

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GRADING AND BUSH HOG)
SERVICES, INC.,)
)
Petitioner,)
)
vs.) Case No. 03-1484BID
)
DEPARTMENT OF TRANSPORTATION,)
)
Respondent,)
)
and)
)
FLORIDA YOUTH)
CONVERSATION CORPS,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted pursuant to notice before the Division of Administrative Hearings by Stephen F. Dean, Administrative Law Judge, on May 22, 2003, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Brant Hargrove, Esquire
Law Office of Brant Hargrove
2984 Wellington Circle, West
Tallahassee, Florida 32308

For Respondent: John C. Bottcher, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0458

For Intervenor: Timothy Patrick Driscoll, Esquire
Timothy Patrick Driscoll, P.A.
101 First Avenue South, Suite 340
St. Petersburg, Florida 33701

STATEMENT OF THE ISSUE

Whether Respondent's proposed award of a contract to Intervenor is contrary to statutes, rules, policies, or the bid specifications, pursuant to Section 120.57(3)(f), Florida Statutes.

PRELIMINARY STATEMENT

On January 14, 2003, the Department of Transportation (DOT) advertised an Invitation to Bid (ITB). Petitioner, Grading and Bush Hog Services, Inc.; Intervenor, Florida Youth Conservation Corps; and others, responded. There was no protest to the terms of the ITB. DOT announced its intent to award the bid to Intervenor, who had the low bid. Petitioner filed this protest and Intervenor intervened.

The case was forwarded to the Division of Administrative Hearings, where it was noticed for hearing on May 22, 2003. At hearing, the parties stipulated to the facts.

The parties filed post-hearing submissions which have been read and considered in the preparation of this Recommended Order.

An extended hearing in another city for three weeks caused a delay in the preparation of this order. This Order was delayed as a result.

FINDINGS OF FACT

1. On January 14, 2003, Respondent advertised for bids by way of an invitation to bid (ITB) for Contract Number E3C42, Maintenance Financial Project Number 40952917201. This would be a "Push Button" contract for the replacement of damaged guardrails along various roadways in Okaloosa and Walton Counties. Pursuant to this Contract, the successful bidder would respond upon notice, and repair or replace guardrails, or take other measures to ensure safety of the traveling public.

2. The bid solicitation and contract were issued pursuant to Section 337.11, Florida Statutes. All bidders had to certify compliance with Florida Statutes and other applicable law, and all contractors were held to strict compliance with all legal requirements. There were no protests to the terms and conditions of the bid solicitation. The instant challenge does not allege non-compliance with the statutes or terms of the ITB generally.

3. The challenge is whether award of the bid to Intervenor, as a non-profit corporation, is "contrary to competition."

4. This maintenance contract does not require that the contractor be pre-qualified pursuant to Section 334.14, Florida Statutes, and Rule Chapter 14-22, Florida Administrative Code.

5. Four bidders responded to the solicitation, with the apparent low bidder being Intervenor, and the apparent second low bidder being Petitioner. Respondent posted its intended award of the contract to Intervenor, and Petitioner timely filed a protest that initiated this proceeding.

6. Intervenor is a not-for-profit corporation created under the provisions of Chapter 617, Florida Statutes. As such, pursuant to Sections 617.0301 and 617.2001, Florida Statutes, Intervenor can engage in any lawful purpose not for pecuniary profit. As a not-for-profit corporation, Intervenor may receive certain tax breaks and other economic advantages not enjoyed by a for-profit corporation.

7. Petitioner is a for-profit corporation.

8. No evidence exists that Intervenor is not capable and responsible to perform the work.

9. Intervenor is qualified to contract with Respondent for the performance of work related to the construction and maintenance of transportation-related facilities by youths enrolled in youth work experience programs, pursuant to Section 334.351, Florida Statutes. Respondent spends appropriations under this section, and Intervenor is the recipient of such

contracts. However, the instant contract will not be let under Section 334.351, Florida Statutes, but pursuant to Section 337.11, Florida Statutes.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings pursuant to Sections 120.569 and 120.57(3), Florida Statutes (2002).

11. The sole legal issue to be resolved in this proceeding is whether Respondent is limited under Section 337.11, Florida Statutes, in awarding and entering into the subject contract with Intervenor because of Intervenor's not-for-profit corporate status.

12. As found above, there were no protests to the terms and conditions of the bid solicitation. Those terms did not limit those corporations that could bid to for-profit corporations only. Therefore, any challenge presented at this juncture must be to substantive application of those terms.

13. The essence of Petitioner's argument is that Respondent cannot contract with Intervenor because Intervenor enjoys a competitive advantage over Petitioner in violation of the standards for competitive bidding as codified in Subsection 120.57(3)(f), Florida Statutes, which provides:

[T]he burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, 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. . . .

14. Petitioner raises no other disputes as to Respondent's compliance with its governing statutes, its rules or policies, or the bid or proposal specifications. The central issue in this proceeding is substantively whether awarding a contract to a not-for-profit corporation would be "contrary to competition."

15. "Contrary to competition" is best understood by its plain and obvious meaning, i.e., against or in opposition to competition.

16. In Harry Pepper and Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190,1192 (Fla. 2d DCA 1977), one of the stated purposes of the bidding process is "to afford an equal advantage to all desiring to do business" with the government. Petitioner's question is whether allowing a not-for-profit corporation to bid on DOT contracts is "contrary to competition" because the not-for-profit firm has an advantage in having to make a profit.

17. The ITB solicitation for the subject contract was silent on participation by not-for-profit corporations. Such firms have to compete on the same terms and specifications as a for-profit firm. These terms were not challenged. Bidders are on equal footing regarding the awarding of the contract, and any corporation may bid without restriction. To the extent that a non-profit company may not have to show a profit for its owners and be able to do the work more cheaply, this inures to the benefit of the taxpayer. The result is not contrary to competition, i.e., to get the work done for the best price. There is no requirement that any bidder include within its bid a profit. Therefore, Respondent's award of the contract to Intervenor is not contrary to competition.

18. Whether Intervenor is acting outside its Articles of Incorporation or beyond the boundaries of Chapter 617, Florida Statutes, is outside the jurisdiction of Respondent to determine in the context of a bid award, and the terms of the ITB were not challenged.

19. Petitioner also asserted that Section 334.351, Florida Statutes, might preclude the award of the contract to Intervenor. That section provides:

334.351 Youth work experience program; findings and intent; authority to contract; limitation.--The Legislature finds and declares that young men and women of the state should be given an opportunity to

obtain public service work and training experience that protects and conserves the valuable resources of the state and promotes participation in other community enhancement projects. Notwithstanding the requirements of chapters 287 and 337, the Department of Transportation is authorized to contract with public agencies and nonprofit organizations for the performance of work related to the construction and maintenance of transportation-related facilities by youths enrolled in youth work experience programs. The total amount of contracts entered into by the department under this section in any fiscal year may not exceed the amount specifically appropriated by the Legislature for this program.

20. The parties agree that Respondent receives and spends appropriations under Section 334.351, Florida Statutes, and that Intervenor is the recipient of such contracts. However, the subject contract is not issued pursuant to Section 334.351, Florida Statutes, but is issued pursuant to Section 337.11, Florida Statutes. Therefore, the instant contract is not subject to the fiscal limitations imposed on work done under Section 334.351, Florida Statutes. The subject contract is being let pursuant to competitive solicitation under Section 337.11, Florida Statutes.

21. Respondent's proposed award of the subject contract to Intervenor is not contrary to statutes, Respondent's rules or policies, nor the specifications of the ITB.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED:

That the protest filed by Petitioner be dismissed and Respondent shall award the subject contract to Intervenor.

DONE AND ENTERED this 24th day of July, 2003, in Tallahassee, Leon County, Florida.



STEPHEN F. DEAN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 2003.

COPIES FURNISHED:

John C. Bottcher, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0458

Brant Hargrove, Esquire
Law Office of Brant Hargrove
2984 Wellington Circle, West
Tallahassee, Florida 32308

Timothy Patrick Driscoll, Esquire
Timothy Patrick Driscoll, P.A.
101 First Avenue South, Suite 340
St. Petersburg, Florida 33701

James C. Myers, Clerk of Agency Proceedings
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

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.