

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROYAL CONCRETE CONCEPTS,)
INC.,)
)
Petitioner,)
) Case No. 03-2220BID
vs.)
)
BROWARD COUNTY SCHOOL BOARD,)
)
Respondent,)
)
and)
)
JAMES B. PIRTLE CONSTRUCTION)
COMPANY, INC.,)
)
Intervenor.)
)

PADULA & WADSWORTH)
CONSTRUCTION COMPANY,)
)
Petitioner,)
) Case No. 03-2221BID
vs.)
)
BROWARD COUNTY SCHOOL BOARD,)
)
Respondent,)
)
and)
)
JAMES B. PIRTLE CONSTRUCTION)
COMPANY, INC.,)
)
Intervenor.)
)

RECOMMENDED ORDER

Pursuant to notice a formal hearing was held in these cases on August 20-21, 2003, in Fort Lauderdale, Florida,

before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner, Royal Concrete Concepts, Inc.:

Steven L. Schwartzberg, Esquire
Schwarzberg & Associates
Esperante, Suite 210
222 Lakeview Avenue
West Palm Beach, Florida 33401

For Petitioner, Padula & Wadsworth Construction Inc.:

Thomas Shahady, Esquire
Adorno & Yoss, P.A.
350 East Las Olas Boulevard
Suite 1700
Fort Lauderdale, Florida 33301

For Respondent, School Board of Broward County, Florida:

Robert Paul Vignola, Esquire
Broward County School Board
Kathleen C. Wright Administrative Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

For Intervenor, James B. Pirtle Construction Company, Inc.:

Usher L. Brown, Esquire
Brown, Salzman, Weiss & Garganese, P.A.
Two Landmark Center, Suite 660
225 East Robinson Street
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether the Respondent, School Board of Broward County, Florida (Respondent or Board), may reject all bids as proposed for Bid No. 2002-02-FC, Group A1, or whether such action is

illegal, arbitrary, dishonest, or fraudulent.

PRELIMINARY STATEMENT

These cases came to the Division of Administrative Hearings by way of an underlying matter (also a bid challenge) during which case the Respondent determined it would reject all bids submitted for the bid. The Petitioners, Royal Concrete Concepts, Inc. (Royal), and Padula & Wadsworth Construction, Inc. (Padula), timely filed protests to the second decision; thereafter, the cases were scheduled for hearing. The findings of fact that follow more completely track the procedural course of this cause. The instant cases dealt solely with the Board's decision to reject all bids.

At the hearing the parties offered joint exhibits and individual exhibits, all of which the transcript more fully identifies. Similarly, all parties presented testimony of witnesses. Those individuals are also identified and noted in the transcript of this proceeding. At the conclusion of the hearing, the parties stipulated that they would file proposed recommended orders within 30 days of the filing of the transcript. All parties substantially complied with that stipulation and the Proposed Recommended Orders have been fully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Respondent is the entity charged with the

responsibility of governing the public schools within the Broward County School District. As such, the acquisition of school properties and attendant improvements fall within the Board's legal authority. These cases involve the procurement of relocatable buildings suitable for classroom purposes.

2. Pursuant to its authority, on or about December 27, 2002, the Respondent issued a bid that is the subject matter of the instant challenge. The bid, identified in this record as Bid 2002-02-FC, sought proposals for the procurement of district-wide relocatable buildings. In a prior time these buildings were known as "portable classrooms" or "portables."

3. In the post-Hurricane Andrew world, these structures are now pre-engineered and constructed of concrete or steel (or a hybrid of both) and must be, by design, capable of being relocated to various sites. The Petitioners, Royal and Padula jointly, and the Intervenor, James B. Pirtle Construction Company, Inc. (Pirtle or Intervenor), design, construct, and install such structures.

4. In these cases the bid sought several distinct proposals. First, the project sought vendors who would provide and deliver concrete relocatable buildings (Group A1). Group A2 (not at issue in this proceeding) sought steel relocatable buildings. Group B (also not at issue in the

instant case) sought site adaptation prices for landscaping, lighted covered walkways, steps, ramps, and other engineering incidental to the installation of the buildings.

5. The advertisement for the bid carried the same generic information as to all groups. The bid documents also contained many terms that were applicable to all groups.

6. Pertinent to the issues of these cases are the following excerpts from the bid document (Joint Exhibit 2).

The order of

the excerpts should not suggest any significance. The

excerpts are listed in this manner solely for convenience

sake:

BASIS OF AWARD

In order to meet the needs of the school system . . . each Award will be . . . up to three responsive and responsible bidders meeting specifications, terms and conditions. Individual projects will be issued . . . based upon lowest cost among one or more bidders per project as determined by the project manager. Therefore, it is necessary to bid on every item in the group, and all items in the group must meet specifications in order to have the bid considered for award. Unit prices must be stated in the space provided on Document 00410 Bid Form. SBBC [the Respondent] reserves the right to procure goods from the second and third lowest bidders if: a) the lowest bidder cannot comply with delivery requirements or specifications; b) the lowest bidder is not in compliance with delivery requirements or specifications on current or previous orders; c) in cases of emergency; d) work

may be issued to multiple contractors if in the opinion of The School Board of Broward County, Florida or its staff the work cannot be completed by a single contractor in the specified time such as a Summer, Winter or Spring Break or if it is in the best interest of SBBC to do so regardless of reason.

ARTICLE 4 BIDDING PROCEDURES

4.01 FORM AND STYLE OF BIDS

A. Bids shall be submitted on forms identical to Document 00410, Bid Form, and other standard forms included with the Bidding Documents. The following documents are required to be submitted with the Bid:

* * *

6. SIGNED SEALED ARCHITECTURAL AND ENGINEERING DESIGN DRAWINGS OF THE STRUCTURES TO BE PROVIDED (FOR RELOCATABLE BUILDINGS BID ONLY)

5.03 REJECTION OF BIDS AND IRREGULAR PROPOSALS

* * *

C. The Owner shall have the right to reject any or all Bids, reject a Bid not accompanied by a required bid security, good faith deposit, or by other data required by the Bid Documents, or reject a Bid which is in any way incomplete, irregular or otherwise not Responsive. The Owner may waive any formality in the bid requirements and award or not award the contract in the best interests of The School Board of Broward County, Florida. (Emphasis in original not shown)

7. In addition to the foregoing, the bid documents contained detailed and specific design criteria that set forth information such as the slope of roofs, the roof spans, the

mechanical systems, ventilation, plumbing, windows, and stoops. These design criteria covered hundreds of topics and encompassed virtually every facet of the structures. To review each bid proposal as to whether each design specification was met would require countless man-hours.

8. The issue of how to review the bid proposals was not adequately anticipated by the Respondent. From the outset the bid document evolved from unusual circumstances. Whether the bid document was intended to be a request for proposals (RFP) or an invitation to bid (ITB) was a primary confusion among the Board's staff. If the proposals were to be deemed responsive or not and then ranked solely on price (thus making the bid process more like an ITB) how could staff effectively determine the threshold question of responsiveness? If the proposals were to be ranked based upon a point or qualitative approach (more like an RFP) where were the criteria by which to score the proposals? In fact, there were no objective criteria disclosed in the bid document by which a proposal could be evaluated.

9. More curious is that no bidder brought this lack of evaluation criteria to the Board's attention during the mandatory bidder's conference. Moreover, no one challenged the bid specifications. Presumably, the bidders believed it was an "all or nothing" award. That is, if they were the

lowest responsive bidder, they would receive the award. The question of who would be responsive and how that decision would be resolved did not come to light until after the bids had been opened.

10. At the mandatory bidders' conference conducted on January 14, 2003, the bidders posed questions in the form of requests for information. In response, the Respondent issued six addenda intended to cover the questions posed. None of the responses addressed how the bid proposals would be evaluated.

11. If anything, Addendum No. 3 added to confusion related to what documents must be submitted with the bid proposal. More specifically, Addendum No. 3 provided, in pertinent part:

[Addendum 3, question and response to inquiry]

9. Can schematics be submitted with the bid instead of the signed and sealed architectural and engineering design drawings of the structures that are requested in Document Article 4.01.A.6?
Response: Signed and Sealed Architectural/Structural Drawings are required to be submitted with the Bid. The Requirement for Mechanical and Electrical signed and sealed drawing is waived, however all engineering associated with the Relocatable Buildings will require engineer of record signed and sealed drawings and calculations prior to issuance of building permit DRC review.

12. Nevertheless, when the bid proposals were opened on

March 4, 2003, the Petitioners and the Intervenor were found to be the three lowest bidders. If responsive, the Intervenor would be considered the lowest bidder with the Petitioners being considered alternate vendors for the procurement.

13. Unsatisfied with the preliminary determination that the Intervenor was the lowest bidder, the Petitioners timely challenged the bid award. The Petitioners maintained that the Intervenor had not timely provided sealed design drawings as required by the bid document. Petitioners argued that the Intervenor had attempted to impermissibly amend their proposal by late-filing a set of structural drawings for the bid.

14. Thus the initial bid protest sought to determine what design drawings were required by the bid and whether the Intervenor had timely supplied such drawings. The Petitioners contended that the Intervenor's submittal should be rejected as non-responsive to the bid. Whether they had complied with the full dictates of the bid requirements was potentially at issue as well.

15. While the initial bid protest was referred to the Division of Administrative Hearings and scheduled for formal hearing, the parties continued to attempt to resolve the issues. It was apparent that the bidders had not submitted identical proposals. How the proposed products had been compared and evaluated was difficult to determine.

16. From the Respondent's committee members came the disclosure that the decision of determining whether the bidders had complied with the bid ultimately came from three fashioned questions. If the structure proposed was pre-engineered, relocatable to various sites, and suitable for educational purposes, the entry was deemed responsive. Based upon this assessment the Petitioners and the Intervenor were deemed responsive and their bids ranked based upon price.

17. This approach did nothing to discern if the designs were comparable in quality, if they met the bid design criteria, or if the drawings were even sufficient to comply with the dictates of the bid.

18. The first posting of the bid award for Group A1 was entered March 18, 2003.

19. On March 21, 2003, the Petitioners timely filed their notices of intent to protest the award of Group A1 to the Intervenor. Thereafter they timely filed the petitions to protest the award and the initial protest was forwarded to the

Division of Administrative Hearings. The protests did not encompass Group A2 or Group B.

20. No bidder protested the proposed awards for Group A2 or Group B. In fact, the Respondent went forward on those procurements and awarded contracts for those groups on April 1, 2003. The Respondent did not award the contract award for the Group at issue in this proceeding.

21. It must be noted that the instant procurement is not the Board's first experience with the procurement of concrete relocatable classrooms. In fact, the Board has purchased similar structures through a procurement contract that the Palm Beach County School Board holds with its vendors. One of the Respondent's concerns when the instant bids were reviewed was why the cost per unit for the bids in this case was higher than the Palm Beach County amount. As it turned out, the installation economy of multiple units at one site directly impacts the cost of the relocatable structures. Royal confirmed this information after the bids had been opened.

22. When the Respondent's staff met with its counsel in preparation for the initial bid dispute (before the Board elected to reject all bids) the cost of the bid, the lack of full evaluation of the bidders' proposals, and the issues of the first protest were openly discussed. By that time any irregularities with the bid documents could not be repaired as

to the contracts

already awarded, but as to the instant matter the Respondent could revisit the circumstances and determine its best course.

23. As a result of that reassessment, the Respondent elected to reject all bids regarding this group and attempt to re-bid the procurement with more certain terms. To that end on May 9, 2003, the Respondent issued a revised bid decision that provided in pertinent part:

The Facilities and Construction Management Division intends to recommend that The School Board of Broward County, Florida, at the School Board meeting on June 3, 2003, reject all bids received for Group A1 and authorize revising the bidding documents and re-bidding. The rejection of all bids received for Group A1 is made due to serious flaws and ambiguities contained in Document 00200 4.01.A-6 as modified by Addendum No. 3. The Division intends to revise the bidding documents to delete the requirements that bidders submit plans with the bids; include ranges of unit quantities within the bid form; include one or more additional types of construction of the classroom buildings including a composite concrete/steel structure; and incorporate within the new Invitation to Bid all revised terms and conditions that were released through addenda in this procurement.

24. The Petitioners timely filed protests regarding this new decision by the Board and the instant action ensued.

25. By issuing the revised decision to reject all bids the Respondent intended to resolve all issues and to cure the perceived problem with the lack of consistent evaluation of the bidders' proposals. More specifically, the Respondent

would be able to assure that the project design could comport with the specifications sought; specify whether architectural or engineering drawings were required and when (it was hoped that the confusion over "architect" vs. "engineer" could be eliminated); and obtain a substantial discount based upon economies from multi-unit purchases for a single site. None of the objectives sought were pre-textual or contrived. Additionally, by avoiding any process that would require a detailed reviewed of the bidders' proposals, countless man-hours could be saved.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569 and 120.57(3), Fla. Stat. (2003).

27. All parties have standing in this matter. The Petitioners and the Intervenor have demonstrated their interests will be materially affected by the decision of the Board in connection with this bid. This conclusion is reached based upon the determination that the Intervenor was designated the primary vendor on the initial bid tabulation and the Petitioners were each considered to be responsive vendors that could conceivably receive orders under the award.

28. The standard of review in this matter is set forth

by statute. Section 120.57(3)(f), Florida Statutes, provides in pertinent part:

. . . Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. . . . In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

29. The Petitioners must therefore establish that the Board action to reject all bids is illegal, arbitrary, dishonest, or fraudulent. In contrast, if the decision is supported by rational, legal, honest, and unambiguous reasoning such decision should stand. This conclusion is based upon the premise that the Board has wide discretion in this matter that should not be overturned even if reasonable persons might disagree. See Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So. 2d 1128 (Fla. 1st DCA 1991).

30. Essentially, these cases turn on the issue of whether or not the Board's decision to reject all bids is arbitrary. The Petitioners argue that the Board's decision to reject all bids was contrived after it realized the initial bid protest was meritorious as to the Intervenor's failure to submit required documents. If the Board's decision was

contrived to meet the factual circumstances of these cases, the decision may not stand.

31. If the bid process was seriously flawed as claimed by the Board, despite the Petitioners' protest to the contrary, the rejection of all bids should be upheld. In Caber Systems, Inc. v. Department of General Services, 530 So. 2d. 325 (Fla. 1st DCA 1988) the court was faced with a similar dilemma. The Caber decision proves instructive in this matter.

32. In Caber the court found that when the agency in its process to review a bid protest discovered valid grounds for rejecting all bids (for reasons that were neither arbitrary or capricious) it was authorized to do so. Similarly, when preparing for the hearing in the underlying or initial protest in these cases, the Respondent discovered all of the underlying facts that gave rise to its decision to reject all bids. Those underlying facts were neither contrived nor arbitrarily determined.

33. In fact, as the history and circumstances of this bid process became more studied, the basis for determining who should prevail and how the Board's employees should fairly review the proposals became more mired in the uncertainty of the tainted process. If price were to be the sole determining factor, the remainder of the specifications would prove

meaningless and, more significantly to the Board's concerns, perhaps unenforceable. If the engineering and qualitative specifications were to bear weight, how were the proposals to be fairly reviewed? There were no performance standards by which a committee might assign points or ratings.

34. The three criteria by which all applicants were initially reviewed did not address specific items listed among the design requirements. Moreover, none of the bidders knew or could have known that the design criteria would be waived in whole or part. Clearly a proposal that did not include the waived item could receive a financial advantage over a competitor who included the item. Arguably, the price of any proposal that included the waived item would be higher. For example, if the bid design called for a covered doorway into the unit and a bidder failed to include that item, the cost basis for the uncovered entry would arguably be less than the unit that offered the covered doorway.

35. But in truth, the Board did nothing to attempt to resolve the issues of whether the designs submitted by the parties fairly or fully met the design items requested by the bid. Instead, faced with hours of evaluation, the committee members "contrived" three questions to determine if the proposal could be deemed responsive. The initial protest exposed the inadequacy of this approach. When called on the

matter and when forced to evaluate the proposals from the dictates limited by the four corners of the bid document, it was apparent that the only fair resolution was to reject all bids. That is exactly what the Board attempted to do.

36. In order to cure the problems discovered through the review of this bid process the Board elected to take the matter back to the drawing board and to begin the process anew. This decision will hopefully result in clear specifications and review criteria. If the Board wants a "concrete reinforced structure" it can define specifically what that term means. If the Board is willing to accept a steel structure with an applied concrete coating, it can do so. If hybrid buildings are acceptable all parties will know what is acceptable. More important, the Board will be able to determine and disclose if price alone will drive the award of the bid. If the Board wants the flexibility to award design points for choosing a higher standard (and thereby assume a higher cost) all parties will be aware of the potential to build that flexibility to their proposal. Currently, there is no way to determine if the parties were submitting the same quality product. No assessment was or could be made to yield that determination. Accordingly, the Board's decision to reject all proposals must be upheld.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Broward County enter a Final Order affirming the decision to reject all bids in this matter.

DONE AND ENTERED this 20th day of November 2003 in Tallahassee, Leon County, Florida.

S

J. D. PARRISH
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 20th day of November 2003.

COPIES FURNISHED:

Dr. Franklin L. Till, Jr.
Superintendent
Broward County School Board
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

Daniel J. Woodring, General Counsel
Department of Education
325 West Gaines Street
1244 Turlington Building
Tallahassee, Florida 32399-0400

Usher Larry Brown, Esquire
Brown, Salzman, Weiss & Garganese, P.A.
225 East Robinson Street, Suite 660
Orlando, Florida 32801

Steven L. Schwarzberg, Esquire
Schwarzberg & Associates
Esperante, Suite 210
222 Lakeview Avenue
West Palm Beach, Florida 33401

Thomas R. Shahady, Esquire
Adorno & Yoss, P.A.
350 East Las Olas Boulevard, Suite 1700
Fort Lauderdale, Florida 33301

Robert Paul Vignola, Esquire
Broward County School Board
K. C. Wright Administrative Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

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.