

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MATTHEW BENDER & CO., INC.,                    )  
  )  
    Petitioner,                                    )  
  )  
vs.    )     Case No. 03-2440BID  
  )  
DEPARTMENT OF STATE,                         )  
  )  
    Respondent.                                 )  
-----) )

RECOMMENDED ORDER

A formal hearing was held pursuant to notice, on July 29, 2003, in Tallahassee, Florida, before Barbara J. Staros, assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary Piccard Vance, Esquire  
                  Vezina, Piccard & Piscitelli, P. A.  
                  318 West Gaines Street  
                  Tallahassee, Florida 32301

For Respondent: Marielba Torres Delgado, Esquire  
                  Department of State  
                  The Collins Building, Room 110  
                  107 West Gaines Street  
                  Tallahassee, Florida 32399-0250

STATEMENT OF THE ISSUE

Whether Respondent's action of disqualifying the bid submitted by Petitioner was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On June 6, 2003, the Florida Department of State (Department) posted its Notice of Intent to award a contract for publication of the Florida Administrative Code pursuant to Invitation to Bid No. 695-100-(01 or 04)-03-7<sup>1/</sup>(the ITB). The Notice stated that four bids were received and that Petitioner, Matthew Bender & Co., Inc., and two other bidders were disqualified resulting in one responsive bidder. Petitioner timely filed a Formal Protest Petition challenging the decision of the Department to disqualify its bid. The Formal Protest Petition was forwarded to the Division of Administrative Hearings on or about July 2, 2003. A formal hearing was scheduled for July 25, 2003.

The parties filed an Agreed Motion for Continuance and Request for Expedited Consideration, which was granted. A formal hearing was rescheduled for July 29, 2003.

The parties filed a Prehearing Stipulation. The parties stipulated to the admission of Joint Exhibits 1 through 10. At hearing, Petitioner presented the testimony of Leigh Trippe, Barry Bridges, and Kathleen Hutchins. Petitioner's Exhibit numbered 2 was admitted into evidence. Respondent presented the testimony of Kathleen Hutchins, Lizzie Cloud,

and Howard C. Kast. Respondent's Exhibit numbered 8 was admitted into evidence.

A Transcript, consisting of one volume, was filed on August 12, 2003. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order. All citations are to Florida Statutes (2002) unless otherwise indicated.

#### FINDINGS OF FACT

##### Stipulated Facts

1. Petitioner submitted a bid in response to ITB No. 695-100-(01 or 04)-03-7.

2. The Department received four bids in response to the ITB. The two lowest bidders, Weil Publishing and Municipal Code Corporation, were disqualified due to lack of compliance with the references requirement set forth in the ITB.

3. Petitioner has standing as the third lowest bidder given the disqualification of the two lowest bidders.

4. Petitioner timely filed a notice of intent to protest and a formal written protest.

##### Findings of Fact Based on the Evidence of the Record

5. The ITB contained a requirement that each bidder provide three references for similar printing contracts, including a brief description of the work performed, a

reference contact person, telephone number, and address. The Department disqualified the two lowest bidders for failure to meet the reference requirement.

6. When it was determined that Petitioner was the resulting lowest bidder, Liz Cloud, Bureau Chief for the Bureau of Administrative Code, wrote a letter to Leigh Trippe, Vice President for Government Relations and Contracts for Petitioner, to inform her that Matthew Bender was the apparent low bidder. The letter was sent to Ms. Trippe along with a package of materials on May 27, 2003.

7. In addition to sending the letter and accompanying materials, Ms. Cloud called Ms. Trippe on May 28, 2003, to inquire if the letter and package had been received. While Ms. Trippe had not yet received the letter and package at the time of the phone call, it was received by Petitioner on May 28, 2003.

8. The language of the ITB is clear in informing potential bidders that the apparent low bidder will be required to show ability to perform by participating in a test run of the Florida Administrative Code. Page 11 of the ITB provides in pertinent part:

EVALUATION AND AWARD

Award will be made to the bidder meeting all requirements of the bid offering the lowest aggregate pricing using the formula on the price sheet.

*Prior to posting the intended award, the apparent low bidder will be required to show ability to perform by participating in a test run of the Florida Administrative Code.*

*The Department will provide the bidder with the material necessary (a hard copy of rule text for the Code) to print the test run of the Code.*

The apparent low bidder shall provide the Department with one 25 page sample volume of the Code, containing pages from rule text, statutory cross reference tables, tables of repealed rules and subject matter indexes. The 8 1/2 X 11 inch sample Code shall include at least two (2) sample three and one-half inch, three ring swing hinge binders of the type that will be used for all subscriptions. The Department will chose from the binder samples submitted by the apparent low bidder. The sample binders submitted must be of equal or higher quality as compared to the ones currently used for publication of the Code. The bidder will be expected to provide copies to the Department within two days of receipt of the sample work. All samples shall be next day mail or courier service, to the Division of Elections for approval.

If the apparent low bidder fails to perform as required, the Department shall proceed to the next low bidder and so on, until either a responsive bidder is found or the Department decides to post for no award.  
[emphasis added]

9. The May 27, 2003, letter from Ms. Cloud to Ms. Trippe reads as follows:

Pursuant to the requirements of Invitation to Bid No. 695-100-01-03-7, enclosed is a

copy of the documents necessary to print a test run of the Florida Administrative Code, including a disk containing the rule text in ascii format; and a disk containing amendments to the rule text in Adobe FrameMaker 7.0.

More specifically, the documents enclosed are a copy of Chapter 62-782, Florida Administrative Code, as filed with the Department of State, with editorial changes marked, and a copy of this chapter as currently printed in the Florida Administrative Code for your information and review. The text provided in ascii format includes Rules 62-782.100 thru 62-782.790. The text provided in Adobe Framemaker 7.0 as amendments to Chapter 62-782 consists of Rules 62-782.800 and 62-782.900.

In accordance with the "Evaluation and Awards" section on page 11 of 25 of the aforementioned bid, this office must receive the finalized sample publication no later than noon Monday, June 2, 2003. If you have any questions please do not hesitate to contact me at (850) 245-6270.

10. The materials provided to Petitioner by the Department did not contain any repealed rules or information regarding a subject matter index or a cross-reference table. The cover letter from Ms. Cloud did not reference repealed rules, a subject matter index, or cross-reference tables or any instruction regarding these items.

11. Petitioner prepared the test run of the publication which was timely delivered to the Department on June 2, 2003. The sample submitted by Petitioner to the Department did not

include a table of repealed rules, a subject matter index, or a cross-reference table.

12. Along with the sample publication, Petitioner enclosed three binders which were described in a cover letter: "The binders provided are representative of our available selections. Any of these selections may be customized to your desired color, size, stamping, etc."

13. Ms. Cloud was not in the office on June 2, 2003, when Petitioner's sample publication was received by the Department. Her assistant and Kathleen Hutchins, Purchasing Director for the Department, opened the box containing the submission submitted by Petitioner. The following day, Ms. Cloud examined the box and its contents. She determined that the test run of the publication did not include a table of repealed rules, a subject matter index, or a cross-reference table. Moreover, she determined that only one of the three sample binders was compliant with the type and size requirement of the binders referenced in the Evaluation and Award Section of the ITB.

14. The Department determined that Petitioner's submission of one compliant binder and two non-compliant binders constituted a minor irregularity. But it was decided to disqualify Petitioner based on Petitioner's test run publication which the Department deemed to be materially

noncompliant with the ITB for failure to include statutory cross references tables, tables of repealed rules, and subject matter indexes.

15. When asked under cross examination about the materials sent to Petitioner to perform the test run, Ms. Cloud responded in part:

Q Do you know whether there were any repealed rules in the material you provided?

A There was not.

Q How were they supposed to create a table of repealed rules?

A They could have taken some of the rules and did the table as if they were repealed, or they could have provided a table saying no rules were repealed in this rule.

16. Ms. Cloud informed Ms. Hutchins that she determined the sample publication submitted by Petitioner to be lacking required elements and was, therefore, non-responsive. She instructed Ms. Hutchins to prepare a cover letter and send the same test run to the next apparent low bidder which was also the only remaining bidder and the current publisher of the Florida Administrative Code. Ms. Hutchins did so.<sup>2/</sup>

17. On June 6, 2003, the Department posted its Notice of Intent to Award a contract to the remaining bidder, Darby Publishing. The Notice of Intent stated that Petitioner was



disqualified because the test run required by the Evaluation and Award section of the ITB was returned incomplete.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case pursuant to Sections 120.569, 120.57(1), and 120.57(3).

19. Petitioner has challenged the Department's proposed agency action determining that Petitioner's submission of a test run of the Florida Administrative Code was incomplete, thereby rendering Petitioner's submission non-responsive.

20. The burden of proof resides with the Petitioner. The standard of proof in this proceeding is whether the agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. Section 120.57(3)(f).

21. The underlying findings of fact in this case are based on a preponderance of the evidence. Section 120.57(1)(j).

22. This de novo proceeding was conducted for the purpose of evaluating the action that was taken by the agency in an attempt to determine whether that action is contrary to the agency's governing statutes, the agency's rules or policies, or the ITB specifications. See Section 120.57(3)(f), and *State Contracting and Engineering Corporation v. Department of*

*Transportation*, 709 So. 2d 607 (Fla. 1st DCA 1998).

23. An agency action is capricious if the agency takes the action without thought or reason or irrationality. An agency decision is arbitrary if it is not supported by facts or logic. *Agrico Chemical Co. v. State Department of Environmental Regulation*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

24. The Evaluation and Award section of the ITB informed prospective bidders that the apparent low bidder will be required to show ability to perform by participating in a test run of the Florida Administrative Code and that the Department will provide the bidder with the material necessary to print the test run.

While the Department provided material necessary to produce a sample volume of the Code containing pages from rule text, it did not provide Petitioner with material necessary to create statutory cross reference tables, tables of repealed rules, or subject matter indexes.

25. Illustrative of the Department's failure to provide necessary materials or instructions is Ms. Cloud's testimony regarding creation of a fictitious table of repealed rules. The Department's expectations that a bidder would create a fictitious table of repealed rules from non-existing information or provide a table stating that no rules were

repealed without any instruction to do so is arbitrary, capricious, and contrary to

the clear language of the ITB that the Department would provide the necessary materials to perform the test run.

26. Petitioner has met its burden of proving by a preponderance of the evidence that the Department's proposed action of disqualifying its bid for submitting an incomplete test run is arbitrary, capricious, and contrary to the clear language of the ITB.

#### RECOMMENDATION

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

RECOMMENDED:

That the Department of State enter a final order reversing its decision that Petitioner's test run submission was incomplete, and, therefore, non-responsive.

DONE AND ENTERED this 15th day of September, 2003, in  
Tallahassee, Leon County, Florida.



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BARBARA J. STAROS  
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 15th day of September, 2003.

ENDNOTES

<sup>1/</sup> The ITB references its number as 695-100-01-03-7. However, the mailing instructions referenced it as 695-100-04-03-7. Bids were accepted with either number and the parties refer to the ITB at issue as 695-100-(01 or 04)-03-7.

<sup>2/</sup> According to Ms. Hutchins, the next apparent lowest bidder submitted a test run publication that was fully compliant with the requirements of the Evaluation and Award section of the ITB. The test run submitted by the next apparent lowest bidder is not in evidence and the proposed winning bidder is not a party to this action.

COPIES FURNISHED:

Mary Piccard Vance, Esquire  
Vezina, Piccard & Piscitelli, P. A.  
318 West Gaines Street  
Tallahassee, Florida 32301

Marielba Torres Delgado, Esquire  
Department of State  
The Collins Building, Room 110  
107 West Gaines Street  
Tallahassee, Florida 32399-0250

Gerry York, General Counsel  
Department of State  
The Collins Building, Room 100  
107 West Gaines Street  
Tallahassee, Florida 32399-0250

Glenda E. Hood, Secretary  
Department of State  
R. A. Gray Building  
500 South Bronough Street  
Tallahassee, Florida 32399-0250

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.