

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

R. CHRISTOPHER GOODWIN & )  
ASSOCIATES, INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-1151BID  
 )  
DEPARTMENT OF MILITARY AFFAIRS, )  
 )  
Respondent, )  
 )  
and )  
 )  
SOUTHEASTERN ARCHAEOLOGICAL )  
RESEARCH, INC., )  
 )  
Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to Notice, a hearing was held before Diane Cleavinger, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Saint Augustine, Florida on April 29 and 30, 2003.

APPEARANCES

For Petitioner: Cynthia S. Tunnickliff, Esquire  
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and

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For Respondent: Elizabeth C. Masters, Lt. Colonel  
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For Intervenor: Seann M. Frazier, Esquire  
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STATEMENT OF THE ISSUE

The issue in this proceeding is whether Respondent, Department of Military Affairs acted arbitrarily or capriciously when it awarded RFP-DMA-39 to Intervenor, Southeastern Archeological Research, Inc.

PRELIMINARY STATEMENT

The Department of Military Affairs (DMA) issued a Request for Proposal DMA-39 (RFP) on November 22, 2002. Petitioner, R. Christopher Goodwin and Associates, Inc. (Goodwin), filed a formal written protest contesting the Department's decision to award the contract advertised in the RFP to Intervenor, Southeastern Archeological Research, Inc. (SEARCH). The Protest alleged that DMA acted arbitrarily or capriciously because its evaluation of the responses to the RFP submitted by the parties violated applicable statutes, rules and specifications based upon the following arguments:

a. SEARCH's proposal was not responsive because the resumes of Principal of the Firm, Principal Investigators, and other supervisory personnel were omitted;

b. SEARCH's proposal was not responsive because certain of SEARCH's employees who were allegedly supervisory personnel did not meet the Secretary of the Interior's Standards and Guidelines contained in the Code of Federal Regulations, 36 CFR Part 61;

c. SEARCH's proposal was not responsive because certain of SEARCH's employees were required to meet, but did not meet, the requirements of 43 C.F.R. Section 7.8.

d. SEARCH's proposal was not responsive because it proposed wages which violated the Fair Labor Standards Act;

e. SEARCH's proposal was not responsive because it was "unbalanced" in violation of Federal Acquisition Regulations; and

f. SEARCH received advanced information conferring a competitive advantage through allegedly inappropriate contact between employees of SEARCH and DMA.

At the hearing on the Amended Petition, Goodwin called as witnesses William P. Athens, David George, Loretta Brooks, Thomas King, Elizabeth Maitland, Marcus Craig, Major Dwayne Jarriel, and Peggy Evans. DMA called Major Mark Widener, Harriett Fleming, and Mike Adams. DMA also introduced the

deposition testimony of Major Wayne Triay. SEARCH presented the testimony of Anne Stokes.

Additionally, the parties offered Joint Exhibits A through E into evidence. The joint exhibits were the RFP, Goodwin's response to the RFP, SEARCH's response to the RFP, DMA's evaluation score sheets, and DMA's bid tabulation. Goodwin offered 7 exhibits into evidence, lettered Goodwin Exhibits A, B-1, B-2, B-3, C, F and I. Goodwin's exhibits were the Secretary of Interior's Standards and Guidelines; Army Regulation 200-4; Army Pamphlet 200-4; the Integrated Cultural Resource Management Plan and Environmental Assessment for the Florida National Guard (ICRMP); certain Federal statutes and Code of Federal Regulations relating to Cultural Resource Management, the Metroplex Contract and e-mail from David George to Dawn Williams with Dawn Williams' reply. SEARCH did not offer any exhibits into evidence.

After the hearing, Petitioner, Respondent and Intervenor filed Proposed Recommended Orders on June 2, 2003.

#### FINDINGS OF FACT

1. DMA is a state agency. However, it is required to comply with Army regulations pertaining to cultural resource management because of its federal alignment with the United States Army. Army Regulation 200-4 (AR 200-4) specifies Army policy for cultural resources management. DMA is required by

AR-200-4 to develop and implement an Integrated Cultural Resource Management Plan (ICRMP).

2. An ICRMP is an internal compliance and management tool that attempts to integrate the entirety of the cultural resources program with DMA's ongoing mission activities.

3. Prior to 2002, DMA had developed an ICRMP. The ICRMP developed by DMA was an extensive multi-part document outlining a five-year plan for DMA's cultural resource preservation activities. The ICRMP set forth standard operating procedures for all the DMA's cultural resource surveys. The ICRMP also identified past work completed on behalf of DMA which had been performed by SEARCH or work that was in progress that was being performed by SEARCH. The statements referencing SEARCH in the ICRMP do not indicate that SEARCH would be promised future work and do not demonstrate any bias by DMA in favor of SEARCH.

4. Cultural resource surveys are required by the National Historic Preservation Act when federal funds are spent on any construction project. Such surveys are reviewed by each state's historic preservation officer for use in that state's compliance with the various historic preservation acts, including the National Historic Preservation Act and the Interior Secretary's rules promulgated thereunder.

5. A cultural resource survey is an examination of a particular area of land or a particular structure for evidence

of significant prehistoric or historic activities or items, potential archaeological sites, the location of such activities or sites and an inventory of any such prehistoric or historic areas or items which are found. A cultural resource survey generally includes a review of archeological or historic documentation and information, preparation of archeological, environmental and historical overviews of a given project area, completion of a field study both above and below ground of the project area, mapping of the project area and a final report detailing the results of the survey.

6. In part, the field study involves people walking over an area looking for signs of prehistoric or historic activity, digging multiple holes in an area looking for signs of prehistoric or historic activity, sifting the soil to discover evidence of any prehistoric or historic activity and documenting any information relevant to an area. The intensity of the search, such as the spacing of the holes, initially depends on the information gained through the review of archeological or historic documentation and information regarding the area being surveyed and later on any prehistoric or historic evidence found in a given area. Areas where prehistoric or historic evidence is found or thought likely to be found are more intensely examined. The decision to intensify the examination of an area is made by the person who supervises the study or supervises the

field workers. That supervisor, depending on the circumstances and distances involved, may or may not be present at the actual survey site. There is no statute or rule which requires such a decision-maker to be present at the survey site.

7. In late, 2002, DMA began to develop and draft the criteria for a request for proposal for cultural resource surveys of DMA's property made necessary by the ICRMP.

8. The RFP was prepared by DMA's Construction and Facility Management Office's (CFMO) Environmental and Cultural Resource Management staff. Developing a request for proposal involving cultural resource surveys was new to CFMO staff. Therefore, at the suggestion of SEARCH who was then conducting a cultural resource survey for DMA, CFMO staff obtained a RFP for cultural resource surveys used by the Florida Department of Transportation. The Department of Transportation's RFP was used as a template for the DMA RFP.

9. The RFP developed by DMA, stated, in relevant part:

7.1 General

The Department will determine whether the Contractor is qualified to perform the services being contracted based upon their proposal demonstrating satisfactory experience and capability in the work area. The Contractor shall identify necessary experienced personnel and facilities to support the activities associated with this proposal.

## 7.2 Qualifications of Key Personnel

Those individuals who will be directly involved in the project should have demonstrated experience in the areas delineated in the scope of work. Individuals whose qualifications are presented will be committed to the project for its duration unless otherwise excepted by the Department's Cultural Resource Manager. . . .

\* \* \* \*

## 8.2 Responsiveness of Proposals

. . . .

A responsive proposal is an offer to perform the scope of services called for in the Request for Proposal in accordance with all requirements of this Request for Proposal **and receiving seventy (70) points or more on the Technical Proposal.** . . .

\* \* \* \*

## 8.5 Waivers

The Department may waive minor informalities or irregularities in proposals where such is merely a matter of form and not substance, and the correction or waiver of which is not prejudicial to other Contractors. Minor irregularities are defined as those that will not have an adverse effect on the Department's interest and will not affect the price of the Proposal by giving a Contractor an advantage or benefit not enjoyed by other Contractors.

\* \* \* \*

## 9.5 Method of Payment

. . . Payment shall be made at the contract hourly billing rates . . . The contract hourly billing rates shall include the costs of salaries, overhead, fringe benefits, travel and operating margin. Payment for expenses shall be made on the basis of actual allowable cost incurred as authorized and approved by the Department.



\* \* \* \*

### 17.1 General Information

This section contains instructions on the required format for the proposal. All proposals submitted shall contain two parts and are to be marked as follows:

PART I TECHNICAL PROPOSAL NUMBER RFP-DMA-39 . . . .

PART II PRICE PROPOSAL NUMBER RFP DMA-39 . . . .

### 17.2 Technical Proposal (part I)

The Contractor must submit . . . copies of the technical proposal which will be divided into the sections described below. . . .

### 17.3 Executive Summary

The Contractor shall provide an Executive Summary to be written in non-technical language to summarize the Contractor's overall capabilities and approaches for accomplishing the services herein. . . .

### 17.4 Contractor's Management Plan

The Contractor shall provide a management plan, which describes administration, management and key personnel.

#### A. Administration and Management

The Contractor should include a description of the organizational structure and management style established and the methodology to be used to control costs, services reliability . . . .

#### B. Identification of Key Personnel

The contractor should provide the names of key personnel . . ., as well as a resume for each individual proposed and a description of the functions and responsibilities of each key person relative to the task to be performed.

. . . .

17.5 Contractor's Technical Plan

The Contractor shall provide a technical plan, which explains technical approach and facility capabilities.

\* \* \* \*

18.1 Evaluation Process

A Selection Committee, . . ., will be established to review and evaluate each proposal. The Committee will be comprised of at least three persons with background, experience, and/or professional credentials in relative service areas. . . .

. . . The Committee will assign points, utilizing the technical evaluation criteria identified herein and complete a technical summary. . . .

The Procurement Office will open Price Proposals . . . The Procurement Office . . . will review and evaluate the price proposals and prepare a summary of its price evaluation. . . .

During the process of evaluation, the Procurement Office will conduct examinations of proposals for responsiveness to requirements of the RFP. Those determined to be non-responsive will be automatically rejected.

\* \* \* \*

18.3 Criteria for Evaluation

Proposals will be evaluated in accordance with the criteria detailed below.

A. Technical Proposal (100 Points)

Technical evaluation is the process of reviewing the Contractor's Executive Summary, Management Plan, Technical Plan, example of work and Work Plan for understanding of the project, qualifications, approach and capabilities, to assure a quality product.

. . . .

Price evaluation is the process of examining a prospective price without evaluation of the separate cost elements and proposed profit of the potential provider. . . . Award will be based on the total price for the five-year period.

. . .

**EXHIBIT "A"**  
**CULTURAL RESOURCES ASSESSMENT SERVICES**

\* \* \* \*

**4. PERSONNEL STANDARDS**

Personnel will be considered qualified when they meet the minimum criteria for archeologists, historians, architectural historians and other professionals as set forth in the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation and 36 CFR Part 61. Resumes of the Principal of the Firm, Principal Investigator, other supervisory personnel, and consultants documenting their qualifications to conduct work in their stated area of expertise must accompany the contract proposal. . . .

The proposed participation of the above individuals in the Department projects is subject to approval by the Cultural Resource Project Manager . . . based on their meeting the minimum qualifications for such work as stated in the above mentioned guidelines and based on a review of their work history. . . .

The firm(s) personnel performing the services must be a member of the Register of Professional Archeologists and meets the Secretary of Interiors' "Standards and Guidelines for Archeology and Historic Preservation" (36 CFR Part 800 Appendix C). . . .

\* \* \* \*

**8. METHOD OF COMPENSATION**

. . .

The Lump Sum payment shall be made at the contract hourly billing rates . . . The contract hourly billing rates shall include the costs of salaries, overhead, fringe benefits, travel and operating margin. Payment for expenses shall be made on the basis of actual allowable cost incurred as authorized and approved by the Department. These expenses shall be approved in advance as part of the project.

Out-of pocket expenses include incidental costs for printing, materials. Expendable equipment, equipment rental, long distance telephone calls, tolls, etc. A detailed list must be prior approved in order to receive reimbursement. All other costs shall be included in the Contractor's hourly rate.

. . .

10. The hourly billing rate or unit rate described in the RFP was based on the hourly rate proposed by the contractor in its response to the RFP. Rates were given for specified categories of personnel over a five-year period beginning in 2003 and ending in 2008. The categories of personnel listed in the RFP were for Principal of the Firm, Principal Investigator, Project Archeologist, Archeological Technician, Senior Historian, Historical Technician, Laboratory Supervisor, Laboratory Technician, Graphics, Clerical, Geographical Information Systems Technician (GIS) and Others. Other than the titles given the various categories of personnel, each of the

categories for which prices were sought was undefined in the RFP.

11. As indicated earlier, the rates proposed by the contractors were to include various areas of costs such as salaries, overhead, fringe benefits, etc. However, the language of the RFP referencing the various items of costs to be included in these rates did not mean that the firms actual costs, such as the actual salary for the principal of the firm, be included in the billing rate, but only that the amount proposed would represent all such costs so that the contractor could not later claim such costs as reimbursable expenses. In short, the rate proposed for the hourly billing rate was the amount the contractor would charge DMA for the performance of the work or service generally associated with a particular category of personnel. It was within the contractor's discretion whether one of its employees would fulfill more than one of the above-listed categories or otherwise divide the work required under the contract within its organization. It was also within the contractor's discretion to pay its personnel amounts different from the amounts listed for the various categories of personnel. Therefore, SEARCH's ability to pay the minimum wage to a particular employee or comply with the federal fair labor law is not related to the amount a contractor proposes to charge DMA for a given service.

12. In relation to the employees of a contractor, the RFP required that the resumes of key personnel showing that personnel's qualifications to participate in a cultural resource survey be included in the contractor's response. The RFP did not require that resumes be provided in a certain form or as a separate document. Therefore, a contractor's response to the RFP could comply with the resume requirement by supplying its key personnel's qualifications or experience to perform that personnel's contribution to creating a cultural resource survey in the text of its response to the RFP. Additionally, the RFP stated that unspecified personnel would be considered qualified when they meet the Secretary of Interiors Standards and Guidelines. The Secretary of Interiors Standards and Guidelines, state in relevant part, as follows:

**Professional Qualification Standards**

. . . The qualifications define minimum education and experience required to perform identification, evaluation, registration and treatment activities.

. . .

History

The minimum professional qualifications in history are a graduate degree in history or closely related field; or a bachelor's degree in history or closely related field plus one of the following:

1. At least two years of full-time experience in research, writing, teaching, interpretation or other demonstrable professional activity with an academic institution, historic organization or agency, museum, or other professional institution; or

2. Substantial contribution through research and publication to the body of scholarly knowledge in the field of history.

#### Archeology

The minimum professional qualifications in archeology are a graduate degree in archeology, anthropology or closely related field plus:

1. At least one year of full-time professional experience or equivalent specialized training in archeological research, administration or management;
2. At least four months of supervised field and analytic experience in general North American archeology; and
3. Demonstrated ability to carry research to completion.

In addition to these minimum qualifications, a professional in prehistoric archeology shall have at least one year of full-time professional experience at a supervisory level in the study of archeological resources of the prehistoric period. A professional in historic archeology shall have at least one year of full-time professional experience at a supervisory level in the study of archeological resources of the historic period.

\* \* \* \*

13. As written, these guidelines are not mandatory and do not apply to contractors. They are relevant to various federal agencies, the State Historic Preservation Officer and other governmental historic preservation officers. The RFP did require these guidelines to be met. However, no official Department of Interior interpretation of the Guidelines was offered into evidence. No other agency's interpretation of the guidelines was offered into evidence. The guidelines only apply to people who identify or evaluate historic or prehistoric

properties and people who actually, preserve, protect, restore, reconstruct or rehabilitate historic or prehistoric property. They do not have any qualifications for laboratory work or personnel. None of the guidelines address or define the level of supervision or the category of personnel to which the guidelines apply. The particular title of the person employed by a contractor ultimately responsible for the identification, evaluation or treatment of historic or prehistoric property is not addressed in these regulations. A particular method of performing a field study is not addressed in these regulations. Therefore, depending on the contractor, the person required to comply with these regulations may be either in the field, in the office, or on-call. The evidence showed that the location of such an employee is more a matter of a firm's philosophical approach to cultural surveys and potential travel times to a survey site. In this case, SEARCH and Goodwin personnel meet these guidelines since both have had cultural resource survey work and reports accepted by the various agencies responsible for the implementation of the various federal and state laws on historic and cultural preservation, including the Florida's State Historic Preservation Officer.

14. The RFP also contained the criteria and method by which bids would be scored. The technical proposal could receive up to 100 points divided into 45 points for the



management plan, 45 points for the technical plan and 10 points for the executive summary.

15. Part of the review of the technical proposal concerned the potential contractor's ability to quickly respond to discoveries made at the survey site, changing survey site conditions and requests or inquiries from DMA. Discoveries at a site can require quick response from a contractor. For example, the unearthing of human remains requires the immediate cessation of work and requires an emergency response plan to go into effect.

16. Price was scored separate from the technical proposal with the lowest priced proposal receiving 25 points. Importantly, price and costs were not the same in the RFP. Price is the total amount that the contractor proposed to charge DMA for its services, irrespective of the actual costs incurred by the contractor for provision of those services.

17. On the other hand, the contractor's efficiency in providing the contract services, profit potential and ability to control its costs were to be considered during the review of the technical proposal. Therefore, in addition to response time, the location of the contractor relative to any potential project site and the potential contractor's location relative to its ability to control potential costs for travel and ability to respond quickly to conditions at the survey site were

appropriate factors to be considered during review of the technical proposals. Such a review was appropriate especially since travel costs were not separately reimbursable expenses under the contract.

18. Ms. Maitland was the employee in CFMO primarily responsible for drafting the RFP; her office is directly in front of Mr. Adams' office. Mr. Adams is the director of CFMO. At times prior to the issuance of the RFP, Ms. Maitland overheard Mr. Adams discuss the RFP with Mr. Pochurek, an employee of SEARCH, on several occasions. No detail about these discussions was offered into evidence. However, simply discussing a developing RFP with a potential contractor is not illegal and does not, by itself, demonstrate bias by DMA towards SEARCH. Nor did any other evidence demonstrate such a bias.

19. On November 19, 2002, three days before the RFP was issued, Mr. Adams requested Ms. Maitland to participate in a speaker phone conversation to explain recent internal changes in the RFP. The evidence did not demonstrate that any competitive advantage resulted from three days of advanced knowledge about the RFP especially since responses to the RFP were not due until February 20, 2003. Additionally, any potential contractor had the right and ability to ask questions regarding the RFP until January 30, 2003.

20. On November 22, 2002, DMA published RFP DMA-39, asking contractors to submit proposals for multi-project cultural resource surveys on DMA property. Goodwin, SEARCH and a third firm not involved here, submitted responses to the RFP.

21. After the issuance of the RFP, Mr. Adams had a conversation with SEARCH about how they could improve their work and reports in the future. Such a critique is a legitimate role for the director of CFMO to perform with any contractor who had performed or was performing work for DMA. Neither the meeting nor the critique demonstrated bias on the part of DMA.

22. In December, 2002, a meeting was arranged at Camp Blanding in order for Marcus Craig, the newly hired person at DMA responsible for GIS data, to discuss with SEARCH what type of GIS information was available or could be developed from the data SEARCH had obtained on a cultural resource survey it had performed under the "Metroplex contract." GIS information is a computational representation and database of a survey site, showing the location of any cultural resources found on a site, as well as any other information relevant to the site. The Metroplex contract did not require GIS data. However, part of Mr. Craig's job was to gather as much information about the Department's armories and property as possible. He participated in the meeting at Camp Blanding in order to ask about information on regions that SEARCH had already surveyed in the

past. Mr. Craig sought to gather the most basic data that they had collected. He needed to ascertain the availability or existence of the GIS information to fulfill the duties of his job with DMA. The meeting at Camp Blanding was not related to the pending, un-issued RFP. The RFP was not discussed. Moreover, the information sought or discussed during the meeting relating to GIS data did not relate to the GIS data that was eventually required under the RFP. The evidence did not demonstrate any bias on the part of DMA. Moreover, there was nothing said at that meeting which would give SEARCH personnel an advantage in submitting a response to the RFP.

23. On January 23, 2003, DMA conducted a pre-proposal conference. Anybody who was interested in the project could ask questions about the RFP and its terms. All relevant staff from the DMA, including a GIS specialist, were present and available to answer questions about the RFP. All prospective contractors were afforded sufficient time to ask questions and receive responses.

24. No one challenged the specifications contained in the RFP. No one asked for clarification about the definition of the categories of personnel contained in the RFP. No one challenged the scoring criteria in the RFP.

25. After the pre-bid meeting, Mr. Pochurek, an employee of SEARCH, faxed Mr. Adams printed copies of two web pages for Goodwin and Pan American, another company that had attended the pre-proposal conference. The web pages were readily available to the public. Provision of such information by one of the potential contractors under an RFP does not show bias on the part of DMA or that SEARCH was treated more favorably than any other contractor who had yet to respond to the RFP.

26. On February 7, 2003, DMA issued Addendum 1 to the RFP. Addendum 1, in relevant part: 1) deleted the requirement to include information on the contractor's ability to conduct underwater archeology, 2) clarified that all travel costs, including costs for motels, meals, vehicle rentals, airline tickets, etc. were to be included in the hourly rates proposed by the contractor in its proposal, 3) added reimbursement of a 50.00 dollar a day allotment for costs not covered under the RFP, and 4) added more specific requirements for Geographical Information Systems (GIS) data in the reports submitted by the contractor. The addendum to the RFP was received in enough time to allow all bidders to adequately respond.

27. Goodwin is one of the premier cultural research management firms in the country. The company engages in all phases of terrestrial and underwater archaeology.

28. Its main office is in New Orleans, Louisiana. However, as projects require, it will maintain a satellite office closer to a given project site. In this case, Goodwin's satellite office would be located in Tallahassee, Florida, approximately 3 to 4 hours away from any site which may be covered by the RFP.

29. Goodwin has worked for both private and public entities; over 150 military installations and 50 national guard installations. Goodwin has done work at Fort Polk, Fort Benning, and Fort Stewart, and several districts of the Army Corps of Engineers. In addition, Goodwin has conducted a survey for Southern Natural Gas across North Florida and Florida Gas Transmission Co. All of Goodwin's cultural resource survey reports submitted to the Florida Historic Preservation Officer have been approved by that office.

30. SEARCH specializes in performing cultural and historic resource surveys. SEARCH is located in Gainesville, Florida. Its office is located approximately an hour away from any potential sites covered by the RFP.

31. SEARCH performs between 100 and 160 cultural resource projects per year. SEARCH has performed Phase I, II and III surveys throughout Florida, the southeastern United States and the West Indies. SEARCH has completed cultural resource surveys for the Florida National Guard and currently has a contract with

the Florida Department of Transportation (DOT), District III for a cultural resource survey on a DOT highway project. During SEARCH's previous work for the DMA, DMA never experienced delay based on a failure of SEARCH to comply with state or federal law, or Army regulations. All of SEARCH's cultural resource survey reports submitted to the Florida State Historic Preservation Officer have been accepted by that office.

32. SEARCH is not a large company. It maintains a staff of only a few professionals. SEARCH has ranged between 4 and 18 employees depending on how much field work it was conducting.

33. SEARCH's archeologists are organized into the following positions: Principal of the Firm, Principal Investigators, Project Archaeologists, and Field Technicians. In addition, SEARCH operates a laboratory where artifacts are indexed, employs a specialist in GIS, and employs various administrative staff.

34. The cultural resource surveys prepared by SEARCH are primarily authored by the Principal Investigator assigned to a project. Others may contribute to the report but, ultimately, the Principal Investigator is responsible for that survey, with the principal of the firm performing a quality assurance role.

35. SEARCH was founded by Dr. Anne V. Stokes in 1993; and she is the Principal of the Firm. Dr. Stokes holds a Ph.D. in anthropology with a specialty in archaeology and is a member of

the Register of Professional Archaeologists (RPA). She is the person responsible for the quality of the cultural resource survey, and she meets the Interior Secretary's professional standards.

36. SEARCH's other two archaeologists are Drs. Carlson and Austin. They hold Ph.D.s in archaeology and are members of the RPA. They are the Principal Investigators for SEARCH in a cultural resource survey performed by it. Both meet the Secretary of the Interior's Guidelines for archaeologists. Geoffrey Mohlman, holds a master's degree in an appropriate field for his specialty and role in a cultural resource survey, history and architectural history, and has years of experience in research and writing. Mr. Mohlman is responsible for all historical and architectural historical work performed at SEARCH and he meets the Interior Secretary's Guidelines. SEARCH does not currently employ a "historical technician" or a "junior historian."

37. SEARCH's proposal included the resumes of the Principal of its Firm, each of its Principal investigators and other supervisory personnel it concluded were responsible for and supervised the validity of the information that would be contained in the cultural resource survey. The RFP did not require additional resumes to be submitted and was open to



interpretation as to what resumes should be included as part of a contractor's response to the RFP.

38. SEARCH also hires personnel in a position it titles "project archaeologists." Currently, SEARCH's project archaeologists are Mr. William Morgan and Mr. James Pochurek. In SEARCH's organization, a project archaeologist makes certain that field crews arrive where they are assigned, makes hotel arrangements, supplies per diem payments, and may participate in some digging. While described as supervisor's in SEARCH's response to the RFP, both employees function more as coordinators for logistical matters, such as communication to the archaeologists responsible for the archeological decisions of the project.

39. Both Mr. Morgan and Mr. Pochurek have backgrounds in archaeology, but they do not possess a master's degree in either archaeology or anthropology. Both are qualified to perform the functions of their positions and have successfully performed such functions in the past. They are both supervised by the Principal Investigator of the project. They are not required to comply with the Interior Secretary's Guidelines. SEARCH did not include a formal resume for Mr. Morgan or Mr. Pochurek; however, both employee's qualifications were sufficiently outlined in SEARCH's response to the RFP to enable a person

reviewing the RFP to determine the employee's qualifications and work experience.

40. SEARCH also employs field technicians, otherwise referred to as field archaeologists. SEARCH is not large enough to divide its field archaeologists into various levels of pay grades. Though not a job requirement and though not all do, many of SEARCH's field technicians hold master's degrees in areas relevant to their work, possess years of experience and meet the Secretary of the Interior's Guidelines.

41. SEARCH also utilizes a lab which contains a supervisor and two lab technicians. Lab technicians and field technicians are approximately the same, and neither are required to have a master's level of training in order to get hired at SEARCH. Nevertheless, John Endonino, SEARCH's laboratory supervisor, has recently received his master's degree in anthropology and already possesses years of experience. Additionally, Asa Randall, a SEARCH laboratory technician, holds a master's degree and possesses years of experience. Both meet the Secretary's Guidelines to the extent they may apply to laboratory work.

42. Finally, SEARCH employs a specific GIS professional. Recently, that professional, Lori Collins, announced her resignation. However, SEARCH has every confidence that it will locate her replacement without difficulty. SEARCH has no dedicated graphics personnel; that job is performed by other

personnel employed by SEARCH or by personnel performing duties associated with one of the other categories of personnel listed in the RFP.

43. In contrast to SEARCH's size, Goodwin has approximately 100 employees. Goodwin's organizational structure is more complex than SEARCH's.

44. Goodwin's Principal of the Firm is Dr. R. Christopher Goodwin. However, Dr. Goodwin is not a member of the Register of Professional Archaeologists (RPA).

45. Goodwin also has Principal Investigators. However, some of the Principal Investigators identified as available for this project in Goodwin's response to the RFP were not members of RPA. Although Goodwin's proposal indicates that only personnel meeting the Interior Secretary's Guidelines would supervise the project, the Interior Secretary's Guidelines do not require RPA affiliation. It remains unclear, whether non-RPA investigators would supervise the project since the RFP required personnel listed in a contractor's response to be dedicated for the area for which the employee was listed.

46. Because of its size and structure, Goodwin also employs "project managers." SEARCH does not have "project managers." In SEARCH's hierarchy, a Principal Investigator performs the duties assigned to a "project manager" as that term is used by Goodwin. Both firms require this position to be

filled by someone with Master's level training who meets the Secretary of Interior's Guidelines.

47. Additionally, Goodwin employs "assistant project managers." An "assistant project manager" is tantamount to a project archeologist at SEARCH. Neither firm requires that this position be filled with employees possessing a master's degree, though some of each firm's employees at this level have received that level of training. Both firms' employees possess some "supervisory" and oversight capacity over lower level employees. However, the Secretary's guidelines do not apply to this level of employee since such personnel are supervised by someone who meets the Secretary of the Interior's Guidelines. The language of the RFP does not require that the Interior Secretary's Guidelines apply to this level of personnel.

48. Goodwin segregates its field archeologists into three grades. None of these positions requires a master's degree in Goodwin's hierarchy. However, like SEARCH, Goodwin's field archaeologists, and indeed their assistant project archaeologists, participate in excavating and identifying artifacts. All are supervised by a person who does meet the Interior Secretary's professional standards. In short, not every employee in an archaeology firm must meet the Secretary of the Interior's Guidelines in order to satisfy the requirement of the RFP. All the parties agree that only certain "supervisory"

personnel must meet the Guidelines. The Guidelines do not address this issue and therefore; the personnel which must comply with the Guidelines are left up to the individual contractor.

49. At both Goodwin and at SEARCH, the Principal Investigator ultimately signs and takes responsibility for the work reported in any cultural resource survey.

51. As noted above, both companies employ professional archeologists who are not required to meet the Guidelines, but who possess limited supervisory roles. Goodwin defines this position as "assistant project manager." SEARCH defines the position as "project archeologist." SEARCH and Goodwin may call their positions by different names, but the qualifications are similar. Employees in these positions are involved in identifying and excavating artifacts. For both companies, so long as the employees in these positions are themselves supervised by an individual who meets the Guidelines, work may be performed satisfactorily.

52. Clearly both firms have the requisite personnel to perform cultural resource surveys under the RFP and operate in a manner that meets the Interior Secretary's guidelines.

53. The Department's review of the responses to the RFP was segregated into three stages. First, the State's Quartermasters' Office reviewed all submissions in order to

determine whether certain mandatory items were included. Second, if a bid contained all the mandatory items, then its narrative sections were forwarded to an evaluation committee where the proposal's executive summary, management plan and technical plan could be scored. Finally, the State Quartermaster's Office opened and scored each price proposal.

54. Ms. Peggy Evans was the State Quartermaster's Office Purchasing Director. In that position, she was responsible for state purchasing and contracting. Ms Evans was involved in the preparation of the RFP and helped to assure that mandatory items required in state contracts were required in the RFP. Ms. Evans included the mandatory requirements made necessary by state law.

55. The mandatory requirements within the RFP included registration by a certain deadline, attendance at the mandatory pre-bid meeting, and the submission of technical and price proposals on time. Additionally, each bid must have included certain mandatory forms and signatures, such as the Drug Free Workplace Certification or a signed acknowledgement of the RFP's Addendum. Goodwin and SEARCH, were both responsive to the mandatory requirements of the RFP.

56. The evaluation committee was responsible for review of the narrative portions of the responses to the RFP. The narrative portions included the management and technical plans submitted by the respondents.

57. The persons originally chosen to sit on the evaluation committee were Mike Adams, Elizabeth Maitland, Major Dwayne Jarriel, and Major Mark Widener. Because of other duties, Major Widener did not participate in the evaluation committee review. Marcus Craig was then appointed to the evaluation committee because of his expertise in GIS. All of the committee members met the qualification for experience in fields related to contracting and the RFP. All were qualified to sit on the review committee.

58. Mike Adams, Elizabeth Maitland, Marcus Craig, and Dwayne Jarriel met at approximately 9:00 a.m. in a conference room at DMA. They each had a copy of the three responses to the RFP and the evaluation sheets.

59. Most of the evaluators were sufficiently familiar with the RFP before arriving at the evaluation. Mr. Craig reviewed the RFP before attending the evaluation. Ms. Maitland assisted in writing most of the technical and management plan, and Mr. Adams oversaw her work. Major Jarriel was the least prepared regarding the specifics of the RFP, but such unpreparedness did not interfere with his ability to review the proposals from a contracting point of view. In addition, on the day of the evaluation, each evaluator had two pages of the RFP related to scoring, pages 18 and 19. A copy of the RFP was also in the room. In this case, it was immaterial that the members of the

evaluation committee did not review the proposals for specific compliance with the RFP's specifications regarding the Interior Secretary's Guidelines or inclusion of resumes since both parties met those specifications.

60. In general, all evaluators collectively agreed that each of the contractors who submitted a response to the RFP was qualified to do the work. The evaluators read each of the proposals quietly, for approximately four hours. Occasionally, one evaluator or another would ask a question. However, for the most part, this review of the bids was conducted in silence and without an opportunity for one evaluator to influence another.

61. At the conclusion of this review, the evaluators convened for a brief, approximately five-minute discussion of the advantages and disadvantages of each of the responses to the RFP. However, before that discussion took place, all of the evaluators had already ranked the proposals in their own mind. All of the evaluators listened to the questions and opinions voiced by their peers. Nothing said during that discussion influenced any evaluator to change his or her decision. Moreover, no evaluator divulged the point score he or she had assigned to any bid; thus, there was no opportunity for collusion among the evaluators. Three of the four evaluators selected SEARCH's proposal as the superior submission.



Elizabeth Maitland did not select SEARCH's proposal as superior. Instead, she selected Goodwin's as the best proposal.

62. Ms. Maitland gave Goodwin a score of 100. Not because they were perfect, but because she thought they were the best. She gave SEARCH an 80. Ms. Maitland favored Goodwin for its experience with the Department of Defense.

63. Major Jarriel recognized that the RFP was a road map which outlines what the agency was looking for. He admits that he never looked at the RFP until after he had completed his evaluation and quite candidly conceded that when he evaluated the three proposals, he didn't exactly know what the Agency was looking for. However, his knowledge about the qualities a contractor must demonstrate in order to successfully work with DMA was sufficient to allow him to honestly evaluate the responses to the RFP.

64. Major Jarriel felt SEARCH's management and technical plans were superior in both presentation and clarity. He also scored SEARCH higher because it was located in Gainesville, Florida, and in his experience that would make them more responsive, more efficient at controlling costs and therefore better able to perform the contract. Such factors were within the review criteria contained in the RFP. He particularly focused on the fact that SEARCH's proposal emphasized designing systems to meet DMA's desires and the level of explanation of

various survey concepts in its proposal. Major Jarriel reviewed the executive summary and management plan and glanced through the technical plan. He looked at the proposal from an overall standpoint, not from any specific individual criterion. Major Jarriel, in part based on the opinion of Mr. Craig, gave SEARCH a higher score because he thought that its GIS format and capabilities would better meet DMA needs. However, reliance on a GIS expert's opinion is neither arbitrary nor capricious and is reasonable for the committee members to do.

65. Mr. Adams felt a firm's experience working and consulting with Native Americans and the National Guard were important factors. He also felt a firm's presentation on its GIS capabilities was an important factor. He felt Goodwin's response was weak in the area of Native American consultations. Mr. Adams scored SEARCH higher because they had experience working with the Florida National Guard and Native Americans. Review and knowledge about the ICRMP was also required in the RFP. Mr. Adams felt SEARCH was better in demonstrating that knowledge. There was no evidence to demonstrate that Mr. Adams' scores did not reflect his true assessment of the parties' responses to the RFP.

66. Mr. Craig was mainly, but not completely, concerned with a response's "GIS section." SEARCH's response devoted almost 5 pages explaining the importance of GIS and its

willingness to help design a GIS system that would best meet the goals of the Department. In Mr. Craig's mind, SEARCH's technical proposal was far superior to Goodwin's. They provided more than the minimum amount of information regarding GIS and demonstrated that they would make efforts to ensure that the Department's needs were satisfied. He also scored SEARCH's proposal higher because they were going to use the same software that he used at DMA. Preference for the utilization of the same software is a legitimate consideration since it eliminates any potential compatibility issues with DMA software which sometimes arise between newer and older versions of software which have had add-ons to upgrade the older version. Mr. Craig also thought SEARCH would be more cost effective and responsive because it was a Florida-based firm. In scoring Goodwin lower than SEARCH on the technical proposal, Mr. Craig took into consideration his opinion that Goodwin's ownership of the underwater sensing equipment would increase its overhead so that it would not be as cost effective as SEARCH and had provided unnecessary information on such underwater capabilities in their response.

67. Mr. Craig also examined the overall way that responses were written and any indications of each bidder's willingness to satisfy the needs of the Department. After his evaluation, Mr. Craig concluded that the Goodwin proposal was not as

responsive to the Department's needs as was the proposal submitted by SEARCH.

68. Mr. Craig, Mr. Adams, and Major Jarriel, noted the Gainesville offices of SEARCH are significantly closer than the functional Tallahassee office of Goodwin. Camp Blanding is less than an hour away from Gainesville and, at over 73,000 acres, constitutes the vast majority of land holdings by DMA. Additionally, few of the Department's armories are located in the Panhandle. Most are located south of Camp Blanding, closer to Gainesville than Tallahassee or elsewhere.

69. Moreover, it was not certain that Goodwin would utilize employees from its Tallahassee office. Upon reviewing resumes during his evaluation, Mr. Adams noted that Goodwin had no employees, other than a receptionist, working in its Tallahassee office. They all worked in New Orleans or in Washington, D.C. Indeed, the telephones in the Tallahassee office forwarded to Goodwin's New Orleans office. Conversely, the SEARCH proposal clearly indicated that all personnel would be located in Gainesville, Florida.

70. The evidence did not demonstrate that any of the evaluators acted arbitrarily, capriciously or failed to utilize the specifications of the RFP.

71. Once the executive summaries, management plans and technical plans of all responsive contractors were scored by the Evaluation Committee, Peggy Evans and her assistant opened the price proposals of the parties. None of the evaluators saw any of the price proposals prior to their scoring. This procedure assured that none of the technical scores would be influenced by the pricing of the bidders.

72. Ms. Evans, upon calculating the total price proposed by each bidder, determined that SEARCH had submitted the lowest bid, by a large margin.

73. Pursuant to the RFP, a total of 25 points was available for the price component of scoring. Because SEARCH submitted the lowest bid, it was awarded the 25 points for pricing. Other bidders received a portion of the 25 points based on the relationship of that contractor's price to SEARCH's low bid. SEARCH scored the highest for both portions of the RFP and was awarded the RFP contract.

74. There was no convincing evidence that SEARCH's bid was unbalanced or that the prices it quoted were not intended to reflect what it would charge for the services related to that price. Moreover, DMA has no regulation requiring a bid to be balanced. Federal acquisition regulations or standards do not apply. Without such a regulation and since "balance" is not required in the RFP, DMA has no authority to reject the apparent

low bid as not responsive to the RFP. Moreover, the evidence did not demonstrate that DMA's decision was arbitrary, capricious, or in violation of its statutes, rules or RFP specifications. Therefore, DMA's decision to award the RFP to SEARCH should be upheld.

#### CONCLUSIONS OF LAW

75. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(3), Florida Statutes (2002).

76. Protests to the award of an RFP is a de novo proceeding which evaluates the decision made by an agency to award a contract to a given contractor. The proceeding does not re-evaluate the proposals submitted in response to the RFP, but only determines whether an agency's decision was arbitrary, capricious, fraudulent, or contrary to competition, agency statutes or rules. State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998). The issue in this protest proceeding is whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rule or policies, or the proposal's specifications. Section 120.57(3)(f).

77. Whether an act is contrary to competition is determined by whether it offends the purpose of the competitive bidding statutes. "The purpose of the competitive bidding

process is to secure fair competition on equal terms to all bidders by affording an opportunity for an exact comparison of bids." Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2nd DCA 1977). The same principal was articulated in Wester v. Belote, 138 So. 721 (Fla. 1931), as follows:

[T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with [government] by affording an opportunity for exact comparison of bids.

78. Section 287.057(2) provides that a request for proposal shall include "a statement of the commodities or contractual services sought and all contractual terms and conditions applicable to the procurement of commodities or contractual services, including the criteria, which shall include, but need not be limited to, price, to be used in determining the acceptability of the proposal." The statute also mandates that the contract shall be awarded to the "responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration the price and the other criteria set forth in the request for proposals." Section 287.057(2). The RFP complied with this

statute. The evaluation committee's review also complied with the specification contained in the RFP.

79. A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic or despotic. Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759 (Fla. 1st DCA 1978).

80. In order for the inquiry to be made in determining whether an Agency has acted arbitrarily or capriciously it is necessary to consider whether the agency has (1) considered all relevant factors; (2) given actual, good faith consideration to those factors; and (3) used reason rather than whim to progress from consideration of those factors to its final decision. Adam Smith Enterprises, Inc. v. State, Department of Environmental Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). At the same time, if a decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is not arbitrary. Dravco Basic Materials Co., Inc. v. State, Department of Transportation, 602 So. 2d 632, 634, fn. 3 (Fla. 2nd DCA 1992).

81. In this case, the evidence did not demonstrate that DMA acted arbitrarily, capriciously or contrary to competition. The evaluators all had a reasonable basis for choosing one of the parties over the other. None of the evaluators went outside



the RFP specifications. While, clearly DMA's process for preparing people for their role as evaluators on a given RFP is lax, that laxness was immaterial since the RFP specifications regarding the Interior Secretary's guidelines and resumes were met by both parties.

82. Finally, The RFP does not make any reference to 43 C.F.R. Section 7.8. Nor does the RFP's reference to compliance with "all federal" laws invoke this regulation or any other federal acquisition regulation. No evidence on these points was produced at hearing. Similarly, no representation was made by either party regarding the wages that it will pay to its employees or compliance with federal fair labor laws. No convincing evidence was produced on this point since the prices contained in the RFP did not represent the actual wages either party paid its employees.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law,

It is RECOMMENDED that the Department enter a final order awarding the contract to SEARCH.

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

*Diane Cleavinger*

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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.