & Stamper Construction Co., Inc., and LeChase Construction Services, LLC. also bid on the project. None are parties in this proceeding. On the line denoted "Add Amt. \$__" on the Bid Form, Grosz placed "N/A Per Addendum No. 1", Carr's placed "N/A Addendum 1", and LeChase placed "Included Above."

^{5/} A decision is arbitrary if it is not supported by facts or logic, or is despotic. Agrico Chemical Co. v. State, Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA

1978), cert. denied, Askew v. Agrico Chemical Co., 376 So. 2d 74 (Fla. 1979).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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