

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

C.M. SECURITY GROUP, INC.,)	
)	
Petitioner,)	
)	
vs.)	Case No. 02-4806BID
)	
DEPARTMENT OF CORRECTIONS,)	
)	
Respondent,)	
)	
and)	
)	
ARCHITECTURAL OPENINGS, INC.,)	
)	
Intervenor.)	
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RECOMMENDED ORDER

Notice was provided and on January 13, 2003, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569, and 120.57, Florida Statutes. The hearing location was the offices of the Division of Administrative Hearings, DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida. The hearing was conducted by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: Gerald Spenard, C.A.
Qualified Representative
C.M. Security Group, Inc.
19400 Cruickshank
Baie D'Urfe
Montreal, Quebec, Canada H9X 3P1

For Respondent: Obed Dorceus, Esquire
Department of Corrections
2601 Blairstone Road
Tallahassee, Florida 32399-2500

For Intervenor: B. Forest Hamilton, Esquire
Rumberger, Kirk & Caldwell, P.A.
108 South Monroe Street
Post Office Box 10507
Tallahassee, Florida 32302-2507

STATEMENT OF THE ISSUE

Should the Department of Corrections' (the Department) decision to award a contract to Architectural Openings, Inc. (Architectural Openings) in Bid No. 02-Martin-7475 (the Project) for security windows be upheld?

PRELIMINARY STATEMENT

On November 19, 2002, bids were opened by the Department related to the Project. Architectural Openings was a bidder. C.M. Security Group, Inc. (C.M. Security) was a bidder. Cornerstone Detention Products, Inc., was a bidder but its bid was rejected as unresponsive. This left the bids of C.M. Security and Architectural Openings to be considered on the merits. Architectural Openings offered the lowest responsive bid.

On November 21, 2002, C.M. Security filed its notice of protest in writing with the Department contesting the decision finding Architectural Openings the low responsive bidder. On December 2, 2002, C.M. Security filed its formal written protest concerning the decision finding Architectural Openings the low

responsive bidder, together with a bond in support of that protest. Section 120.57(3)(b), Florida Statutes.

The case was unresolved between the parties. On December 13, 2002, the Department filed a notice with the Division of Administrative Hearings requesting the assignment of an Administrative Law Judge to conduct a hearing in accordance with Section 120.57(3)(e), Florida Statutes.

Initially the case was assigned to Barbara J. Staros, Administrative Law Judge. The case was reassigned for hearing.

Architectural Openings petitioned to intervene. On January 3, 2003, an order was entered granting the intervention.

The Department moved for summary recommended order or alternatively for dismissal. Oral argument was held on the motion. On January 8, 2003, an order was entered denying the motion without prejudice to raise its substance at final hearing. Concerning the motion for summary recommended order, the issues in the motion for summary recommended order are addressed by the entry of the recommended order.

The Department filed a motion to dismiss the formal written protest for alleged violations by C.M. Security of Sections 607.1501(1) and 607.1502, Florida Statutes, and for lack of standing to pursue the action for failure to comply with Section 4.3.12 of the Invitation to Bid the Project. Oral argument was

considered at the commencement of the hearing. Ruling on the motion was reserved pending entry of the recommended order.

The parties submitted a prehearing stipulation as required. Joint Exhibits numbered 1 through 4 were submitted as part of the prehearing stipulation and have been admitted. Proposed facts set forth in paragraphs 1 through 5 to the prehearing stipulation are admitted and will be reported in the findings of fact. Petitioner Exhibits numbered 1, 2, 3A-3E, and 4 were denied admission. The Department presented Charles Terry Pendergrass, Purchasing Specialist with that agency, as its witness.

On January 28, 2003, a hearing transcript was filed with the Division of Administrative Hearings.

The Department and Architectural Openings submitted proposed recommended orders which have been considered in preparing the recommended order.

FINDINGS OF FACT

STIPULATED FACTS

1. In November of 2002, or approximately thereof, the Department issued an Invitation to Bid (ITB) requesting that qualified contractors submit bids to sell to the Department stainless steel windows for Martin Correctional Institution.

2. On or about November 19, 2002, the Department received bids from three vendors, namely, Architectural Openings, Inc.,

C.M. Security Group, Inc., and Cornerstone Detention Products, Inc. The bids were as follows:

Architectural Openings	\$175,885.92
C.M. Security	\$273,325.92
Cornerstone Detention Products, Inc.	\$301,392.00

3. Among the three bids received by the Department, only Cornerstone's bid was found not responsive.

4. On or about November 19, 2002, the Department issued its Notice of Intent to award to AOI, the lowest bidder.

5. Petitioner, as the second lowest bidder, filed its Notice of Intent to protest on November 21, 2002. Petitioner's formal protest was submitted to the Department on November 26, 2002, and received on December 2, 2002.

STATED GROUNDS FOR PROTEST

6. Per form PUR 7028 Rev. 6/1/98 item 4, c, "Mistakes" it may be possible there was a mistake in the extension of unit price.

7. Per ITB 3.1.2, A. "Manufacturer shall be experienced in the manufacture of stainless steel detention windows of this type and quality". To our knowledge the lowest bidder has no experience with this type of window.

8. Per ITB 3.1.2, B. "Source quality control" Does the manufacturer have independent test on hand for the type of window required? This includes ASTM E 283, ASTM E 331, ASTM A 627 and ASTM A 629.

DISCUSSION OF PERTINENT PROVISIONS WITHIN THE PROJECT ITB

9. Under Section 2.1 Background of the ITB it is stated:

The Department of Corrections is seeking a qualified vendor to furnish security vendors to furnish security windows for Martin Correctional Institution.

10. Under Section 2.2 Statement of Purpose of the ITB it is stated:

The purpose of this Invitation To Bid is to secure competitive bids from qualified vendors to furnish security windows for Martin Correctional Institution, 1150 Southwest Allapattah Road, Indiantown, Florida 34956-4397. There are three (3) buildings included in this project, each requiring 112 windows. The windows are to be installed by inmate labor crews into existing masonry openings measuring approximately 2'-9" wide by 2'-9" high on the interior and 2'-4" wide by 2'-4" high on the exterior. The successful bidder shall only furnish the product specified or an approved equivalent. Installation is not required.

11. Under the ITB 1.11, Vendor, Offeror and Bidder are synonymous terms to describe those firms that would have the opportunity to bid on the project where it is stated:

A legally qualified corporation, partnership or other entity submitting a bid to the Department pursuant to this ITB.

12. The winner or successful bidder is defined at Section 1.12 in the ITB as:

The business or entity submitting the lowest responsive bid, meeting all requirements of the Department's ITB.

13. The opportunities to do business with the Department under the ITB are referred to at Section 4.3.12 State Licensing Requirements, where it is stated:

All entities defined under Chapters 607, 617 or 620, Florida Statutes, seeking to do business with the Department shall be on file and in good standing with the Florida Department of State.

14. The general conditions, Form PUR 7028, revised 6/1/98

at Paragraph 4.(c) states:

PRICES, TERMS AND PAYMENT: Firm prices shall be bid and include all packing, handling, shipping charges and delivery to any point within the State of Florida.

* * *

MISTAKES: Bidders are expected to examine the specifications, delivery schedule, bid prices, and all instructions pertaining to supplies and services. Failure to do so will be at bidders risk. In case of mistake in extension the unit price will govern.

15. The ITB at Section 5.5 refers to Cost Proposals. In particular Section 5.5.1 Cost Proposal Submission Requirements states:

The Bidder shall submit the Cost Information Sheet(s) (Table 1). By submitting a bid or bids under this ITB, each Bidder warrants its agreement to the prices submitted. Any qualifications, counter-offers, deviations, or challenges shall render the bid non-responsive.

16. Consistent with the ITB expectations C.M. Security and Architectural Openings executed Table 1-Cost Information and submitted those tables with their respective responses to the ITB.

17. Contrary to the claim by C.M. Security concerning a possible mistake in relation to the unit price by Architectural Openings, no proof was advanced to establish that allegation. Moreover, Section 6.2 to the ITB, Incomplete Cost Information

Sheet, contemplates the opportunity for the Department to proceed in its award of a contract even in the event of some inconsistencies or inaccuracies in price extensions where it states:

Any cost information sheet that is incomplete or in which there are significant inconsistencies or inaccuracies may be rejected by the Department. No deviations, qualifications, or counter offers will be accepted. The Department reserves the right to reject any and all bids. All calculations will be reviewed and verified. The Department may correct mathematical errors; however, in the event of any miscalculations, unit prices shall prevail.

18. This exercise of discretion in addressing the matter of unit cost and total cost is supported in the definition at Section 1.5 Desirable Conditions which states:

The use of the words 'should' or 'may' in this ITB indicate desirable attributes or conditions, but are permissive in nature. Deviation from, or omission of, such a desirable feature, will not in itself cause rejection of a proposal.

19. Treatment of unit costs and total costs by the Department does not fall within the expectations of Section 1.6 Mandatory Responsiveness Requirements which states:

Terms, conditions or requirements that must be met by the bidder to be responsive to this ITB. These responsiveness requirements are mandatory. Failure to meet these responsiveness requirements will cause rejection of a bid. Any bid rejected for failure to meet mandatory responsiveness requirements will not be further reviewed.

20. The manner in which the Department addresses unit cost and total cost is not perceived under Section 1.7 Material Deviations to constitute a material deviation within the meaning of that definition which states:

The Department has established certain requirements with respect to bids to be submitted by bidders. The use of shall, must or will (except to indicate simple futurity) in this ITB indicates a requirement or condition from which a material deviation 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 bid, or on the cost to the Department. Material deviations cannot be waived.

21. Taken in the context of provisions within the ITB any problems perceived concerning unit price or total cost can be addressed under Section 1.8 as a Minor Irregularity wherein it is stated:

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 interest of the Department.

22. At Section 4.3.6.1 Mandatory Responsiveness Requirements are further discussed. At Section 4.3.6.2 Material Deviations are described again. At Section 4.3.6.3 Minor Irregularities are referred to for a second time. In essence, these discussions at Section 4 mirror the definitional statements in Section 1 on those topics.

23. The statement of unit cost controls in ranking the bidders for purposes of cost of the project, in the event that unit cost extension in arriving at total cost is an error.

24. Most importantly, by a simple mathematical exercise it can be seen that 336 units called for, multiplied by a unit cost of \$523.47, leads to a total cost of \$175,885.92 as represented in Table 1 to the Architectural Openings' submission.

25. Section 3 to the ITB contains product information that further describes the nature of the windows being purchased. Section 3.1.1 under Specifications summarizes the nature of the product where it is stated:

B. Type of security windows on project is a stainless steel unit with fixed vision glass and operable ventilation dampers protected from vandalism by security screens.

C. Glazing: Window units shall be glazed with 1/2" clear translucent polycarbonate.

26. Section 3.1.2 to the ITB describes the need for quality assurance as:

A. Manufacturer shall be experienced in the manufacture of stainless steel detention windows of this type and quality.

B. Source quality control:

1. Air infiltration test

a. ASTM E 283

b. Maximum air infiltration .5 cfm per ft. of crack length with pressure differential across the window unit of 1.56 PSF.

2. Water penetration test

a. ASTM E 331

b. No water penetration for 15 minutes when the window is subjected to a rate of flow of 5 gal./hr./sq. ft.

with differential pressure across the window of 2.86 PSF.

3. Upon request, the window manufacturer shall provide a test report from a qualified independent testing laboratory regularly engaged in testing windows.

4. Tool-Resistant Steel (when specified)

Submit test reports from a qualified independent testing laboratory showing that the tool-resistant steel used in the windows conforms with ASTM A 627 and A 629.

C. Design Criteria: Drawings indicate size and profiles of the existing mason opening only. Shop drawings for the security windows and trim are to be based on the dimensions indicated.

D. The design of the ventilators, security screen, and insect screen shall be such that at least 90 sq. in. of free area for ventilation is provided.

27. Contrary to the allegations by C.M. Security, the provision at 3.1.2 A. taken in the context of the overall ITB does not require that Architectural Openings be a manufacturer of the form of stainless detention windows of the type and quality sought, it is only necessary that Architectural Openings as a successful bidder furnish the kind of product specified or an approved equivalent. Section 2.2. To that end the manufacturer of the product would have to be experienced in manufacturing stainless steel detention windows of the type and quality specified or an equivalent. Section 3.1.2 A. The windows when provided would then be installed by inmate labor crews.

28. Section 3.1.2 B. reminds the bidder of the degree of quality control necessary in manufacturing the windows as to the air infiltration test and water penetration test and the prospect

that upon request the window manufacturer might be called upon to provide a test report from an independent testing laboratory. There is also the discussion in the instance where there would be tool-resistant steel of further test reports from a qualified independent testing laboratory. Nothing in the quality assurance statement at 3.1.2 D. requires that this supporting test information be made available with the responses to the ITB. Neither responsive bidder, C.M. Security or Architectural Openings, provided this information with the responses, not being called upon to do so. What is intended by the ITB is that the product be capable of withstanding the test regime for air infiltration and water penetration and the prospect of additional testing if requested or specified.

29. The mandatory information to be provided with the responses to the ITB is identified at Section 5.1 Mandatory Responsiveness Requirements where it is stated:

The following terms, conditions, or requirements must be met by the bidder to be responsive to this ITB. There responsiveness requirements are mandatory. Failure to meet these responsiveness requirements will cause rejection of a bid.

5.1.1 It is mandatory that the bidder supply one (1) original, signed bid. The envelope shall be clearly marked "ITB-#02-MARTIN-7475."

5.1.2 It is mandatory that the bidder complete, sign and return PUR Form 7028, State of Florida ITB/Bidder Acknowledgement, which is the front cover of this ITB document. The bidder must return either the original or a copy (front & back) with an original signature.

5.1.3 It is mandatory that the bidder complete, sign and return TABLE I -- Cost Information, which consists of page No. 31. The bidder must return the entire TABLE I -- Cost Information section dated and with an original signature.

30. Source quality control information under 3.1.2B. is not among the items mandated to be provided with the bid response so that it may be verified in determining responsiveness for purposes of then comparing the bids of the competitors. The determinations concerning quality control are left for another occasion when the winner in the competition has been chosen.

31. When the winner is chosen, the nature of the process is further described at Section 3.1.3 Submittals where it is stated:

A. Shop Drawings: Within two weeks after receipt of purchase order, submit five (5) sets of shop drawings, including wall elevations at 1/4" scale, typical unit elevations at 3/4" scale, and full size detail sections of every typical composite member. Show anchors, hardware, operators, and other components not included in manufacturer's standard data. Include glazing details.

Submit shop drawings to:

Bob Rogers
Fort Lauderdale Service Center
Second Floor
1400 West Commercial Blvd.
Fort Lauderdale, Fl. 3309-3752
Phone (954) 202-3819

B. Samples, Submit one complete unit of type required, prior to job production, for review of construction and finish. After approval, sample may be used in actual construction.

The owner reserves the right to require additional samples which show fabrication techniques and workmanship of component parts, and design of hardware and other exposed auxiliary items.

C. Certification: Where manufacturer's standard window units comply with requirements and have been tested in accordance with specified tests, provide certification by manufacturer showing compliance with such tests; otherwise, perform required tests through a recognized testing laboratory or agency and provided certified test results.

32. The nature of the materials to be used are described in Section 3.1.5. The act of fabrication is described in Section 3.1.8 to the ITB.

33. In association with the allegations in the formal written protest, to the extent that C.M. Security misapprehended any of the instructions in the ITB concerning matters that needed to be submitted with the responses to the ITB and other requirements, it was instructed on those subjects at Section 4.3.7 Bid Inquiries, in particular at 4.3.7.2, 4.3.7.3 and 4.3.7.4 where in it is stated:

4.3.7.2 The bidder shall examine this ITB to determine if the Department's requirements are clearly stated. If there are any requirements which restrict competition, bidder may request, in writing, to the Department, that the specifications be changed. The bidder who requests changes to the Department's specifications must identify and describe the bidder's difficulty in meeting the Department's specifications, must provide detailed justification for a change, and must recommend changes to the specifications. Requests for changes to this ITB must be received by the Department no later than the date shown for written inquiries in the "Calendar of Events." A bidder's failure to request changes by the date described above shall be considered to constitute bidder's acceptance of Department's specifications. The Department shall determine what changes to this ITB shall be acceptable to the Department. If required, the Department shall issue an addendum reflecting the acceptable changes to

this ITB, which shall be sent to all bidders in order that all bidders shall be given the opportunity of proposing to the same specifications.

4.3.7.3 Any inquiries from bidders concerning this ITB shall be submitted in writing, identifying the submitter, to the individual identified in Section 4.1 of this ITB and must be received no later than the date and time specified in Section 4.2 of the Calendar of Events. (E-mail inquiries are preferred with the bidder following up by mailing or faxing a hard copy.) It is the responsibility of the bidder to confirm receipt of e-mailed and faxed inquiries.

4.3.7.4 Failure to file a protest of the bid specifications within the time prescribed in Section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under Chapter 120, Florida Statutes.

34. The record does not reflect any attempt by C.M. Security or other bidders to avail themselves of the opportunity for clarification. This meant that the ITB must be interpreted and applied as originally written.

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in accordance with Sections 120.569(1) and 120.57(1) and (3), Florida Statutes.

36. There is pending a ruling on the motion to dismiss the formal written protest for Petitioner's alleged violation of Sections 607.1501(1) and 607.1502, Florida Statutes, and for lack of standing pursuant to Section 4.3.1 of the ITB.

37. Section 607.1501(1), Florida Statutes, states:

A foreign corporation may not transact business in this state until it obtains a certificate of authority from the Department of State.

38. Section 607.1502(1), Florida Statutes, states:

A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

39. Exceptions to the transaction of business are further addressed in Sections 607.1501(2) and (3), Florida Statutes, wherein it is stated:

(2) The following activities, among others, do not constitute transacting business within the meaning of subsection (1):

(a) Maintaining, defending, or settling any proceeding.

(b) Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs.

(c) Maintaining bank accounts.

(d) Maintaining officers or agencies for the transfer, exchange, and registration of the corporation's own securities or maintaining trustees or depositaries with respect to those securities.

(e) Selling through independent contractors.

(f) Soliciting or obtaining orders, whether by mail or through employees, agents, or otherwise, if the orders require acceptance outside this state before they become contracts.

(g) Creating or acquiring indebtedness, mortgages, and security interests in real or personal property.

(h) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts.

(i) Transacting business in interstate commerce.

(j) Conducting an isolated transaction that is completed within 30 days and that it not one in the course of repeated transactions of a like nature.

(k) Owning and controlling a subsidiary corporation incorporated in or transacting business within this state or voting the stock of any corporation which it has lawfully acquired.

(l) Owning a limited partnership interest in a limited partnership that is doing business within this state, unless such limited partner manages or controls the partnership or exercises the powers and duties of a general partner.

(m) Owning, without more, real or personal property.

3. The list of activities in subsection (2) is not exhaustive.

40. Having in mind the discussion concerning business transactions in Florida for purposes of the receipt of a certificate of authority, the statute does not contemplate that the submission of a response to an invitation to bid constitutes the transaction of business in this state. With that outcome, even if it is assumed that the prohibition against maintaining a proceeding in a court in the state without benefit of a certificate of authority, has application to the Division of Administrative Hearings in its consideration of the administrative action by a formal written protest to the intent

to award the contract to Architectural Openings, the statute does not preclude the maintenance of the present action.

41. As a consequence, C.M. Security is a legally qualified corporation for purposes of the definition at Section 1.11 with the ITB.

42. Finally, Section 4.3.12 to the ITB in its admonition that C.M. Security would be seeking to do business with the state as a foreign corporation described in Chapter 607, Florida Statutes, only in the instance where the contract was being offered to C.M. Security. On that occasion it could not do the business or transact the business without obtaining a certificate of authority from the Department of State. Otherwise, C.M. Security would not be in good standing with the Florida Department of State as contemplated both in the statute and Section 4.3.12 to the ITB.

43. On the merits, C.M. Security has the burden of proof to demonstrate that the proposed agency action by the Department which concluded that Architectural Openings has offered the lowest responsive bid and was entitled to an award of the contract was incorrect in that it was contrary to the Department's governing statutes, its rules or policies or the specifications in the ITB. The decision finding Architectural Openings to be the lowest responsive bidder by price quotation entitled to the award when considered under the terms of those

governing statutes or rules or policies or the ITB must be shown to constitute clear error, to be contrary to the competition, arbitrary or capricious. Section 120.57(3)(f), Florida Statutes. Facts to be found in making the determination are based upon the preponderance of the evidence. Section 120.57(1)(j), Florida Statutes.

44. C.M. Security has failed in its proof of the grounds alleged in the formal written protest, which seeks to overturn the proposed agency action finding Architectural Openings to be the lowest responsive bidder entitled to the contract award. The allegations are not compelling for reasons as described in the fact finding.

45. Architectural Openings and C.M. Security have complied with the mandatory requirements to be considered responsive to the ITB. There were no material deviations from the terms of the ITB. There were no irregularities material or minor that have been shown. No mistakes were proven in the provision of unit cost by Architectural Openings or the extension of the unit price in offering a statement of total cost. No showing has been made that Architectural Openings must be a manufacturer of the called for windows to participate or to have any former experience with this type of windows sought. The obligation is for the winner in the competition to deliver windows from an experienced manufacturer that comply with the terms of the ITB as have been

described and to verify the window design quality consistent with the ITB when orders are made for the product. There was no obligation by the bidders concerning the final allegation in the formal written protest, the consideration of source quality control at the time the bid responses were made. In summary, those claims of noncompliance with specifications that would lead to the rejection of the bid by Architectural Openings pertaining to "mistakes" under PUR 728 rev. 6/1/98 item 4.(c). or related to Section 3.1.2A. and 3.1.2B. to the ITB are rejected.

RECOMMENDATION

Upon consideration, it is

RECOMMENDED:

That a final order be entered which dismisses the formal written protest and upholds the proposed agency action finding Architectural Openings to be the lowest responsive bidder by price and entitled to an award on the project described in Bid No. 02-Martin-7475.

DONE AND ENTERED this 26th day of February, 2003, in Tallahassee, Leon County, Florida.

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of February, 2003.

COPIES FURNISHED:

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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.