

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RHC AND ASSOCIATES, INC.,)
)
 Petitioner,)
)
vs.) Case No. 02-4668BID
)
HILLSBOROUGH COUNTY SCHOOL)
BOARD,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 17, 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: Joseph W. J. Robinson
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Post Office Box 4505
Tampa, Florida 33677

For Respondent: Thomas M. Gonzales, Esquire
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and

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Few & Ayala
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STATEMENT OF THE ISSUE

The issue is whether the specifications in the request for architectural services first advertised by Respondent on November 12, 2002, are contrary to Respondent's governing statutes and adopted policies or are otherwise vague, arbitrary or contrary to competition.

PRELIMINARY STATEMENT

On November 12, 2002, a request for architectural services (RAS) was first advertised by the Hillsborough County School Board (School Board, District, or Respondent). On November 14, 2002, Petitioner timely filed a notice of protest with Respondent, and on November 19, 2002, Petitioner timely filed a formal written protest with Respondent. The formal written protest identified eight "issues" and generally alleged deficiencies in the specifications of the RAS and the School Board's minority business enterprise (MBE) program.

On December 2, 2002, after the parties were unable to resolve the protest, Respondent 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. See Section 120.57(3)(d), Florida

Statutes. In accordance with the expedited time frame in Section 120.57(3)(e), Florida Statutes, the final hearing was scheduled for and held on December 17, 2002.

On December 11, 2002, Respondent filed a motion to dismiss the protest. The motion alleged that Petitioner lacks standing to challenge the specifications of the RAS, that the allegations in the protest related to deficiencies in the MBE program are beyond the scope of a specification protest, and that the other allegations are insufficient to demonstrate the invalidity of the RAS. Petitioner filed a response to the motion on December 17, 2002.

Respondent's motion to dismiss was considered at the outset of the final hearing. That portion of the motion directed to Petitioner's standing was denied without prejudice based upon the supplemental allegation in Petitioner's December 17, 2002, filing that it has "a registered architect on staff." That portion of the motion directed to the alleged deficiencies in the School Board's MBE program (i.e., Issues 1, 2, 3, 5, 6 and 8) was treated as a motion to strike and was granted except as to Issue 2, which was reframed and narrowed at the hearing. Ruling was reserved on that portion of the motion directed to the alleged deficiencies in the specifications of the RAS (i.e., Issues 4 and 7); those issues are addressed in this Recommended Order.

Petitioner was not represented by an attorney at the hearing. Joe Robinson, Petitioner's majority owner and president, was authorized at the hearing to appear as the qualified representative for Petitioner. See Rule 28-106.106, Florida Administrative Code.

At the hearing, Petitioner presented the testimony of Paul Jackson, a registered architect; Spencer Albert, the manager of Hillsborough County's minority and small business program; Henry Ballard, the manager of the School Board's MBE program; Tom Blackwell, the School Board's manager of construction; Jack Davis, the School Board's chief information and technology officer and former assistant superintendent of operations; Michael Bookman, the School Board's assistant superintendent for business; and Mr. Robinson. Petitioner's Exhibits P1 through P5, P7, P8, P10, P12, and P13 were received into evidence. Exhibit P11 was proffered, but not received.

Respondent did not present any witnesses at the hearing. Respondent's Exhibits R1 through R4 were received into evidence.

Upon Petitioner's request, official recognition was taken of the Recommended Order issued in DOAH Case No. 02-2230BID and the Final Order issued in DOAH Case No. 02-3138RP.

The Transcript of the hearing was filed with the Division on January 9, 2003. The parties were given 10 days from the date of the hearing to file their proposed recommended orders

(PROs). See Rule 28-106.216(2), Florida Administrative Code. The parties' PROs were each filed on January 22, 2003, and were given due consideration 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:

A. Parties

1. Petitioner is a consulting engineering firm. Its principal office is in Tampa, Florida.

2. Petitioner is certified by and/or registered with the State of Florida and the School Board as a minority-owned business. Petitioner's majority owner and president, Joe Robinson, is an African-American male.

3. Petitioner employs several licensed professional engineers, including Mr. Robinson. Mr. Robinson serves as the "qualifier" for the firm, which enables the firm to provide engineering services in its corporate name.

4. Petitioner does not employ any registered architects and, hence, does not have a "qualifier" which would enable the firm to provide architectural services in its corporate name.

5. Respondent does not have a certificate of authorization from the Board of Architecture and Interior Design.

6. Petitioner has an oral arrangement with Paul Jackson, a registered architect, which allows Petitioner to include Mr. Jackson's resume in its response to bid proposals and other competitive procurement solicitations. If Petitioner is awarded a contract using Mr. Jackson's resume, Mr. Jackson would become a "staff member" or "employee" of Petitioner. The specifics of such an arrangement are not entirely clear, however, because Petitioner has not been awarded a contract on a project where it submitted Mr. Jackson's resume.

7. Respondent is a local school district of the State of Florida.

8. Respondent is responsible for the construction, renovation, management, and operation of the public schools in Hillsborough County. To fulfill those responsibilities, Respondent is often required to obtain the services of architects, engineers, and other professionals through competitive procurement under Section 287.055, Florida Statutes, the Consultants' Competitive Negotiation Act (CCNA).

B. Relevant Background

1. Recent Scrutiny of the School Board's Procurement Practices

9. The School Board's process for procuring professional services has been the subject of considerable scrutiny over the past year.

10. In May 2002, the Ernst & Young consulting firm completed a "forensic evaluation and analysis" of the School Board's procurement process. The Ernst & Young report identified a number of deficiencies in the process.

11. In July 2002, the Gibson Consulting Group (Gibson), on behalf of the Legislature's Office of Program Policy Analysis and Governmental Accountability, completed a performance audit of the School Board. Gibson's assessment of the School Board's procurement process was generally favorable.

12. The School Board's procurement process has also been the subject of several legal challenges brought by Petitioner. Indeed, this is the fourth case at the Division of Administrative Hearings between Petitioner and the School Board involving the School Board's procurement process under the CCNA.

13. The first case, DOAH Case No. 02-2230BID, involved Petitioner's challenge to the specifications of a request for qualifications (RFQ) issued by the School Board in May 2002. The purpose of the RFQ was to implement the recommendation in the Ernst & Young report that the School Board supplement its in-house staff of architects and engineers in order to provide increased on-site supervision, management, and inspection of ongoing school construction projects. The Recommended Order in DOAH Case No. 02-2230BID concluded that the RFQ was arbitrary and contrary to competition because it did not inform potential

Respondents in advance of the criteria or factors upon which the responses would be evaluated or the weight that would be given to each factor and because the selection committee members did not use a uniform method for evaluating the Respondents. The Recommended Order recommended that the School Board rescind the RFQ, which the School Board did.

14. The second case, DOAH Case No. 02-3138RP, involved Petitioner's challenge to the new policies and summaries of procedures adopted as part of the School Board's Policy Manual in response to the Ernst & Young report and the deficiencies alleged (and ultimately proven) by Petitioner in DOAH Case No. 02-2230BID. The Final Order in DOAH Case No. 02-3138RP concluded that the new policies and summaries of procedures were not invalid exercises of delegated legislative authority, except for the provision which purported to make interviews optional for projects costing less than \$1 million. The Final Order was not appealed.

15. The third case, DOAH Case No. 02-3922F, involved Petitioner's request for attorney's fees and costs under Section 57.111, Florida Statutes, as the prevailing small business party in DOAH Case No. 02-2230BID. The Final Order in DOAH Case No. 02-3922F (issued in conjunction with this Recommended Order) concluded that Respondent was not substantially justified when it issued the RFQ and that no

special circumstances exist which would make an award to Petitioner unjust. Accordingly, the Final Order awarded Petitioner \$5,563.00 in attorney's fees and costs for DOAH Case No. 02-2230BID.

16. As more fully detailed in the Recommended and Final Orders issued in those cases, the School Board's existing procurement process had its flaws, but the changes that were made to the process and the new policies which were adopted as a result of the recent scrutiny of the process adequately remedied those flaws. This case involves the application of those new policies for the first time.

2. The School Board's Minority Business Enterprise Program

17. The School Board created a Minority Business Enterprise Program (MBE Program) in June 1995 and, at the same time, the School Board established a "10 percent minority inclusion goal for all construction related services" (hereafter "10 percent MBE Goal" or "Goal").

18. The stated purpose of the MBE Program and the Goal was to "increase the opportunities for minority/women enterprises and individuals who participate in providing construction services as general contractors or subcontractors for Hillsborough County Schools."

19. The Goal does not define the phrase "construction related services." Apparently, however, the Goal has never been

construed by the School Board to apply to the procurement of professional services, such as architects or engineers.

Instead, it has only been applied to vocational trades such as masonry, plumbing, concrete, dry-walling, plastering, etc.

20. This interpretation of the Goal -- which was confirmed by each of the School Board employees who testified at the hearing, including the manager of the MBE Program -- is consistent with the language in the document discussing the function and operation of the MBE Program. That document refers to "bids," "trades," "contractors," and "subcontractors" rather than the procurement of professional services.

21. The School Board is expected to consider an expansion of the MBE Program and the Goal beyond its current scope to include the procurement of professional services as part of its 2003-04 agenda.

C. The Request for Architectural Services
and Petitioner's Protest

22. As required by Section 7.30 of the School Board's Policy Manual, the RAS was published in the Tampa Tribune (on November 12, 2002), the Florida Sentinel Bulletin (on November 12, 2002), the Tampa Record (on November 14, 2002), and the La Gaceta (on November 15, 2002).

23. The RAS announces the School Board's need for professional architectural services on six school projects, five

involving new construction and one involving remodeling and renovation. The construction budgets for the projects range from \$7.5 million to \$13.6 million.

24. The RAS states in pertinent part:

Any applicant interested in providing architectural services shall make application by submission of the materials prescribed in the Project Information Packet. Required materials shall be separate and apart from any accompanying materials. Only applicants with offices in Hillsborough County will be considered. Professional liability insurance will be required for these commissions.

The Project Information Packets, additional project information and the weights associated with each qualification and evaluation criteria can be obtained by contacting the Planning & Construction Office at (813) 272-4112 or via the Internet at <http://apps.sdhc.k12.fl.us/sdhc2/planning/pa.htm>.

25. The RAS does not define the scope of the "architectural services" that are being sought. Apparently, however, the RAS is seeking "full architectural services," which means all of the design services for the project from the ground to the roof. In this regard, the selected architect or architects will be responsible for submitting to the School Board completed design plans which are consistent with the educational requirements established by the School Board and State law.

26. To do so, it will be necessary for the architect(s) to engage engineers as consultants to design mechanical, electrical, plumbing, fire protection, and other engineered systems consistent with the architectural design. However, the selected architect(s) are ultimately responsible for ensuring that the design plans meet the specifications of the School Board.

27. The selected architect(s) will remain involved in the project throughout the construction phase as well in an administrative capacity, e.g., administering progress payments, monitoring contract compliance by the builder.

28. The Project Information Packet referenced in the legal advertisement announcing the RAS included the following materials: the policies and summaries of procedure governing the School Board's acquisition of professional services (i.e., Sections 7.29 through 7.33 of the Policy Manual) along with a document summarizing that process; documents describing the "District prototypes" for new elementary and middle schools; a map showing the location of the proposed school sites; a document titled "Standardized Submittal Requirements" (hereafter "Submittal Requirements"); and a document titled "Professional Services Selection Committee Evaluation Criteria" (hereafter "Evaluation Criteria").

29. In compliance with the requirements of Section 7.30 of the Policy Manual, all of those materials were available to potential applicants on November 12, 2002, in conjunction with the publication of the RAS.

30. The Submittal Requirements set forth the information that the applicant must submit as well as the formatting requirements for paper and electronic submittals. The submittals were required to include a separate summary sheet for each of the evaluation criteria (described below) and all information related to a criterion was to be on the summary sheet or on supplemental sheets immediately following the summary sheet for that criterion. The submittal was also required to include a separate "SF 254" form, which is a standard form that provides general information about the firm.

31. The factors which will be used to evaluate the responses to the RAS and the weights associated with each factor are set forth in the Evaluation Criteria as follows:

WEIGHT	TOPIC	DESCRIPTION
25 Points	Project/Application Correlation	Correlation of applicant's experience and capabilities to the unique requirements of the project.
25 Points	SDHC Track Record	Applicant's performance on prior projects with the District, including ability to meet project schedule and budget. Greater consideration will be given to more recent

		projects and projects of similar scope.
20 Points	Firm's Resume	Demonstrated capabilities of the firm, with consideration given to corporate philosophy, community involvement, credentials of senior/professional staff
15 Points	Firm's Current Workload	An evaluation of the applicant's capacity to undertake additional work, in light of its current workload.
10 Points	MBE Participation	Whether the firm is a certified minority business enterprise, ^[1] and the applicant's demonstrated commitment to increasing the successful participation of minority and women owned businesses.
5 Points	Prior/Current Volume with SDHC	Volume of recent work awarded the applicant by the District. Score is inverse to volume.

32. Applicants are presumed to start with a score equal to half of the available points for each category involving "experience related considerations." Because there are 100 total points available, each applicant will start with a total of 50 points. The Selection Committee will adjust the applicant's score above or below that number based upon its review of the materials submitted by the applicant.

33. There are no schedules, "rating tables," or "tally sheets" to guide the Selection Committee in allocating points in each of the categories. Instead, the Committee will use a

normative method of evaluating the responses in each category rather than a criterion reference.

34. Under the normative methodology, the Committee will stratify or rank-order the responses in each category and then assign points to each response based upon where it falls within that stratification or ordering. It is not entirely clear how the Committee will translate the rank-ordering into point additions or subtractions to the presumed 50 points that each respondent starts with. That determination is left to the Committee, but it will be uniformly applied by the Committee members to all responses.

35. That approach is markedly different from and seemingly more complex than the approach suggested by Petitioner through its sample forms in Exhibit P8. Under Petitioner's approach (which was characterized by Respondent's witnesses as the criterion methodology), the score for each category would be based upon a pre-established rating system applied by the members of the Committee (e.g., awarding +10 points if the evaluator considered the response to be "outstanding" in the category, 0 points for "average," -10 points for "poor") or a pre-determined table (e.g., awarding 5 points for prior work between \$0 and \$25,000; 4 points for prior work between \$25,001 and \$50,000, etc.).

36. It is not entirely clear what benefit there would be to Petitioner or other applicants by knowing in advance the methodology that the Committee intends to use to translate the rank-ordering into scores for each category. In this regard, the Evaluation Criteria define the weights that are associated with each category and, where appropriate, explain generally how those points will be allocated within the categories (e.g., score for "prior/current volume of work with SDHC" is inverse to volume, meaning that the more work the firm has with the District, the fewer points it will get in that category).

37. The information that is provided in the RAS contains sufficient guidance to enable applicants to prepare and submit a response. Indeed, it is significant that Mr. Jackson testified that his firm could prepare a response based upon the information that was made available to potential respondents in connection with the RAS.

38. The deadline for submitting a response to the RAS was November 22, 2002, at 4:00 p.m. The School Board received responses from 27 firms prior to the deadline.

39. Petitioner did not submit a response to the RAS. Instead, on November 14, 2002, Petitioner filed a notice of protest, and on November 19, 2002, Petitioner filed a formal written protest directed to the specifications in the RAS.

40. As a result of Petitioner's protest, the RAS was put "on hold." The responses received prior to the submittal deadline have not been referred to the evaluation committee and no other action has been taken in connection with the solicitation or contract award process because of Petitioner's protest.

41. The record does not reflect whether the School Board has sought to move forward with the evaluation and contract award process notwithstanding Petitioner's protest as it is authorized to do by Section 120.57(3)(c), Florida Statutes.

CONCLUSIONS OF LAW

A. Jurisdiction

42. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), and 120.57(3), Florida Statutes. (All references to Sections and Chapters are to the Florida Statutes (2002). All references to Rules are to the Florida Administrative Code.)

B. Standing

43. Petitioner has the burden to prove its standing to protest the RAS. See generally Department of Health and Rehabilitative Services v Alice P., 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979) (burden is upon petitioner to prove standing, when standing is resisted).

44. 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's decision or intended decision" may file a notice of protest and formal written protest within the times specified by statute.

45. Despite that seemingly broad statutory language, case law has limited standing to challenge the agency's intended award of a contract to bidders except in "exceptional circumstances." See, e.g., Ft. Howard v. Dept. of Management Servs., 624 So. 2d 783, 785 (Fla. 1st DCA 1993); Brasfield & Gorrie General Contractor, Inc. v. Ajax Construction Co., 627 So. 2d 1200, 1203 (Fla. 1st DCA 1993); Westinghouse Elec. v. Jacksonville Transp. Authority, 491 So. 2d 1238, 1241 (Fla. 1st DCA 1986).

46. By contrast, case law confirms that "potential bidders" have standing to challenge the specifications in the procurement document. See Advocacy Center for Persons with Disabilities, Inc. v. Dept. of Children & Family Servs., 721 So. 2d 753, 756 (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 request for proposals as being vague, arbitrary or unreasonable). And cf. RHC & Assoc., Inc. v. Hillsborough County Sch. Bd., DOAH Case No. 02-2230BID, Recommended Order at 20-24 (Sep. 6, 2002)

(rejecting the School Board's argument that Petitioner lacked standing to challenge the specifications of the RFQ at issue in that case because evidence showed that Petitioner was a potential respondent to that RFQ).² This distinction is based upon the fact that a specification protest typically occurs (as it did in this case) prior to the deadline for submitting bids or responses and, as a result, there are not yet any bidders or respondents; there are only potential bidders or potential respondents. Id. at 21; Florida Overland Express, L.P. v. Dept. of Transportation, DOAH Case No. 98-2172BID, Recommended Order at 25-27 (Aug. 6, 1998).

47. The School Board first argues that Petitioner lacks standing to challenge the specifications in the RAS because Petitioner has not responded to the RAS. As discussed above, standing to challenge the specifications in a solicitation document is not limited to respondents. Therefore, Respondent's argument on that point is rejected (as it was in DOAH Case No. 02-2230BID).

48. Additionally (or alternatively), the School Board argues that Petitioner lacks standing to challenge the specifications in the RAS because it is an engineering firm, not an architectural firm, and therefore is not even a potential respondent to the RAS. That argument is supported by the evidence.

49. Significantly, Petitioner failed to establish that it is able to provide architectural services in its own name because it does not have a "certificate of authorization" from the Board of Architecture and Interior design. See Section 481.219(2). Not only does Petitioner not have a registered architect as a principal officer of the corporation as is required to obtain such a certificate, see Section 481.219(7)(a), but Petitioner does not even have an architect "on staff" in the traditional sense.

50. Despite its inability to presently provide architectural services in its own name, Petitioner contends that it could "team up" with Mr. Jackson or some other architectural firm to provide the "full architectural services" contemplated by the RAS. Indeed, Petitioner contends that the services of an engineer will be critical to providing such services. While that may be true, it would not change the fact that Petitioner, as a separate corporate entity, could not in its current form provide the architectural component of the services described in the RAS.

51. In this regard, if Petitioner were to "team up" with an architectural firm to prepare a response to the RAS, Petitioner would effectively be in the position of a subcontractor providing its engineering services to the architect as the general contractor.³ Case law is clear that suppliers or

sub-contractors do not have standing to challenge the failure of the agency to award a contract to the general contractor, see, e.g., Ft. Howard, 624 So. 2d at 785, and the same logic underlying that decision would preclude a sub-contractor from challenging the specifications of the procurement document directed to the general contractor.

52. Because Petitioner failed to demonstrate that it (as a separate legal entity) is a potential respondent to the RAS, Petitioner does not have standing to challenge the specifications in the RAS. Therefore, Petitioner's protest should be dismissed.

53. This result is not inconsistent with the result reached in DOAH Case No. 02-2230BID. The RFQ at issue in that case sought "professional architectural and/or professional engineering services," see DOAH Case No. 02-2230BID Recommended Order, at 11 (emphasis supplied), which, unlike the architectural services sought through the RAS, Petitioner was clearly qualified to provide in its own name.

C. Merits of Petitioner's Protest

54. If, contrary to the foregoing discussion, the School Board in its final order (or an appellate court) determines that Petitioner does have standing to protest the specifications in the RAS, the merits of Petitioner's protest must be addressed.

Accordingly, in an abundance of caution, the merits of the protest are addressed below.

55. The RAS is a solicitation that is subject to the CCNA and, as a result, the provisions of Section 120.57(3) are applicable to the solicitation and award of contracts under the RAS. Cf. Dunbar Elec. Supply, Inc. v. School Bd. of Dade County, 690 So. 2d 1339, 1340 (Fla. 3rd DCA 1997) (noting that procurements by school boards are generally not subject to Chapter 287 or Section 120.57(3), except those subject to the CCNA). Accordingly, the merits of Petitioner's protest is governed by Section 120.57(3)(f).

56. Section 120.57(3)(f) provides in relevant part:

In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, 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 solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

57. Petitioner has the burden of proof in this proceeding. See Section 120.57(3)(f) ("the burden of proof shall rest with the party protesting the proposed agency action"); GTECH Corp. v. Dept. of Lottery, 737 So. 2d 615, 619 (Fla. 1st DCA 1999).

58. Petitioner's formal written protest (as it exists after the undersigned's ruling on Respondent's motion to dismiss) identifies essentially three grounds upon which Petitioner contends that the RAS is invalid. Specifically, Petitioner contends that the RAS (1) is inconsistent with the School Board's MBE Program because it does not take into account the 10 percent MBE Goal, see Petitioner's Formal Written Protest, at Issue 2; (2) that it is inconsistent with the School Board's governing statutes, rules, and policies because it does not include each of the evaluation criteria set forth in the CCNA and the School Board's new procurement policy and it affords inordinate weight to the location factor by precluding firms outside of Hillsborough County from applying, id. at Issue 4⁴; and (3) that it is generally contrary to competition because it fails to include "tally sheets" or other directions to guide the Selection Committee's allocation of points for each of the evaluation criteria, id. at Issue 7. Each of these grounds will be addressed in turn.

1. Applicability of 10 Percent MBE Goal (Issue 2)

59. The 10 percent MBE Goal requires "10 percent minority inclusion goal for all construction related services" (emphasis supplied). Petitioner contends that the Goal applies to the RAS because the architectural services being solicited are "construction related services." In response, Respondent

contends that the Goal is inapplicable to the RAS because "construction related services" has been interpreted to mean only vocational construction trades and not professional services such as architecture and engineering.

60. Respondent's interpretation of the Goal is entitled to great deference. See D.A.B. Constructors, Inc. v. Department of Transportation, 656 So. 2d 940, 944 (Fla. 1st DCA 1995) ("An agency's construction of a statute which it administers is entitled to great weight and will not be overturned unless the agency's interpretation is clearly erroneous. The agency's interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of permissible interpretations.") (citations omitted).

61. Respondent's interpretation of the Goal is not clearly erroneous, and in light of the references to "trades" and "sub-contractors" throughout the document establishing the MBE Program and the Goal, Respondent's interpretation is certainly within the range of reasonable interpretations. Moreover, the interpretation proffered by Petitioner is not supported by the weight of the evidence, particularly in light of the uncontradicted testimony of Mr. Ballard (the School Board employee responsible for managing the MBE Program and ensuring compliance with the 10 percent MBE Goal) and Mr. Davis (the assistant superintendent with supervisory authority over the MBE

Program) that the Goal has not been applied to professional services in the past, but that the School Board is considering expanding the Goal to include those services in the future.

62. Because the 10 percent MBE Goal is inapplicable to the procurement of professional services, it follows that the Goal is inapplicable to the RAS at issue in this proceeding which is seeking architectural services. Accordingly, Petitioner failed to prove that the specifications of the RAS are inconsistent with the School Board's policies related to the MBE Program or the 10 percent MBE Goal.

2. Consistency of the Evaluation Criteria with the New Procurement Policy and the CCNA (Issue 4)

63. The CCNA requires the following factors to be considered in determining the most highly qualified firm:

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.

Section 287.055(4)(b).

64. Consistent with that mandate, the School Board's recently-adopted procurement policy requires the following

factors to be considered by the Selection Committee in awarding contracts for professional services:

the ability of professional personnel;
whether the 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 District, and other such factors
which may be pertinent to the project.

Policy Manual, Section 7.31.

65. Contrary to Respondent's contention, the evaluation criteria established for the RAS (quoted in Finding of Fact 31) incorporate each of those requirements. Therefore, the RAS is not inconsistent with the School Board's governing statutes or rules.

66. Petitioner next argues that the requirement in the RAS that respondents have an office in Hillsborough County gives inordinate weight to the "location" factor. As Respondent's witnesses conceded at the hearing, this "residency requirement" effectively precludes firms which do not have offices in Hillsborough County from being awarded a contract under the RAS notwithstanding their other qualifications.

67. Although the CCNA and the School Board's procurement policy (both quoted above) expressly authorize agencies to consider location as a factor in determining the "most qualified" firm, and although agencies are entitled to broad

discretion in the award of contracts for public works, see, e.g., Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982), there is support for Petitioner's position that absolute weight cannot be given to any particular factor, as the "residency requirement" in the RAS does. Specifically, in Opinion No. 2002-03, the Attorney General concluded that school boards may give "preferences" to local firms in evaluating their qualifications under the CCNA, but that "undue weight" should not be given to any particular factor. See Attorney General Op. 2002-03 (Jan. 7, 2002). Accord Attorney General Op. 2001-65 (Sept. 14, 2001) (concluding that it would be permissible for a school board to give a preference to local bidders "in the form of a small percentage reduction in the contract price or, in the event of equally qualified vendors, local bidders would be awarded the contract"). And cf. Attorney General Op. 87-18 (Mar. 10, 1987) (concluding in an opinion issued to the attorney for the Hillsborough County School Board that the School Board could not restrict the awards of a competitively bid school construction contract under Section 235.31 based upon residency requirements); Marriott Corporation v. Metropolitan Dade County, 383 So. 2d 662, 668 (Fla. 3d DCA 1980) (rejecting contract award made based upon bidder's presumed status as a "local firm" rather than its status as the lowest responsible bidder);

Adolphus v. Baskin, 116 So. 225 (Fla. 1928) (rejecting contract award made solely because the successful bidder "is a local man, will use local contractors and local labor and will patronize local supply houses").

68. Ultimately, however, it is unnecessary to determine whether School Board has acted arbitrarily or capriciously or otherwise abused its discretion by imposing the "residency requirement" in the RAS, see Attorney General Op. 2002-03 (suggesting that giving "undue weight" to a particular factor would be arbitrary and capricious, but noting that it is "[u]ltimately . . . within the discretion of the school board to consider factors that it deems pertinent"), because Petitioner lacks standing to challenge that aspect of the RAS. Indeed, even if contrary to the conclusion in Part B above, Petitioner were considered a potential respondent to the RAS, Petitioner failed to demonstrate that it is adversely affected by the "residency requirement" as it is required to do by Section 120.57(3)(b). Because Petitioner has an office in Hillsborough County, that restriction does not preclude Petitioner from being awarded a contract under the RAS and by effectively limiting competition from firms located outside of the county, the "residency requirement" actually works in Petitioner's favor.

3. Absence of Directions to Evaluation Committee (Issue 7)

69. Petitioner contends that the RAS is generally contrary to competition because it fails to include "tally sheets" or directions to the Selection Committee to guide the Committee's evaluation and scoring of the responses to the RAS. Petitioner failed to prove that the absence of those materials hinder it from preparing a response to the RAS. See Advocacy Center, 721 So. 2d at 755.

70. In any event, Petitioner failed to demonstrate that "tally sheets" or directions to the Selection Committee are required by the CCNA or the School Board's newly adopted procurement policy. Indeed, the procurement policy specifically contemplates the normative methodology described by Respondent's witnesses at the hearing as compared to the criterion methodology preferred by Petitioner. See Policy Manual, Section 7.31 ("The Professional Services Selection Committee shall report a consensus evaluation for each applicant, including a relative ranking for each weighted criteria.") (emphasis supplied).

71. Contrary to Petitioner's argument, the Final Order in DOAH Case No. 02-3138 did not require the adoption of "tally sheets" or directions to the Selection Committee. Indeed, the Final Order in that case did not require the School Board to do anything⁵; it simply determined that the proposed policies and

summaries of procedure challenged by Petitioner were not invalid exercises of delegated legislative authority based upon the testimony and evidence presented in that case.

72. In sum, Petitioner failed to prove that the "tally sheets" or directions to the Selection Committee are required by law or make it impossible for it to formulate a response to the RAS. Accordingly, the RAS is not deficient based upon its failure to include those materials.

4. Conclusion

73. Petitioner failed to demonstrate that the RAS is contrary to the CCNA or the School Board's recently-adopted procurement policy. Indeed, the preponderance of the evidence establishes that the RAS is consistent with the procedural and substantive requirements of those authorities and that it provides sufficient detail to enable potential respondents to prepare a response to the RAS. Moreover, the RAS specifies in advance the weights/points associated with each evaluation criteria and, even though the points will be assigned based upon a rank-ordering of responses rather than based upon pre-established "tally sheets" or schedules, the use of a point system provides an objective standard against which to judge the contract award pursuant to the RAS in the event that the award is protested or challenged by an unsuccessful respondent. Accordingly, even if it were determined that Petitioner had

standing to protest the specifications in the RAS, Petitioner failed to meet its ultimate burden of proof under Section 120.57(3)(f).

RECOMMENDATION

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

RECOMMENDED that the Hillsborough County School Board issue a final order which dismisses Petitioner's formal written protest.

DONE AND ENTERED this 3rd day of February, 2003, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of February, 2003.

ENDNOTES

1/ This initial clause was not in the version of the Evaluation Criteria, which was available on November 12, 2002; it was added on November 14, 2002. The revised version of the Evaluation Criteria was posted on the District's website at the address listed in the RAS on November 14, 2002, with the new clause highlighted in blue.

2/ The School Board adopted the Recommended Order without modification as its final order. See generally Section 120.57(1)(1).

3/ This might not be true in a circumstance where the potential respondent was a joint-venture or similar entity that included both an architectural firm and an engineering firm. However, the protest in this case was filed only by Petitioner, not a separate legal entity including Petitioner and Mr. Jackson or some other architectural firm.

4/ At the outset of the hearing, the School Board took the position that the latter issue (i.e., the so-called "residency requirement" which requires the firm have an office in Hillsborough County) was beyond the scope of Petitioner's protest. While the protest letter did not mention the "residency requirement" specifically, the allegation identified as Issue 4 appears to encompass that issue and testimony related to the "residency requirement" was subsequently elicited at the hearing without objection.

5/ Paragraph 61 of the Final Order, upon which Petitioner's argument is based, simply recognizes that the project-specific information provided to potential respondents would be "similar to" that suggested by Petitioner in that case (and which was received as Exhibit P8 in this proceeding). The Submittal Requirements, Evaluation Criteria and other materials included in the Project Information Package for the RAS are similar to the comparable documents in Exhibit P8.

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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.