STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GRANITE CONSTRUCTION COMPANY OF CALIFORNIA,	)	
Petitioner,	)	
vs.	)	Case No. 03-2374BID
DEPARTMENT OF TRANSPORTATION,	)	
Respondent,	)	
and	)	
GILBERT SOUTHERN CORPORATION,	)	
Intervenor.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 28, 2003, in Tallahassee, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William E. Williams, Esquire
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For Intervenor: Christopher T. McRae, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the Department of Transportation's proposed award of the contract for FIN Project Nos. 25840115201, 25840115602, and 25841005603 to Intervenor is contrary to the Department's governing statutes, rules, policies, or the bid solicitation specifications.

PRELIMINARY STATEMENT

On May 22, 2003, the Department of Transportation (Department) posted notice of its intent to award the contract for a construction project known as Interstate 4 Reconstruction, 14th Street to 50th Street, Hillsborough County, Florida, FIN Project Nos. 25840115201, 25840115602, and 25841005603 (the Project) to Intervenor. Thereafter, Petitioner timely filed a notice of protest and a formal written protest (Protest) with the Department challenging the proposed award. The Protest requested that the Department refer the matter to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge to conduct a formal hearing. The Department referred the Protest to the Division on June 25, 2003.

Intervenor filed a motion to intervene with the Department, and that motion was referred to the Division along with the Protest. The motion was granted by Order dated June 30, 2003.

In accordance with the expedited time frame established by Section 120.57(3)(e), Florida Statutes, the final hearing was initially set for July 22 and 23, 2003. The hearing was subsequently rescheduled for July 28 and 29, 2003, at the request of the parties.

On June 25, 2003, before the matter was referred to the Division, Intervenor filed a motion to dismiss the Protest on the theory that it is actually an untimely challenge to the bid specifications rather than a timely challenge to the proposed award of the contract. The Department joined Intervenor's motion through a filing dated June 30, 2003. The motion to dismiss was denied through a detailed Order dated July 11, 2003, and the case proceeded to final hearing on July 28, 2003.

At the hearing, Petitioner presented the testimony of Jeffrey Wittmann, J.C. Miseroy, Robert Szatynski, Teresa Driskell, and Juanita Moore. Petitioner's Exhibits P1-A, P1-B, P1-C, P3, P4, P7, and P8 were received into evidence. Neither the Department nor Intervenor presented the testimony of any witnesses at the hearing. Exhibits R1, R2, and R5 through R11, which were jointly introduced by the Department and Intervenor,

were received into evidence. The parties' Joint Exhibits J1 through J27 were also received into evidence.

The two-volume Transcript of the hearing was filed with the Division on August 4, 2003. The parties were given ten days from the date that the Transcript was filed to file their proposed recommended orders (PROs). The parties' PROs were timely filed and were given due consideration by the undersigned in preparing this Recommended Order.

All statutory references are to the 2002 codification of the Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing and the stipulations set forth in the parties' Pre-Hearing Stipulation, the following findings are made:

A. Parties

1. The Department is the state agency responsible for construction and maintenance of the State highway system, which includes Interstate 4. The Department is the contracting agency for the Project at issue in this proceeding.

2. Petitioner and Intervenor are corporations engaged in the business of road and bridge construction, and they both submitted bids for the Project.

3. Intervenor was determined by the Department to be the lowest responsible bidder for the Project, and Petitioner was determined to be the next lowest responsible bidder.

4. Petitioner and Intervenor both have the requisite standing in this proceeding.

B. Overview of the Project

5. The Project involves the widening and "reconstruction" of approximately three miles of Interstate 4 in Hillsborough County between 14th Street and 50th Street.

6. The Project is located in the Department's District Seven.

7. The Department's initial cost estimate for the Project was $148.5 million, making this the most expensive project ever in District Seven.

8. The Project is being funded primarily by federal funds from the U.S. Department of Transportation, Federal Highway Administration (FHWA).

9. The high per-mile cost of the Project is a result of the complexity of the Project due to its location in an urban environment and the numerous bridges included in the Project.

C. Bid Documents

10. The Department issued a Bid Solicitation Notice (Notice) for the Project on February 28, 2003.

11. The Notice provided a general description of the Project and informed prospective bidders how they could obtain the plans and specifications for the Project.

12. The Notice also included a list of the pay items for the Project. That list included "approx[imate]" quantities for each item, and was "not for bidding purposes."

13. The plans and specifications for the Project included a Summary of Pay Items, sheets 2 through 16D (Summary), which listed the pay items for the Project, as well as the estimated quantity for each item.

14. More than 400 pay items were listed in the Summary, including Item No. 2534-72-12, Barrier Wall Noise (the "noise wall").

15. The noise wall is an aesthetic feature. Its purpose is to reduce the amount of roadway noise that can be heard on adjacent property. The noise wall is free-standing and is not structurally connected to the roadway or other aspects of the Project.

16. It is possible that the noise wall may be deleted from the Project during construction. However, bidders were required to bid on the noise wall since it is shown in the plans and is listed as a pay item in the Summary and on the proposal form.

17. The estimated quantity for the noise wall provided in the Summary is 1,453 meters squared (m^2), which is the same as the "approx[imate]" quantity that was shown in the Notice.

18. That same figure--1,453 m^2--is provided for the noise wall on the proposal form. The proposal form is commonly referred to as the "bid blank."

19. The bid blank was provided to the prospective bidders in electronic format. It lists each pay item for the Project, and for each item, it specifies the item number, item description, and estimated quantity.

20. The bidders were required to insert their bid or unit price for each pay item directly into the electronic bid blank form. The bidders could not change the estimated quantities shown on the bid blank. If a bidder attempted to do so, its bid would have been rejected as nonresponsive.

21. Once the bid/unit prices are inserted into the electronic bid blank form, the bid amount is automatically calculated for each pay item by multiplying the estimated quantity shown on the form by the bidder's bid/unit price. The bidder's total bid is then automatically calculated by adding up the bid amounts for each pay item.

22. The bid documents[1] incorporated by reference the 2000 edition of the Department's Standard Specifications for Road and Bridge Construction (Standard Specifications).

23. Section 2-3 of the Standard Specifications, entitled "Interpretation of Estimated Quantities," explains the purpose and significance of the estimated quantities set forth in the bid documents. That provision states:

> For those items constructed within authorized plan limits or dimensions, use the quantities shown in the plans and in the proposal form as the basis of the bid. The Department will also use these quantities for final payment as limited by the provisions for the individual items. For those items having variable final pay quantities that are dependent upon actual field conditions, use and measurement, the quantities shown in the plans and in the proposal form are approximate and provide only a basis for calculating the bid upon which the Department will award the Contract. . . .
>
> The Department may increase, decrease, or omit the estimated quantities of work to be done or to be furnished.

24. The estimated quantities shown in the bid documents are not necessarily the actual quantities that will be built on the Project. It is important, however, that the estimated quantities be as accurate as possible so that the Department can develop a reasonably accurate cost estimate for budgeting purposes and so that contractors can have a good idea of the resources that they will need to devote to construction when they are formulating their bids.

25. Section 3-1 of the Standard Specifications, entitled "Consideration of Bids," informed bidders how the Department

would determine the lowest bid for the Project. That provision states that:

> [F]or purposes of award, after opening and reading the proposals, the Department will consider as the bid the correct summation of each unit bid price multiplied by the estimated quantities shown in the proposal form.

26. The "proposal form" referenced in Section 3-1 of the Standard Specifications is the official form on which the Department requires formal bids to be prepared and submitted. It is the same as the "bid blank" described above.

D. Pre-bid Phase

27. Petitioner ordered the plans and specifications for the Project on March 3, 2003. The Department sent the plans and specifications to Petitioner on March 4, 2003.

28. Petitioner received the plans and specifications approximately two weeks prior to the mandatory bidders' meeting/"pre-bid conference" held on March 31, 2003.

29. The pre-bid conference was attended by two of Petitioner's employees. Neither of those employees asked questions regarding the estimated quantity for the noise wall, although they each asked questions regarding other elements of the Project.

30. The Transcript of the pre-bid conference reflects that no other bidder asked about the estimated quantity for the noise

wall either, even though the noise wall was mentioned on several occasions at the conference, and a question was asked about the quantity shown for another item listed in the specifications.

31. At some point after the pre-bid conference, Petitioner's senior estimator, Jeffrey Wittmann, calculated "take-offs" for all of the walls in the Project, including the noise wall. This is a standard practice done in the course of putting together a bid.

32. The purpose of a take-off is to verify the accuracy of the estimated quantities in the bid documents and to calculate the work and materials that will be required to perform the contract. A take-off converts the graphical information shown in the plans for an item to a numerical amount for that item, and is done by using the plans and specifications for the Project and the Department's standard computation manual.

33. The take-off calculated by Mr. Wittmann for the noise wall was 3,809 m^2, which is more than two-and-a-half times the estimated quantity of 1,453 m^2 shown in the bid documents.

34. The Department's contact person for the Project was Teresa Driskell.

35. Ms. Driskell began receiving questions about the accuracy of the estimated quantity for the noise wall in late March or early April. The first question regarding that issue came from Intervenor.

36. Intervenor questioned the estimated quantity shown for the noise wall in the Summary and the bid blank because its take-off showed the estimated quantity to be significantly more than 1,453 m^2.

37. Ms. Driskell referred Intervenor's question to Robert Szatynski, the Department's outside consultant and engineer of record for the Project, and asked him to formulate a response.

38. Mr. Szatynski directed a member of his staff to review the computations and spreadsheets from which the estimated quantity for the noise wall was originally computed. Based upon the results of his staff's review, Mr. Szatynski responded to Ms. Driskell that the 1,453 m^2 figure was correct.

39. Ms. Driskell forwarded that response to Intervenor, but not to other prospective bidders. Ms. Driskell followed a similar pattern with respect to other inquiries; she provided the response only to the prospective bidder who made the inquiry.

40. Ms. Driskell continued to get questions from other prospective bidders, including Petitioner through Mr. Wittmann, regarding the accuracy of the estimated quantity for the noise wall.

41. On Friday, April 18, 2003, Ms. Driskell asked Richard Frank, the Department's in-house construction manager for the Project, to take a look at the questions being raised by the

prospective bidders regarding the estimated quantity for the noise wall.

42. Mr. Frank calculated his own take-off for the noise wall, which only took him about an hour. Mr. Frank's take-off calculated an estimated quantity for the noise wall of 3,853 m^2, which is very similar to Mr. Wittmann's calculation.

43. Based upon his take-off, Mr. Frank sent an e-mail to Ms. Driskell which stated that he "agree[d] with the concerns that have been raised that the quantity [for the noise wall] is in error" and that Ms. Driskell could "let the contractors know that they are correct."

44. Mr. Frank's e-mail was sent to Ms. Driskell at approximately 4:30 p.m. on April 18, 2003. A copy of the e-mail was sent to Mr. Szatynski at the same time.

45. On the morning of Monday, April 21, 2003, Mr. Szatynski sent an e-mail to Ms. Driskell concurring in Mr. Frank's assessment. That e-mail stated that:

> [W]e agree with [Mr. Frank] that the original quantity shown in the plans is inaccurate. The final quantity for [the noise wall] should be 3893.9 m2. We will send the updated quantity calculation sheet for your use.

46. Later that same day, Mr. Szatynski sent Ms. Driskell a revised area computation sheet for the noise wall. The sheet specified a new quantity for the wall of 3,894 m^2.

47. The spreadsheet used by Mr. Szatynski's staff to calculate the original estimated quantity for the noise wall had a mathematical error in it. The heights and lengths for the noise wall in the spreadsheet that were derived from a take-off of the plans were correct, but the formula underlying the spreadsheet failed to multiply those dimensions by the number of panels needed for the noise wall. The error in the spreadsheet was not known to or found by Mr. Szatynski or his staff when they reviewed the noise wall quantity estimate in response to Ms. Driskell's first request described above.

48. In recalculating the area of the noise wall, Mr. Szatynski did not change any of the wall's dimensions in the plans or any of the figures in his original take-off. He simply corrected the formula underlying in the spreadsheet to include the number of panels needed in the calculation.

49. Even though the Department knew that the estimated quantity for the noise wall in the bid documents was "inaccurate" and "in error," and even though it had been given the corrected "final quantity" from Mr. Szatynski on April 21, 2003, the Department did not issue an addendum to change the estimated quantity.

50. Addenda are issued by the Department's Tallahassee office upon the request of the District office. The

"turn-around time" for an addenda varies based on nature and extent of the change.

51. No changes to the plans were necessary to correct the erroneous estimated quantity for the noise wall, and Mr. Szatynski had already provided a corrected area computation sheet. The only other thing that would have been necessary to correct the noise wall quantity was a revised electronic bid blank and revised Summary page.

52. According to Juanita Moore, the Department's contract administrator in Tallahassee for the Project, it would have only taken "a few hours" to do an addendum to change the estimated quantity for the noise wall under such circumstances.

53. The decision not to issue an addendum to correct the estimated quantity for the noise wall was made by Ms. Driskell alone. She based her decision on a number of factors, including the fact that the noise wall was a stand-alone item that was not structurally related to the remainder of the Project and that it might be deleted from the Project; the fact that the noise wall was not a "major item of work;"[2] her estimate that the projected cost overrun would be less than $1,000,000, which is less than one percent of the total contract price; and her concern that the plans would need to be revised or that it would take too long to get an addendum approved.

54. In hindsight, Ms. Driskell clearly made the wrong decision by not changing the estimated quantity for the noise wall because her concerns about the time it would take for an addendum and need for revisions to the plans were unfounded, she underestimated cost overrun that the error would cause by approximately $500,000, and it turned out that the ultimate award of the contract hinges on that pay item. Nevertheless, Ms. Driskell's decision not to seek an addendum to correct the estimated quantity for the noise wall was not arbitrary or illogical at the time that it was made.

55. The Department issued five formal addenda to the Project specifications. The addenda were issued on March 17, 2003 (Addendum No. 1); April 7, 2003 (Addendum No. 2); April 17, 2003 (Addendum No. 3); April 22, 2003 (Addendum No. 4); and April 29, 2003 (Addendum No. 5).

56. The addenda were sent by overnight delivery to the prospective bidders, and they contained instructions on how to download the updated electronic bid blank form from the Internet.

57. Addenda Nos. 4 and 5 were issued after April 21, 2003, which is the date that the Department received confirmation from Mr. Szatynski that the noise wall quantity estimate in the bid documents was "inaccurate" and that the correct "final quantity"

was 3,894 m^2. However, Addendum No. 4 was in the review process prior to that date.

58. Addendum No. 4 changed the estimated quantities for several pay items, including an eight-foot traffic railing barrier wall (Item No. 2521-7-1), which Mr. Wittmann had discussed with Ms. Driskell in connection with their discussions regarding the noise wall. The change added approximately 1,100 meters to that pay item.

59. Using the unit prices bid for that item by Petitioner and Intervenor, the financial impact of the change in the quantity for the barrier wall item was between $500,000 and $790,000. That amount is less than the financial impact of the "error" in the estimated quantity for the noise wall.

60. On the afternoon of Friday, April 25, 2003, Mr. Wittmann e-mailed Ms. Driskell and asked "[w]hy [there was] no change to the [noise wall] in addendum 4 as previously discussed." Ms. Driskell did not respond to Mr. Wittmann's e-mail, although as discussed below, she answered his question in a telephone conversation on Monday, April 28, 2003.

61. Addendum No. 5 was issued the day before the bid submittal deadline. It changed the estimated quantity for Item No. 2102-911-2 to correct an obvious scrivener's error.

62. At some point during the pre-bid phase, a bidder other than Petitioner or Intervenor made a public records request for

all of the Department's responses to the questions asked by prospective bidders. Ms. Driskell's supervisor directed her to provide the information responsive to the public records request to all of the prospective bidders.

63. That information was not provided to the prospective bidders in the form of an addendum; it was just "made available to them" at the District Seven office on April 29, 2003. Included in that information were Mr. Frank's e-mail stating that the estimated quantity for the noise wall was "in error" and Mr. Szatynski's e-mail concurring in that assessment and providing a "final quantity" of 3,894 m^2.

64. Ms. Driskell called each of the prospective bidders on April 28, 2003, to inform them that the package of information could be picked up on April 29, 2003. During her conversation with Mr. Wittmann, Ms. Driskell was again asked why the estimated quantity for the noise wall had not been changed. She told Mr. Wittmann that it was "too close to the letting" and that "it would not be changed."

65. Ms. Driskell's response to Mr. Wittmann is somewhat disingenuous because she had the necessary information since April 21, 2003, to make a change in the noise wall quantity through an addendum, and it would have taken only "a few hours" to do so. Indeed, on April 21, 2003, Ms. Driskell's supervisor, Brian McKishnie, told Ms. Driskell that she "need[ed] to tell

them [the bidders] to 'bid it [the noise wall] as you see it' or get the corrected quantity to all bidders."

66. Although there is conflicting evidence regarding what Ms. Driskell told Mr. Wittmann on and around April 21, 2003, regarding the discrepancy in the estimated quantity for the noise wall and the Department's intent to issue an addenda to change the quantity, it is ultimately immaterial what Mr. Wittmann was told at that time because on April 28, 2003, Ms. Driskell clearly and unequivocally told Mr. Wittmann that no change was going to be made to the noise wall.

67. Thus, on April 28, 2003, Petitioner was on notice that the estimated quantity for the noise wall was going to remain 1,453 m^2, and Petitioner prepared its bid based upon that figure.

68. Petitioner did not file a specification protest within 72 hours after Ms. Driskell informed Mr. Wittmann that the estimated quantity for the noise wall was not going to be changed.

69. Petitioner did not pick up the package of information which included the e-mails from Mr. Frank and Mr. Szatynski related to the corrected noise wall quantity until May 12, 2003, which is nearly two weeks after it had submitted its bid. Thus, Petitioner could not have relied on the information in those e-mails in preparing its bid.

70. On April 30, 2003, Petitioner, Intervenor, and several other bidders timely submitted their bids for the Project.

71. Neither Petitioner, nor any other prospective bidder, filed a solicitation protest within 72 hours after the Notice was issued.

72. Neither Petitioner, nor any other prospective bidder, filed a solicitation protest within 72 hours after they received the plans and specifications for the Project.

73. Neither Petitioner, nor any other prospective bidder, filed a specification protest based upon the matters included in (or omitted from) any of the addenda within 72 hours after their issuance.

E. Department's Review of the Bids

74. The bids submitted by Petitioner and Intervenor were both determined to be responsive.

75. Intervenor's bid of $149,898,506.15 was the lowest bid.

76. Petitioner's bid of $149,959,420.22 was the next lowest bid. It was approximately $61,000 (or 0.041 percent) more than Intervenor's bid.

77. The Department has a policy--Section 3.3 of Policy No. 600-010-001-d (effective February 14, 2001)--which requires that before an award can be made based upon the apparent low bid, the

bid must be reviewed to ensure that it is not "materially unbalanced." FHWA policy is in accord.

78. The primary purpose of this review is to determine whether there is a quantity error in the bid documents that the apparent low bidder is exploiting to the State's detriment or to the detriment of the competitive bidding process.

79. There are two types of unbalanced bids, a mathematically unbalanced bid and a materially unbalanced bid. As described by the FHWA policy, which is in accord with the Department's policy and the testimony of the Department witnesses at the hearing,

> [a] mathematically unbalanced bid is structured on the basis of a nominal price submitted for some work and inflated prices for other work. There is no prohibition against a contractor submitting a mathematically unbalanced bid.
>
> A material unbalanced bid, however, exists if there is a reasonable doubt that the award to the bidder submitting the mathematically unbalanced bid will result in the lowest ultimate cost to the Government or have a detrimental effect on the competitive bid process. A materially unbalanced bid is unacceptable.

80. The Department's unbalanced bid review is a two-step process. The first step is to determine whether the bid is mathematically unbalanced. The second step is to determine whether a mathematically unbalanced bid is materially unbalanced.

81. The Department utilizes a computer program in the first step of the process to determine whether a bid is mathematically unbalanced. The computer compares the unit cost bid for each item to a pre-determined estimated price for that item. The computer "flags" any items for which the bid price is materially different from the estimated price. If any items are flagged, the bid is considered to be mathematically unbalanced.

82. Then, in the second step of the process, a Department estimator compares the quantity for the flagged unit item(s) in the bid documents with the "correct" quantity for the item(s) based upon a take-off from the plans. Based upon that comparison, the estimator determines whether the mathematical unbalance will result in a material cost overrun, a change in the low bidder, or otherwise be contrary to competition. If so, the bid is deemed to be materially unbalanced; otherwise, the bid is accepted.

83. This process is more formally described in Department Policy No. 600-010-001-d as follows:

> 3.3 Post-letting Procedures
>
> * * *
>
> (d) [A]s soon as the Bid verses Estimate (SAS) Report has been generated, a list of mathematically unbalanced bid items is sent to the District Design Project Manager (Central Office only). They review the computation book and check the quantities of items for possible overruns and/or

> underruns. If the quantity is found to be in error, the Project Manager calculates the correct quantity and faxes the list back to the estimator. The estimator then calculates the effects of the overrun/underruns by multiplying each contractor's unit bid by the overrun amount. The overrun amount is added back to each contractor's total bid. If there is an underrun, the amount is subtracted from each contractor's total bid. If this adjustment causes the low bidder's total to become larger than another contractor's total, a switch in low bidders have [sic] occurred, which is a materially unbalanced bid. The project must not be awarded to the original low bidder. The lowest adjusted bid will then be considered the low bidder and award will be made accordingly.
>
> (e) As soon as the bids have been loaded into the system by the Contracts Administration Offices, the low bid verses estimate (SAS) report can then be generated (Central Office only). This is followed by the Unbalanced Bid Item report. The Unbalanced Bid Item program utilizes a bell curve distribution that develops a statistical average unit price (Average 2). The program then establishes a range of acceptable prices to which the contractor's prices are compared. If this comparison is above or below a defined window (range), it is flagged by the program. This flag basically means to check the quantity on the mathematical unbalanced bid items for possible quantity overruns and/or underruns. The flag could also indicate the pay item was not needed when a contractor bids a small unit price on an item. . . .

(Emphasis in original.)

84. The computer program flagged four items which were mathematically unbalanced in Intervenor's bid. After review,

none of those items resulted in Intervenor's bid being declared materially unbalanced.

85. The computer program did not flag the noise wall item as being mathematically unbalanced. That means that the $600 per m^2 bid by Intervenor for the noise wall was not materially different from the estimated cost for that item.

86. Because the noise wall item was not flagged, the Department was not required (or allowed) under the policy quoted above to proceed to the next step to determine whether there was any material unbalance on that item.

87. Had the noise wall item been flagged as being mathematically unbalanced, the Department would have used the "final quantity" from Mr. Szatynski's April 21, 2003, e-mail in evaluating whether Intervenor's bid was materially unbalanced. That evaluation would have resulted in Intervenor's bid no longer being the lowest bid, and under Section 3.3(d) of Department Policy No. 600-010-001-d (and the FHWA policy), the contract for the Project would not have been awarded to Intervenor. Instead, the contract would have been awarded to Petitioner if its bid "passed" the unbalanced review.

88. If the Department used the 3,894 m^2 estimated quantity for the noise wall instead of the 1,453 m^2, Petitioner's bid amount would be $151,301,970.22 and Intervenor's bid amount

would be $151,363,106.15.[3] As a result, Petitioner would become the lowest bidder by approximately $61,000.

89. Petitioner informed the Department of these figures on May 20, 2003. Thus, at the time that the Department issued the notice of intent to award the contract to Intervenor, it was not only aware of the "correct" estimated quantity for the noise wall, but it was also aware that Intervenor would not be the lowest bidder if the "correct" quantity were used.

90. The Project has a built-in cost overrun of approximately $1.5 million (i.e., the difference between Intervenor's bid based upon the 1,453 m^2 estimate and its "corrected" bid based upon the 3,894 m^2 estimate) because under Section 2-3 of the Standard Specifications, payment for the noise wall will be based upon the size of the wall that is actually built and because the 3,894 m^2 more accurately reflects the size of the wall than does the original 1,453 m^2 estimate.

F. Proposed Award to Intervenor and Petitioner's Protest

91. On May 22, 2003, the Department posted notice of its intent to award the contract for the Project to Intervenor.

92. Petitioner's Protest was timely filed in relation to that notice.

CONCLUSIONS OF LAW

A. Jurisdiction

93. The Division has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 120.57(3).

B. Is This Actually a Specification Protest?

94. The Department and Intervenor argue that the Protest must be dismissed in its entirety because it is actually an untimely protest to the specifications in the bid documents.

95. The statutory language relevant to this argument is in Section 120.57(3)(b), which provides in pertinent part:

> With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation. The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter.

96. It is undisputed that neither Petitioner, nor any other prospective bidder, filed a specification protest at any point during the pre-bid phase. Therefore, if Petitioner's Protest is actually a specification protest, it is untimely and must be dismissed. *See* Section 120.57(3)(b); *Capeletti*

Brothers, Inc. v. Department of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1986) ("A failure to file a timely protest [of the plans and specifications for the project] constitutes a waiver of chapter 120 proceedings.").

97. The crux of the Department's and Intervenor's argument on this issue is that the estimated quantity for the noise wall of 1,453 m^2 in the bid documents never changed and, because Petitioner did not challenge that quantity through a specification protest, it is barred from doing so now. This argument is correct as far as it goes.

98. The evidence establishes that the estimated quantity for the noise wall in the bid documents, although clearly incorrect, was not changed prior to the Department's receipt of bids. Moreover, the evidence establishes that Petitioner was expressly told by the Department prior to the bid submittal deadline that the quantity was not going to be changed. Despite such notice, Petitioner did not file a specification protest.

99. Petitioner argues that it was not required to file a specification protest because "the only purpose to be served by a bid specification challenge, bringing a specification error to the agency's attention and affording it an opportunity to correct that error, was accomplished throughout the necessity of a formal administrative challenge." Petitioner's PRO at 16. Contrary to Petitioner's argument, the purpose of a bid

solicitation protest is not just to afford the agency an opportunity to correct the error, it is to get the error corrected. *See Capeletti Brothers*, 499 So. 2d at 857 ("[T]he purpose of a bid solicitation protest provision is . . . to correct or clarify plans and specifications prior to accepting bids."). Petitioner was clearly on notice after Ms. Driskell spoke with Mr. Wittmann on April 28, 2003, that no change was going to be made to the estimated quantity for the noise wall despite the Department's prior acknowledgement that there was an error. At that point (if not before), Petitioner could have brought a bid solicitation protest to force the Department to correct the error, but it failed to do so.[4]

100. Petitioner's argument that the Department should nevertheless change the noise wall quantity estimate post-bid and award the contract based upon the "correct" noise wall quantity of 3,894 m^2 is jurisdictionally foreclosed. *See Capeletti Brothers*, 499 So. 2d at 857; *Vila & Son Landscaping Corporation v. Department of Transportation*, Case No. 93-4556BID, 1993 WL 944007, at *5 (DOAH October 22, 1993); *State Paving Corporation v. Department of Transportation*, Case No. 87-3848, 1987 WL 488156, at *4 (DOAH October 1, 1987).

101. This determination does not warrant dismissal of the Protest in its entirety because the Protest alternatively argues that the proposed contract award to Intervenor is contrary to

the Department's governing statutes, policies, and the proposal specifications. Even though those arguments also implicate the erroneous noise wall quantity estimate, those arguments are not jurisdictionally foreclosed and are addressed below.

C. Does Petitioner's Protest to the Department's Proposed Award Have Merit?

102. The nature and scope of a protest to the proposed contract award is prescribed by Section 120.57(3)(f), which provides in pertinent part:

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

103. This statutory language was parsed and critically analyzed by Administrative Law Judge John G. Van Laningham in his Recommended Order in *Syslogic Technology Services, Inc. v. South Florida Water Management District*, Case No. 01-4385BID, 2002 WL 76312 (DOAH January 18, 2002). The pertinent portions of that analysis, with which the undersigned agrees, provide:

> 45. As the statute says, the ultimate issue is "whether the agency's proposed action is contrary to the agency's governing

statutes, the agency's rules or policies, or the bid or proposal specifications." This could be construed as a standard of review, which might be distilled into: whether the agency erred in applying a governing principle. Such a review would be akin to an appellate court's evaluation of a lower tribunal's legal conclusions. Ordinarily, of course, legal conclusions are decided independently (or de novo) by the reviewing court, with little deference paid to the trial judge. [citations omitted]

46. The next sentence, however, which describes the "standard of proof," renders the foregoing interpretation untenable, for reasons that will become clear. But first: it is an impediment to applying the statute that of the several standards ushered in by words "standard of proof," none is a known "standard of proof."

47. As commonly used in legal discourse, the term "standard of proof" signifies the nature, quality, and quantity of evidence with which the proponent of an allegation (or the one who bears the burden of proof) must come forward in order to establish that allegation. The widely-recognized standards of proof are: preponderance (or greater weight) of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt. [citations omitted]. It is highly unlikely that the legislature intended to change the standard of proof in bid protests, from "preponderance of the evidence," see Section 120.57(1)(j), Florida Statutes, to a new and unfamiliar standard.

48. Instead, a reasonable interpretation of "standard of proof" as used in Section 120.57(3)(f) is that the term means standard of review. This is because, while the "standard of proof" sentence fails to mention a single common standard of proof, it does articulate two accepted standards of review: the "clearly erroneous" and abuse

of discretion (= "arbitrary, or capricious") standards. (The "contrary to competition" standard——whether it be a standard of proof or standard of review——is unique to bid protests.) Construing "standard of proof" to mean "standard of review" makes the sentence make sense.[8]

> [Endnote 8. The legislature's use of the term "standard of review" in the very next sentence of the statute, which deals with protests contesting a rejection of bids, has not been overlooked. While ordinarily it would be presumed that the legislature, having chosen to use different terms in the same statute, must have intended that each separate term convey a distinct meaning, the ordinary presumption simply does not work here. The legislature could not reasonably have intended that a protester establish its case by "clearly erroneous" evidence, or by proof that is "contrary to competition."]

49. It also sheds light on the "de novo proceeding" sentence. If the "standard of proof" sentence describes the standard of review (as reasonably it must), then logically the "de novo proceeding" sentence must <u>not</u> prescribe the standard of review, because the legislature presumably would not have done so twice, differently. Moreover, the "standard of proof" sentence plainly manifests an intent that the agency's proposed action be accorded a measure of deference that is inconsistent with a de novo review for error, which would seem to be the standard of review if the "de novo proceeding" sentence were construed to articulate one. By framing the ultimate issue as being "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or

> policies, or the bid or proposal specifications," it is probable that the legislature, rather than describing a standard of review, intended to establish a standard of conduct for the agency. The standard is: In soliciting and accepting bids or proposals, the agency must obey its governing statutes, rules, and the project specifications. If the agency breaches this standard of conduct, its proposed action is subject to (recommended) reversal by the administrative law judge in a protest proceeding.
>
> 50. Applying the above interpretations, it is concluded that the party protesting the intended award must identify and prove, by the greater weight of evidence, a specific instance or instances where the agency's conduct in taking its proposed action was either:
> (a) contrary to the agency's governing statutes;
> (b) contrary to the agency's rules or policies; or
> (c) contrary to the bid or proposal specifications.
>
> It is not sufficient, however, for the protester to prove merely that the agency violated the general standard of conduct. By virtue of the applicable standards of review, the protester must in addition establish that the agency's misstep was:
> (a) clearly erroneous;
> (b) contrary to competition; or
> (c) an abuse of discretion.

Id., 2002 WL 76312 at **8-10 (Emphasis in original). *See also State Contracting & Engineering Corporation v. Department of Transportation*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998) (noting that the object of a bid protest proceeding is to "evaluate the

action taken by the agency" in accordance with the standards set forth in Section 120.57(3)(f)).

104. Petitioner first argues that the Department's proposed award of the contract to Intervenor is contrary to Section 337.11(2). That statute requires the Department to "ensure that all project descriptions, including design plans, are complete, accurate, and up to date prior to the advertisement for bids on such projects." (Emphasis supplied.)

105. Although Section 337.11(2) might have provided a basis for a solicitation protest directed at the erroneous estimated quantity for the noise wall once it became apparent that the Department did not intend to correct that error through an addendum, the statute does not impose a continuing obligation on the Department to unilaterally correct errors in the bid documents after the Project has been advertised. Accordingly, Section 337.11(2) does not provide a basis upon which to challenge the Department's intended award of a contract made pursuant to the bid documents, even if an item in those documents is shown to be inaccurate, as it was here.

106. This construction of Section 337.11(2) is consistent with *Capeletti Brothers* and its progeny which hold that challenges to the specifications must be timely raised during the pre-bid phase or they are waived. This construction of the statute also preserves the integrity of the competitive bidding

process by prohibiting after-the-fact challenges to the specifications in the bid documents.

107. Petitioner next argues that the Department's proposed award of the contract to Intervenor is contrary to the Department's policy of rejecting materially unbalanced bids. Petitioner failed to meet its burden of proof on this issue because the evidence establishes that the Department followed its policy governing the review of bids for unbalancing in this case.[5] In this regard, because Intervenor's bid was not determined to be mathematically unbalanced with respect to the noise wall item, the policy did not require (or even allow) the Department to determine whether Intervenor's bid was materially unbalanced on that item. *Cf. Vila & Son*, *supra* (discussing the Department's unbalanced bid review process and post-bid changes made in circumstance involving mathematically unbalanced bid items). Indeed, had the Department deviated from the procedures set forth in the unbalanced bid policy and declared Intervenor's bid materially unbalanced by using the "correct" quantity for the noise wall item, even though that item was not "flagged" by the computer, its action would have been subject to challenge by Intervenor as being contrary to the Department's written policy.

108. Finally, Petitioner argues that the Department's intended award of the contract to Intervenor is contrary to the bid specifications. Petitioner failed to meet its burden of

proof on this issue. The evidence establishes that the estimated quantity for the noise wall was never changed from 1,453 m^2 and that, consistent with Sections 2-3 and 3-1 of the Standard Specifications, the Department's proposed award to Intervenor was based upon that figure. The evidence further establishes that Petitioner's representative was expressly told prior to the bid submittal deadline that the noise wall quantity estimate was not going to be changed and Petitioner subsequently submitted its bid based upon the noise wall quantity estimate of 1,453 m^2. *And cf. Capeletti Brothers v. Department of General Services*, 432 So. 2d 1359 (Fla. 1st DCA 1983)(affirming contract award to lowest bidder even though bid specifications contained a known and acknowledged error regarding the ownership of the access road to the construction site).

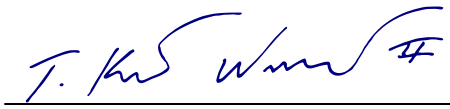
109. Because Petitioner failed to prove that the Department's intended award of the contract to Intervenor is contrary to statute, Department policy, or the bid specifications, it is unnecessary to determine whether any such "misstep" was clearly erroneous, contrary to competition, or an abuse of discretion. *See Syslogic Technology Services*, 2002 WL 76312 at *10 (second paragraph in Paragraph 50).

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation issue a final order which denies the formal written protest filed by Petitioner and awards the contract for the Project to Intervenor.

DONE AND ENTERED this 25th day of August, 2003, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of August, 2003.

ENDNOTES

1/ Unless the context indicates otherwise, all references in this Recommended Order to "bid documents" includes the Notice, the plans and specifications for the Project, the proposal form/bid blank, and the five addenda issued by the Department.

2/ Section 1-3 of the Standard Specifications defines "major item of work" as an item of work whose value is more than five percent of the contract price. Here, the five percent threshold is approximately $7.5 million.

3/ These amounts are computed as follows:

	Petitioner	Intervenor
Original Bid	$149,959,420.22	$149,898,506.15
Less: Noise Wall @ 1,453 m^2	(799,150.00)	(871,800.00)
Plus: Noise Wall @ 3,894 m^2	2,141,700.00	2,336,400.00
"Corrected" Bid	$151,301,970.22	$151,363,106.15

For Petitioner, the noise wall figures were computed by multiplying 1,453 m^2 and 3,894 m^2 by the $550 per m^2 bid by Petitioner, and for Intervenor, the noise wall figures were computed by multiplying 1,453 m^2 and 3,894 m^2 by the $600 per m^2 bid by Intervenor.

4/ The undersigned is mindful that Section 120.57(3)(b) requires a solicitation protest to be filed within 72 hours after "posting of the solicitation" which, in this case, occurred on February 28, 2003, when the Notice was issued. However, under the circumstances of this case, the 72-hour period to file a specification protest (or at least a protest directed to the error in the noise wall quantity) could not have commenced on that date because the bidders did not yet have the plans for the Project which provided the graphical information from which the error could be determined through a take-off calculation. Moreover, under the circumstances of this case, the Department would have been hard-pressed not to consider a specification protest had one been filed by Petitioner within 72 hours after Ms. Driskell finally informed Mr. Wittmann on April 28, 2003, that despite their earlier conversations, the Department did not intend to change the estimated quantity for the noise wall. Ultimately, however, this is simply an academic exercise since Petitioner did not file a specification protest at any point in the process.

5/ There is some merit to Petitioner's argument that the Department's policy makes no sense under the circumstances of this case since the primary purpose of an unbalanced bid review is to determine whether there is a quantity error in the bid documents that the bidder is exploiting to the State's detriment or to the detriment of the competitive bidding process. Here, the Department was aware at the time the bids were received of the error in the estimated quantity for the noise wall, as well as the cost overrun that the error would cause, and it was

informed prior to noticing its proposed award of the contract to Intervenor that use of the "correct" estimated quantity would result in a change in low bidders. Nevertheless, the scope of review in this proceeding is limited to determining whether the Department followed its policy, as written, in awarding the contract, which it did.

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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.