

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANCHOR TOWING, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 04-1447BID
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent,)
)
 and)
)
 SUNSHINE TOWING, INCORPORATED,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

This cause came on for formal hearing before the Honorable Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on July 20 and 21, 2004, and on August 10, 2004, in Miami, Florida.

APPEARANCES

For Petitioner: Miguel A. De Grandy, Esquire
Stephen Cody, Esquire
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Coral Gables, Florida 33134

For Respondent: C. Denise Johnson, Esquire
Department of Transportation
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For Intervenor: John C. Shawde, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the Department of Transportation's intended award of RFP-DOT-04/05-6063DS to Sunshine Towing, Inc., is contrary to the Agency's governing statutes, rules, or policies, or the bid proposal specifications.

PRELIMINARY STATEMENT

Petitioner, Anchor Towing, Inc. ("Anchor Towing"), filed a Notice of Intent to Protest on March 19, 2004, and a Formal Written Protest and Incorporated Memorandum of Law on March 29, 2004. The protest was filed in response to the posting by the Department of Transportation (the "Department") of its intended award of RFP-DOT-04/05-6063DS, for Road Ranger services to motorists on certain Florida Highways, to Sunshine Towing, Inc. ("Sunshine Towing"). On April 22, 2004, the petition was referred to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a formal hearing. On April 27, 2004, Petitioner and Respondent filed a Stipulation to Waive the Thirty (30) Day Requirement for proceeding with the matter to hearing. On May 7, 2004, Sunshine Towing filed its Unopposed Ex-Parte Motion for Leave to

Intervene which was subsequently granted on May 13, 2004. The original hearing scheduled for June 16-17, 2004, was continued pursuant to an Order granting [Petitioner's motion for] continuance on June 11, 2004. Pursuant to notice, the final hearing was held on July 20-21, and August 10, 2004.

Each of the parties filed unilateral pre-hearing statements. In its pre-hearing statement (labeled a "unilateral pre-hearing stipulation"), Petitioner stated its arguments for finding the Sunshine Towing proposal to be non-responsive:

1) Sunshine Towing's proposal failed to follow the Technical Proposal Format set forth in the Request for Proposal (RFP); 2) Sunshine Towing's proposal failed to provide information regarding its litigation history as required by the RFP; and 3) Sunshine Towing's proposal failed to provide an acknowledgment of "Addendum Two" to the RFP. Additionally, Petitioner alleged that the scoring methodology employed by the Department was arbitrary and capricious because different Selection Committee members were allegedly "directed or permitted to give different weight to evaluation categories." These same issues had been raised by Petitioner in its Formal Written Protest of the intended award of the services at issue to Anchor Towing.

By stipulation at the beginning of the hearing, Petitioner withdrew its argument in Section II of its Petition which alleged that Intervenor is not the highest-ranked proposer. At

the hearing, the parties offered Joint Exhibit Nos. 1-7, 14, 15, 20, 21, 24-27, and 29, all of which were received into evidence. Anchor Towing also offered Exhibit Nos. 18, 28, 30, and 31, which were received into evidence. Sunshine Towing also offered Exhibit Nos. 8, 10, 12, 13, and 19, which were received into evidence. Petitioner, Anchor Towing, presented the testimony of Takako Monica Savits, President of Anchor Towing; four representatives of the Department, Nancy Kay Lyons, Arnaldo Fernandez, Angel Reanos, and Omar Meitin; Aurelio Carmenates from Miami Dade Expressway, Alexis Ramos, president of Sunshine Towing, and Ann Margaret Ramos, vice president of Sunshine Towing. Respondent Department presented the testimony of Nancy Kay Lyons. Intervenor, Sunshine Towing, presented the testimony of Ann Margaret Ramos, Takako Monica Savits, Christopher Savits, Arnaldo Fernandez, and Omar Meitin.

A Transcript was filed on September 8, 2004. After the hearing, Petitioner requested an Unopposed Motion for Extension of Time to file its proposed recommended order. An Order was issued on September 27, 2004, granting the extension of time to file proposed recommended orders no later than October 5, 2004. Respondent filed its Proposed Recommended Order on September 23, 2004. Petitioner and Intervenor filed their Proposed Recommended Orders on October 5, 2004, and October 6, 2004, respectively.

References to statutes are to Florida Statutes (2004) unless otherwise noted.

FINDINGS OF FACT

1. On December 18, 2003, the Department of Transportation, District Six, advertised Request for Proposal No. RFP-DOT-04/05-6063DS to provide under the SunGuide Intelligent Transportation System (ITS) program, service patrol highway assistance services to motorists stranded with disabled vehicles on State Roads 112, 836, 874, 878, and 924, in Dade County, Florida.

2. One addendum was issued for RFP-DOT-04/05-6063DS.

3. The RFP was created by Nancy Kay Lyons, the Department's District Contract Administrator from "boilerplate" language kept on Department computers.

4. The "boilerplate" language and the language throughout the RFP had been approved by the department's office in Tallahassee and underwent review by the department's lawyers.

5. The RFP requested "written proposals from qualified Proposers."

6. The RFP states that the Department "intends to award this contract to the responsive and responsible Proposer whose proposal is determined to be the most advantageous to the Department."

7. Both the RFP and the Notice of the RFP contained the following requirement:

QUALIFICATIONS OF THE PROPOSER:

Prospective proposers must be able to meet or exceed the qualifications and proposer requirements in accordance with proposal documents.

IN ADDITION TO THE ABOVE THE PRIME PROPOSER SHALL BE REQUIRED TO SUBMIT PROOF OF THE FOLLOWING ALONG WITH THE SEALED PROPOSAL: .
. .

1. The proposer shall provide proof that the firm not the individual is authorized and licensed to do business in the state of Florida and has been providing the type of services required for a minimum of five (5) years in good corporate standing. . . .

FAILURE TO ADHERE TO THIS DIRECTIVE SHALL RESULT IN THE SUCCESSFUL PROPOSER'S PROPOSAL BEING DECLARED NON-RESPONSIVE.

8. The above requirement is also found in Section 20.2.1.iii of the RFP.

9. The RFP contained a notice that only the RFP or addenda thereto contained the operative terms of the RFP.

10. One addendum was issued concerning the RFP.

11. One mandatory pre-proposal conference was held at the Department's Miami-Dade County Office on January 8, 2004, concerning the RFP.

12. Both Anchor Towing and Sunshine Towing attended the January 8, 2004, conference.

13. Ms. Lyons conducted the meeting and addressed the issue of qualifications of the proposers by stating: "You're

going to be required proof that the firm, not the individual, is licensed, is authorized and licensed to do business in the State of Florida, and has been providing the type of services required for a minimum of five years in good corporate standing." She suggested that to meet this requirement, proposers submit their corporate charters.

14. Ms. Lyons stated at the pre-proposal conference that the decision on which firm would be awarded the contract would be based solely on the contents of the proposal.

15. The RFP set forth specific evaluation criteria upon which all proposers would be judged at Sections 20.2 and 21.3.

16. Section 20.2 of the RFP identified six categories to be addressed by each proposer: Administration and Management, Identification of Key Personnel, Business History/Experience of the Contractor, Technical Approach, Facility and Equipment Capabilities, and Insurance.

17. Section 20.2 of the RFP also identified various components of the six categories that each proposer "may," "should," or "shall" include in its written responses, including Section 20.2(1)(iii)(g) of the RFP which states:

The proposer shall indicate if their company or any of their principal officers, employees or owners have been involved with any lawsuits or judgments against the individual or the firm. They shall include a list of all outstanding judgments (if any) relating to towing or storage activities.

18. Section 21.3 of the RFP established the point system for scoring the six categories of data provided by each proposer to the Department for evaluation as follows: Administration and Management 20 points, Identification of Key Personnel 15 points, Business History/Experience of the Contractor 20 points, Technical Approach 20 points, Facility and Equipment Capabilities 20 points, and Insurance 5 points.

19. The RFP contained provisions prescribed by Agency Rules or Governing Statutes. These provisions relate to Department conduct with respect to review of the proposals.

20. Section 11.2 of the RFP required all proposals to be typed or printed in ink. Additionally, proposals were required to be timely submitted, and receive a technical score of 70 or more in order to be deemed responsive and to be considered for the contract award.

21. Section 11.2 of the RFP defines a "responsive proposal" as follows:

A responsive proposal is an offer to perform the scope of services called for in the Request for Proposal in accordance with all the requirements of this Request for Proposal and receiving seventy (70) points or more on the Technical Proposal. Proposals found to be non-responsive shall not be considered. Proposals may be rejected if found to be irregular or not in conformance with the requirements and instructions herein contained. A proposal may be found to be irregular or non-responsive by reasons that include, but are

not limited to, failure to utilize or complete prescribed forms, conditional proposals, incomplete proposals, indefinite or ambiguous proposals, improper and/or undated signatures.

22. Section 11.5 of the RFP provides as follows:

The department may waive minor informalities or irregularities in proposals received where such is merely a matter of form and not substance, and the correction or waiver of which is not prejudicial to other Proposers. Minor irregularities are defined as those that will not have an adverse effect on the Department's interest and will not affect the price of the Proposal by giving a Proposer an advantage or benefit not enjoyed by other Proposers.

23. The Department expressly reserved the right to accept or reject any and all proposals.

24. The RFP provides that the Department expects all technical proposals to follow the prescribed format, and that a failure to do so may result in the rejection of the proposal.

25. The Selection Committee members chosen to evaluate the proposals were: Aurelio Carmenates, Arnaldo Fernandez, Omar Meitin, and Angel Reanos, all of whom had prior experience as Selection Committee members for previous RFP solicitations.

26. The Department provided each member of the Selection Committee with instructions for grading the proposals received. The instructions told the evaluators to direct any questions

concerning the instructions to Nancy Kay Lyons, the District Contracts Administrator, or to Michele Narehood, the District Procurement Specialist.

27. Evaluator Arnaldo Fernandez, Intelligent Transportation Systems Production Manager, provided a disk to two of the other evaluators, Angel Reanos and Omar Meitin, which provided a format outlining the evaluation criteria.

28. The criteria contained on the disk corresponded with the information outlined in Section 20.2 of the RFP. The two primary categories, Management Plan and Proposer's Technical Plan, were broken into six subcategories in the RFP.

29. The RFP did not mention that the six subcategories might be divided further into sub-subcategories.

30. The four evaluators from the Selection Committee further divided the six subcategories into 24 sub-subcategories for evaluation purposes.

31. The individual evaluators assigned differing maximum points to the 24 sub-subcategories based upon their personal experience, and in only one instance did all four evaluators assign the same maximum weight to the same criterion.

32. The four evaluators assigned the same aggregate number of points to each of the subcategories. The differences in assignment of points among the evaluators related to the sub-subcategories.

33. Each evaluator scored the proposals independently and assigned point values. Evaluator Aurelio Carmenates was not provided with the disk by Mr. Fernandez, and he also scored the proposals independently of the other three evaluators.

34. The Selection Committee reviewed each proposal, awarding Sunshine Towing 105.482 points (92.625 technical and 12.857 price) and Anchor Towing 105.017 points (92.25 technical and 12.767 price).

35. Neither before nor following the Selection Committee's review of the proposals, did Ms. Lyons review Sunshine Towing's, the top-ranked proposer's, submission to determine whether it was non-responsive to the RFP.

36. Ms. Lyons believed that the Selection Committee was responsible for reviewing the responsiveness and potential disqualification of proposers.

37. The members of the Selection Committee were given no instruction as to whether they had the authority to disqualify a proposer who failed to submit required information.

38. The Selection Committee members were not briefed by Ms. Lyons or anyone from the Department as to what was intended by the requirement that the firm, not the individual, was to have five years of good corporate standing.

39. Sunshine Towing, Inc., is a domestic for-profit corporation authorized to do business in Florida since June 20, 2000. It has been a towing company since its inception and its status is active.

40. Sunshine Towing's officers are Alexis Ramos, President, and Ann Margaret Ramos, vice president.

41. Sunshine Towing is a current provider of service patrol highway assistance services to motorists stranded with disabled vehicles for the Department.

42. Prior to forming the corporate entity known as "Sunshine Towing, Inc.," the officers and employees of Sunshine Towing, Inc., had been doing business under the duly-registered fictitious name "Sunshine Towing" since June 3, 1994.

43. In order to establish that it meets the requirement of five years of corporate good standing, Sunshine Towing offered a letter from GEICO Insurance Company stating that Sunshine Towing had been "a contracted tower for the last five years," as well as a letter from InterAmerican Benefit Corp., which stated that "our agency has been handling the employee benefits for the above referenced company [Sunshine Towing] for nearly 10 years."

44. One of the Selection Committee members considered information regarding the "corporate good standing" requirement

based upon his personal relationship with the officers of Sunshine Towing. This information was not included in Sunshine Towing's proposal.

45. The experience of Sunshine Towing, including that of its officers, is that of a vendor providing the type of services sought by the Department under the RFP without suspension, debarment or dissolution.

46. Sunshine Towing's response to the RFP did not follow the organizational format or numbering of the Technical Proposal Format set forth in the RFP.

47. Sunshine Towing's response to the RFP did contain an executed acknowledgment of Addendum No. 1.

48. Sunshine Towing's response to the RFP did not disclose the litigation history of the firm or its owners. Sunshine Towing's response to the RFP received zero points from the Selection Committee due to its failure to disclose the litigation history of the firm or its principal officers, employees, or owners.

49. Anchor Towing, Inc., is a domestic for-profit corporation authorized to do business in the State of Florida since July 3, 1995. It has been a towing company since its inception and its status is active.

50. Anchor Towing's registered officer is Monica Savits, President.

51. Anchor Towing is a current provider of service patrol highway assistance services to motorists stranded with disabled vehicles for the Department.

52. Anchor Towing's Response to the RFP did not follow the organizational format of the Technical Proposal Format set forth in the RFP in that it was not sequentially numbered and was not indexed as set forth in Section 20.4 of the "Special Conditions" to the RFP.

53. Anchor Towing's response to the RFP did not contain a copy of the firm's Certificate of Occupancy for business premises from which to conduct the services solicited by the RFP as set forth in Section 20.2(1)(iii)(c) of the RFP.

54. Anchor Towing's response to the RFP disclosed ten lawsuits, all of which were filed in Miami-Dade County, and listed Anchor Towing as a party.

55. Petitioner failed to disclose two litigation matters involving Monica Savits, president of Anchor Towing, which were dismissed prior to a judgment or verdict having been rendered.

56. Petitioner failed to disclose a matter involving Anchor Towing that was filed on February 20, 2004, after the date of the filing of the proposals which are the subject of this proceeding.

57. Petitioner failed to disclose a matter involving Raul Corbo, Jr., an employee of Anchor Towing, filed on June 9, 2004, after the date of the filing of the proposals which are the subject of this proceeding.

58. Petitioner failed to disclose a small claims court matter filed against Anchor Towing on May 3, 2002. The disposition of that matter was not made known at hearing.

59. Petitioner did not disclose the felony conviction of Christopher Savits dated August 5, 2003, relating to towing or storage activities involving one of Anchor Towing's tow trucks and Mr. Savits.

60. Christopher Savits is the husband of Monica Savits, the president of Anchor Towing. They have been married almost 12 years.

61. Mr. Savits was employed by Petitioner until some time in 2000, as a tow truck operator, and he performed other duties as needed at Anchor Towing.

62. Mr. Savits was never an officer or director of Anchor Towing.

63. After 2000, Mr. Savits left the employ of Petitioner to open his own real estate company that eventually became Petitioner's landlord.

64. Once Mr. Savits formed his own business, he did not regularly work under the direction and control of his wife's company.

65. On several occasions, Mr. Savits attended Department-sponsored meetings at which he signed-in on behalf of Petitioner related to service patrol highway services, also known as the "Road Ranger" program.

66. On one occasion, Mr. Savits went on his wife's behalf in the middle of the night to deliver a tow truck to one of Petitioner's employees.

67. On occasion, Mr. Savits helped clean the yard at Anchor Towing without pay.

68. After the year 2000, Mr. Savits remained as a signatory on Petitioner's corporate bank account, and he signed checks at the request of Monica Savits as a convenience to her.

69. After the year 2000, Mr. Savits continued to be listed as an authorized driver on Petitioner's corporate automobile insurance policy.

70. Christopher Savits assisted Monica Savits with the acquisition of trucks for Anchor Towing.

71. In its response to the RFP, Petitioner included letters of reference that refer to Mr. Savits as an owner or co-owner of Petitioner.

72. In 2004, Mr. Savits took a diversity training course given by Petitioner at its office.

73. In 2004, Mr. Savits received \$70,000 in a series of checks from Anchor Towing to purchase a family boat that was titled in his name alone.

74. The \$70,000 received by Mr. Savits from Anchor Towing exceeded the maximum amount he was ever paid in a single year as an employee of Anchor Towing.

CONCLUSIONS OF LAW

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

76. The burden of proof in this proceeding lies with Petitioner. See § 120.57(3)(f), Fla. Stat.

77. The underlying findings of fact in this case are based upon a preponderance of the evidence. § 120.57(1)(j), Fla. Stat. The standard of proof is whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

78. The de novo proceeding in this case was conducted to examine the Department's proposed action in an attempt to determine whether that action is contrary to the agency's governing statutes, the agency's rules or policies, or the RFP

specifications. See § 120.57(3)(f), Fla. Stat., and State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998).

79. Section 11.5 of the RFP permits the Department to waive any minor informalities or irregularities where such is merely a matter of form, rather than substance; where the other proposers would not be prejudiced; where the Department's interest will not be adversely affected; where the price will not be affected; and where the proposer will not receive an advantage or benefit not enjoyed by the other proposers. See Fla. Admin. Code R. 60A-1.002(9) and 60A-1.001(16). See also Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

80. A "responsive offeror" is one who has submitted a proposal which conforms in all material respects to an invitation to bid or a request for proposals. § 287.012(17), Fla. Stat.

81. Petitioner's Formal Written Protest of the award of the contract to Sunshine Towing, as well as its unilateral pre-hearing "stipulation," raise four distinct issues: a) whether Sunshine Towing's proposal should be deemed non-responsive due to its failure to follow the Technical Proposal Format contained in the RFP; b) whether Sunshine Towing's proposal should be deemed non-responsive due to its failure to provide information

regarding its litigation history as required by the RFP;

c) whether Sunshine Towing's proposal should be deemed non-responsive due to its failure to provide an acknowledgment of "Addendum Two" to the RFP; and d) whether the scoring methodology used by the Department's Selection Committee was arbitrary and capricious. No additional issues were raised by Petitioner in either its original petition or its pre-hearing statement. No additional issues were raised by Petitioner either through a motion to amend its original petition or any form of pleading, whether written or ore tenus, to expand the scope of the proceeding or to inform the Department and the Intervenor of its intent to raise, argue, and present evidence on matters not previously raised.

82. Section 120.57(3)(b), Florida Statutes, requires that "the formal written protest shall state with particularity the facts and law upon which the protest is based." The RFP states that any protest must contain "a concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action." This language tracks that contained in Florida Administrative Code Rule 28-106.201(e).

83. Model Rules of Procedure 28-5.202, provides, in part, "The petitioner may amend its petition after the designation of the presiding officer only upon order of the presiding officer."

Pilla v. The School Board of Dade County, Florida, 655 So. 2d 1312, 1314 (Fla. 3d DCA 1995), citing Beckum v. Department of Health and Rehab. Servs., 443 So. 2d 227, 228 n.3 (Fla. 1st DCA 1983). Amendments to pleadings should be freely given by the trial court unless, by doing so, the opposing party will be prejudiced in maintaining his action or defense on the merits. Fla. R. Civ. P. 1.190(a), (b), see Subsection 120.569(2)(f), Florida Statutes (Authority to use Florida Rules of Civil Procedure). This proceeding was brought by Petitioner seeking to have Intervenor's winning proposal thrown out in favor of its second-place finisher. Intervenor and the Department, whose role at hearing was in support of its decision to award the contract for services to Intervenor, are entitled to fair notice of the grounds for the challenge and the opportunity to be heard on each of the allegations against its proposal.

84. The fact that Petitioner included a "catch-all" phrase in its petition that Sunshine Towing "failed to comply with material terms of the RFP and therefore should be deemed non-responsive and disqualified," is not sufficient to put the Department and Intervenor on-notice as to the specific alleged shortcomings of Petitioner's proposal. A Petitioner must allege specific facts and how those facts constitute violations of statutes, rules, policies, or the RFP in order to provide sufficient notice of an alleged violation by the Department or

the Intervenor. See Hamilton v. Department of Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000), citing Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

85. Regardless of the validity of the issue of Sunshine Towing's compliance with the requirement of the RFP that the proposer's "firm not the individual" is authorized and licensed to do business in the State of Florida and has been providing towing services for at least five years in "good corporate standing," the plain fact remains that Petitioner failed to put the Department and the Intervenor on-notice that this would be an issue at hearing. Counsel for Intervenor objected to Petitioner's attempt to raise the issue of the five-year requirement at hearing. Counsel's objection was well taken. The issue of whether Sunshine Towing meets the five-year requirement is not properly before this forum and will not be considered as an issue for determination here.

86. Two of the remaining issues before the Division are whether Petitioner has standing to raise the issue of Intervenor's non-responsiveness concerning Petitioner's failure to submit its proposal in the required format and its failure to include in the proposal its list of litigation involving any principal officers or employees of the Proposer. The evidence at hearing clearly supported the fact that neither Petitioner

nor Intervenor submitted the proposal in the required format. Further, while Petitioner submitted a list of litigation matters involving its officer or employees, its list was incomplete. Petitioner was awarded 11 points for its incomplete list while Intervenor was awarded zero points for its failure to include a list.

87. The evidence at hearing as well as the pertinent case law lead to the conclusion that Petitioner lacks standing to raise the issues of Intervenor's failure to follow the organizational proposal format and failure to disclose its litigation history since Petitioner's proposal suffered from the same defects. The Third District Court of Appeal, in Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380, 384 (Fla. 3d DCA 1992), declared:

At least a party protesting an award to the low bidder must be prepared to show not only that the low bid was deficient, but must also show that the protestor's own bid does not suffer from the same deficiency. To rule otherwise is to require the State to spend more money for a higher bid which suffers from the same deficiency as the lower bid.

88. Both Sunshine Towing and Anchor Towing failed to follow the Department's organizational format contained in the RFP, and both failed to disclose (or, in the case of Petitioner, to fully disclose) litigation history, according to the

testimony of principals of each company. Accordingly, Anchor Towing's response suffers from the same defects as Sunshine Towing's response. Therefore, Petitioner does not have standing to raise this argument.

89. In addition to Petitioner's lack of standing to raise the argument concerning the organizational format, Petitioner's challenge to Intervenor's proposal on this ground must fail because the organizational requirement is a minor irregularity which the Department may waive pursuant to Fla. Admin. Code R. 60A-1.001(17), and Section 11.5 of the RFP. The failure to follow the organizational format by both Petitioner and Intervenor did not affect the price quoted by either proposer for the services offered; did not give either proposer a benefit not enjoyed by the other proposers; and did not adversely affect the interests of the Department. Accordingly, even if Petitioner had standing to raise this argument, the argument must fail.

90. The Selection Committee adequately accounted for Intervenor's failure to disclose its litigation history by awarding it no points for the omission. The Selection Committee, however, awarded Petitioner 11 points for an incomplete litigation history because the Selection Committee accepted the history submitted by Petitioner as a complete response to the RFP requirement. By virtue of providing the

Department with an incomplete response (five matters were omitted from the litigation history), Petitioner received a benefit not available to Intervenor. Since Petitioner has already been found to lack standing to raise this issue, it is not necessary to impose a penalty for failure to fully disclose the litigation history. The award of 11 points for the disclosure of Petitioner's litigation history, however, would surely have been reduced by the Selection Committee evaluators had they been fully aware of the omission.

91. The issue of Petitioner's allegation that Intervenor should have made reference to "Addendum Two" in its proposal is not supported by the evidence. In fact, no evidence was produced to demonstrate that an "Addendum Two" even existed. The only evidence produced at hearing concerning addenda to the RFP concerned "Addendum One" which both Petitioner and Intervenor were found to have included with their proposals. Since no evidence appears on the record to support Petitioner's contention that Intervenor's proposal is non-responsive for failure to file an "Addendum Two," this allegation is rejected.

92. The final argument raised by Petitioner is that the scoring methodology employed by the four members of the Selection Committee was arbitrary and capricious. Petitioner raised this argument on the basis of its position that the evaluators divided the acceptable subcategories listed in the

RFP for scoring the proposals into unacceptable sub-subcategories that were left to the evaluators to determine the weight to be given for each sub-subcategory. The evidence at hearing was undisputed that the evaluators utilized the numeric values of the scoring subcategories as the upper limit for the aggregate of the sub-subcategories related to each subcategory. None of the evaluators crossed over from one subcategory to another when scoring the proposals. Each of the four evaluators testified that he was not directed to give different weights to the categories or subcategories other than the points assigned by the RFP. The use of sub-subcategories as an aid for the evaluators to score the proposals was no more than a manner suggested by one of the evaluators for scoring the proposals. It was neither mandatory nor in violation of the terms of the RFP. No testimony was given at hearing to demonstrate that any Selection Committee member awarded more points for a category or subcategory than was permitted by the terms and conditions of the RFP.

93. Petitioner challenged the scoring system employed by the Selection Committee as arbitrary and capricious. If, to borrow from the definitions contained in Section 120.52(8) of the Florida Statutes, "arbitrary" may be defined as not supported by logic or the necessary facts, and "capricious" may be defined as action taken without thought or reason, or on a

whim, then Petitioner wholly failed to prove that the scoring methodology was arbitrary and capricious. If the scoring methodology were arbitrary and capricious, then it was so with respect to all proposers, not just Petitioner. Moreover, Petitioner failed to prove at hearing that it would have been the higher-scored proposer if a different scoring methodology were used. Actually, the testimony offered by the four members of the Selection Committee proves their diligence and thoughtfulness in evaluating all the materials before them during the scoring process. By not proving that the Department's scoring methodology resulted in Petitioner's proposal receiving unfair treatment or Intervenor's proposal having somehow received an unfair competitive advantage due to the scoring methodology employed, Petitioner has failed to meet its burden of proof on the issue of whether the Department's scoring methodology was arbitrary and capricious. Accordingly, Petitioner's argument on this point must similarly fail.

94. The Department conducted the RFP solicitation process in accordance with Chapter 287.057, Florida Statutes; Fla. Admin. Code. R. 60A-1.002(9) and (10) and 60A-1.001(17); and the text of RFP-DOT-04/05-6063DS. No evidence was produced at hearing to show that the Department committed illegality, fraud, oppression, or misconduct in the RFP solicitation process. Petitioner raised a significant issue concerning the five-years-

in-business requirement for the first time at hearing without prior notice to either Respondent or Intervenor and without a motion to amend its petition, thereby depriving both the Department and Sunshine Towing of the opportunity to prepare a defense to the allegations. Petitioner raised two alleged violations of the RFP by Intervenor that were transgressions also committed by Petitioner itself. Petitioner raised the "Addendum Two" issue yet offered no evidence to support its position. Finally, Petitioner alleged that the scoring methodology employed by the Selection Committee was arbitrary and capricious, yet offered little evidence to support this allegation other than the fact that the sub-subcategories used by the evaluators were not specifically set forth in the RFP. Clearly, Petitioner has failed to meet its burden of proving that either it should be awarded the contract as the second highest proposer or that the proposals should be rejected and the RFP re-opened for new proposals.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is RECOMMENDED as follows:

1. That Petitioner's Formal Written Protest be dismissed as it relates to the issues of Intervenor's failure to follow the organizational format of the RFP and the failure to disclose the litigation history;

2. That Petitioner's Formal Written Protest be denied as it relates to the issues of the alleged failure to reference "Addendum Two" and the allegation that the Respondent's scoring methodology was arbitrary and capricious;

3. That the RFP solicitation process was conducted in accordance with Chapter 287.057, Florida Statutes; Fla. Admin. Code R. 60A-1.002(9) and (10) and 60A-1.001(17); and the text of RFP-DOT-04/05-6063DS; and

4. That the Respondent enter a Final Order adopting the above recommendations and executing a contract for RFP-DOT-04/05-6063DS with Sunshine Towing, Inc.

DONE AND ENTERED this 29th day of October, 2004, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of October, 2004.

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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.