

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALL POWER GENERATORS)	
CORPORATION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 03-3954BID
)	
DEPARTMENT OF CORRECTIONS,)	
)	
Respondent,)	
)	
and)	
)	
PANTROPIC POWER PRODUCTS,)	
)	
Intervenor.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 21, 2003, by video teleconference, with the Petitioner and the Intervenor appearing in Miami, Florida, and the Respondent appearing in Tallahassee, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: LaShawn Strachan, Esquire
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For Respondent: Susan P. Stephens, Esquire
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For Intervenor: David M. McDonald, Esquire
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STATEMENT OF THE ISSUE

Whether the Respondent's decision to reject the bid submitted by the Petitioner in response to Invitation to Bid # 03-DC-7514, Maintenance and Repair of Emergency Generators, was contrary to the Respondent's governing statutes, the Respondent's rules or policies, or the specifications in the Invitation to Bid.

PRELIMINARY STATEMENT

In a Petition filed with the Department of Corrections ("Department") on October 10, 2003, All Power Generators Corporation ("All Power Generators") asserted that the Department's decision to reject its bid, which was submitted in response to Invitation to Bid # 03-DC-7514 ("the ITB"), for maintenance and repairs of emergency generators in Region IV was clearly erroneous, arbitrary or capricious, and contrary to its own rules. All Power Generators alleged that it met the experience requirement set forth in the ITB and that it should have been awarded the contract as the lowest responsive bidder.

The Department transmitted the petition to the Division of Administrative Hearings for the assignment of an administrative law judge. On November 12, 2003, Pantropic Power Products ("Pantropic") filed a petition to intervene in the proceeding, and Pantropic was granted intervenor status in an order entered November 18, 2003. Pursuant to notice, the final hearing was held on November 21, 2003.

At the hearing, the parties offered Joint Exhibits 1 through 4, which were received into evidence. All Power Generators presented the testimony of Juan Ricardo Garcia, its President, and Petitioner's Exhibit 1 was received into evidence. The Department presented the testimony of Diana Trahan, a purchasing analyst employed by the Department, and Robert Richard Rogers, a maintenance and construction officer employed by the Department; Respondent's Exhibit 1 was received into evidence. Pantropic presented the testimony of Richard Gaska.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on December 9, 2003, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of the Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. On June 23, 2003, the Invitation to Bid ("ITB") for Bid No. 03-DC-7514 was advertised and also mailed to prospective bidders on the bidding list maintained by the Department. The ITB solicited bids for the maintenance and repair of emergency generators in correctional facilities, and separate bids were to be submitted for Regions I through IV.

2. All Power Generators submitted its bid by the deadline of 2:00 p.m. September 15, 2003, together with four other bidders, including Pantropic. Both All Power Generators and Pantropic bid only on the part of the ITB relating to work in Region IV.

3. When the bids were opened, the annual costs stated by the bidders for each region covered by the ITB were read and recorded. All Power Generators' cost total was lower than that of Pantropic, and All Power Generators was the apparent lowest responsive bidder.

4. After the bids were opened, Department personnel reviewed the cost tabulations to confirm their accuracy and reviewed the other documentation required by the ITB, including the Certification/Attestation for Mandatory Statements, the

Certification/Attestation of Executive Summary Statements, and the Bidder's Background Summary, to ensure the bidders' responsiveness to the requirements of the ITB.

5. As a result of this review, the Department's Procurement Manager determined that All Power Generators did not meet the three years' business/corporate experience requirement of the ITB. The Procurement Manager recommended that the contract be awarded to Pantropic, the next lowest bidder. This recommendation was accepted, and the Department noted on the Bid Tabulation form its intent to award the contract for Region IV to Pantropic and its determination that All Power Generators did "not meet required experience criteria."

6. In Section 1.3 of the ITB, "mandatory responsiveness requirements" are defined in pertinent part as follows: "Terms, conditions or requirements that must be met by the bidder to be responsive to this ITB. These responsiveness requirements are **mandatory**. Failure to meet these responsiveness requirements will cause rejection of a bid. . . ." (Emphasis in original.)

7. Section 4.3.6 of the ITB provides in pertinent part:

The Department **shall** reject any and all bids not meeting mandatory responsiveness requirements. In addition, the Department **shall** also reject any or all bids containing material deviations. The following definitions are to be utilized in making these determinations:

4.3.6.1 Mandatory Responsiveness

Requirements: Terms, conditions or requirements that must be met by the bidder to be responsive to this ITB. These responsiveness requirements are **mandatory**. Failure to meet these responsiveness requirements will cause rejection of a bid.

4.3.6.2 Material Deviations: The Department has established certain requirements with respect to bids to be submitted by bidders. The use of *shall*, *must* or *will* (except to indicate simple futurity) in this ITB indicates a requirement or condition which may not be waived by the Department. A deviation is material if, in the Department's sole discretion, the deficient response is not in substantial accord with this ITB's requirements, provides an advantage to one bidder over other bidders, has a potentially significant effect on the quantity or quality of items or services bid, or on the cost to the Department. Material deviations cannot be waived and shall be the basis for rejection of a bid.

(Emphasis in original.)

8. The Mandatory Responsiveness Requirements are set forth in Section 5.1 of the ITB, which provides in pertinent part:

The following terms, conditions, or requirements must be met by the bidder to be judged responsive to this ITB. **These responsiveness requirements are mandatory. Failure to meet these responsiveness requirements shall cause rejection of a bid.** Any bid rejected for failure to meet responsiveness requirements will not be reviewed.

* * *

5.1.4 It is mandatory that the bidder sign, have certified by a notary public and return, under Tab 1, the

"Certification/Attestation for Mandatory Statements" (**ATTACHMENT 1**), which includes the following statements:

5.1.4.1 Business/Corporate Experience:

A statement certifying that the bidder/contractor has business/corporate experience of at least three (3) years relevant to the provision of generator maintenance and repair, within the last five (5) years.

5.1.4.2 Authority to Legally Bind the Bidder: A statement certifying that the person signing form PUR 7031 [the Bidder Acknowledgment] and all other forms is the person in the bidder/contractor's organization responsible for, or authorized to make, binding decisions as to the prices bid.

9. Juan R. Garcia signed the form PUR 7031 and the Certification/Attestation for Mandatory Statements as President and owner of All Power Generators, and these documents were duly notarized.

10. The Certification/Attestation for Mandatory Statements form signed by Mr. Garcia contains the following statement:

"This is to certify that the bidder/contractor has business/corporate experience of at least three (3) years relevant to the provision of generator maintenance and repair, within the last five (5) years."

11. Mr. Garcia also signed the Certification/Attestation of Executive Summary Statements, wherein he certified that "the

bidder is a corporation" that is "registered to do business in Florida."

12. Finally, Mr. Garcia completed the Bidder's Background Summary for All Power Generators in which he stated that All Power Generators was established in 2001 as a corporation whose primary business was to service and repair generators. All Power Generators has been doing business for approximately two and one-half years.

13. Mr. Garcia has worked for 21 years repairing and maintaining generators. Prior to organizing All Power Generators, Mr. Garcia was the service manager for a company called Power Depot. His primary job at Power Depot was repairing and maintaining generators, and, among other technical qualifications, he is certified by Kohler to work on the generators it manufacturers.

14. All Power Generators has five employees, including Mr. Garcia, who have between 8 and 22 years' experience maintaining and repairing generators.

15. It is of critical importance that the Department's emergency generators be properly maintained and promptly repaired. When there is a power outage in one of the Department's correctional facilities, emergency generators automatically start and provide emergency power to operate security systems, food service operations, water wells,

wastewater plants, and emergency lighting. Under the ITB, response time is 24 hours for non-emergency repairs and four hours for emergency repairs. The bidder/contractor who is awarded the contract to maintain and repair emergency generators used in the correctional facilities must have employees who are technically proficient in maintaining and repairing generators, but, because of the short response time for repairs and the numerous correctional facilities covered by the contract, especially in Region IV,¹ the Department requires that the bidder/contractor also have business/corporate experience in managing contracts and coordinating the necessary maintenance, routine repairs, and emergency repairs of the generator systems.

16. The evidence presented by All Power Generators is not sufficient to establish that its bid satisfied the mandatory requirement that the bidder/contractor have a minimum of three years' business/corporate experience. All Power Generators was organized in 2001 and has been in business only two and one-half years. Even though Mr. Garcia has many years of technical experience in the repair and maintenance of generators, All Power Generators does not have the business/corporate experience required by the ITB.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of

the parties thereto pursuant to Sections 120.569 and 120.57(1) and (3), Florida Statutes (2003).²

18. In its Petition, All Power Generators has alleged that the Department's decision to reject its proposal is erroneous, arbitrary or capricious, and contrary to its own rule. All Power Generators' bid protest was filed pursuant to Section 120.57(3), Florida Statutes, which provides in pertinent part:

(f) . . . 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. . . .

19. The court in State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998), defined the *de novo* hearing required by Section 120.57(3)(f) as

a form of intra-agency review. The judge may receive evidence, as with any formal hearing under Section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency. See Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3d DCA 1992).

20. Section 120.57(3)(f) also provides that "[u]nless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action." There is no statute placing the burden of proof in a bid protest proceeding on anyone other than the party prosecuting the bid protest. Section 120.57(1)(j), Florida Statutes, provides in pertinent part that "[f]indings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute," There is no statute providing for a lesser or a greater quantum of proof in a bid protest proceeding than a preponderance of the evidence. Accordingly, pursuant to Section 120.57(3)(f), and in accordance with the allegations in its petition, All Power Generators has the burden of proving by a preponderance of the evidence that the Department's decision that All Power Generators failed to satisfy the mandatory requirement that the bidder/contractor have at least three years' business/corporate experience was clearly erroneous, arbitrary, capricious, or contrary to the ITB at issue herein.

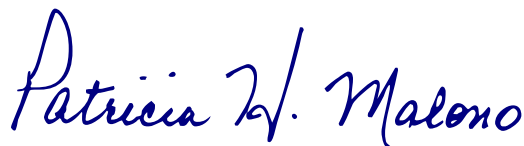
21. Based on the findings of fact herein, All Power Generators has failed to carry its burden in this case. All Power Generators was on notice that it must meet the mandatory requirements set forth in the ITB. Among those mandatory requirements was the requirement that the bidder/contractor have

three years' business/corporate experience, which is in addition to the technical expertise of the bidder/contractor's staff.³ This requirement is not arbitrary or capricious; the Department's decision to reject All Power Generators' bid was not clearly erroneous or contrary to its rules or policies; and, pursuant to the terms of the ITB, the Department must reject All Power Generators' bid.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Corrections enter a final order denying the bid protest of All Power Generators Corporation and dismissing the Petition filed by All Power Generators Corporation.

DONE AND ENTERED this 13th day of January, 2004, in Tallahassee, Leon County, Florida.



PATRICIA HART MALONO
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of January, 2004.

ENDNOTES

^{1/} The contract for Region IV covers 13 major correctional facilities and 52 emergency generators and related equipment located in Broward, Dade, Charlotte, Desoto, Everglades, Hardee, Hendry, Indian River, Lee, Martin, Okechobee, and Palm Beach counties.

^{2/} All statutory references are to the 2003 edition of the Florida Statutes unless otherwise stated.

^{3/} Section 3.4.4 of the ITB addresses staffing requirements for the contract and specifies that "[a]ll technicians provided to perform services shall have at least 40 hours factory training on generators similar to those identified herein, or related equipment."

COPIES FURNISHED:

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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.