

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMEC CIVIL, LLC,)
)
 Petitioner,)
)
 vs.) Case No. 04-3169BID
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent,)
)
 and)
)
 SUPERIOR CONSTRUCTION CO.,)
 INC.,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before the Honorable Stephen F. Dean, a designated Administrative Law Judge of the Division of Administrative Hearings, on October 20, 21, and 22, 2004, in Jacksonville, Florida, and was reconvened on October 27, and October 28, 2004, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the Department of Transportation's decision to reject all bids for Financial Project No. 209278-1-52-01 (J. Turner Butler Blvd.) a major interchange in Duval County, Florida, was exercised illegally, arbitrarily, dishonestly or fraudulently.

PRELIMINARY STATEMENT

Petitioner, AMEC Civil, LLC (hereinafter AMEC), filed a Notice of Intent to Protest on June 21, 2004, and a Formal Written Protest on July 1, 2004, of the posting by the Department of Transportation (hereinafter Department) of its intent to reject all bids for Financial Project Number 209278-1-52-01, a major interchange in Duval County, Florida, (hereinafter "JTB Project"). On September 2, 2004, the petition was referred to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a formal hearing. A Notice of Hearing, and Order of Pre-Hearing

Instructions were entered on September 9, 2004, setting this matter for hearing on September 17, 2004. The parties moved by ore tenus motion for a continuance on September 10, 2004, and the motion was granted, subsequently entering an Order of Continuance on September 14, 2004. The hearing in this matter was rescheduled for October 20 and 21, 2004, in Jacksonville, Florida. Superior Construction Co., Inc. (hereinafter Superior Construction), filed a Motion to Intervene on September 28, 2004, which was subsequently granted on September 29, 2004.

Petitioner filed a unilateral pre-hearing statement on October 19, 2004. The Intervenor joined in the pre-hearing statement filed by the Department, which was filed on October 19, 2004. In the Petitioner's Unilateral Proposed Pre-hearing Statement, the Petitioner set forth its position that "the Department's decision to reject all bids and the process leading up to that decision were not based on fact or logic and were instead arbitrary, illogically and/or fraudulently based on preference, and were contrary to competition." The Formal Written Protest alleges that the Department's actions are based on "animus" and "dislike" for the Petitioner, and "asserts that the Respondent is not concerned about changes in the MOT [Maintenance of Traffic] plans for the Project, but rather, simply does not want Petitioner to obtain the award."

The Department's stated reason for rejecting all bids was concern about the MOT plans and the phasing of the MOT plans discovered after the posting of the bids. The Department's decision to reject all bids occurred on June 15, 2004, and was posted on June 17, 2004.

Pursuant to notice, the final hearing was held on October 20, 21, and 22, 2004, in Jacksonville, Florida, and on October 27, and 28, 2004, in Tallahassee, Florida. At the hearing, the parties stipulated to the presentation of testimony by the Department's resident engineer, Robert Hansgen, P.E., at the beginning of the hearing pursuant to the request of the ALJ to present the rationale of the Department's decision. In addition to Hansgen, the Department offered testimony of Allan Moyle; John (Jack) Box; Freddie Simmons, P.E., State Highway Engineer; Robert Hansgen, P.E.; Ananth Prasad, P.E., Director of Office of Construction; and Mohammed Majboor, P.E., District 2 Design Project Manager. The Department offered Exhibits numbered 1 through 4, all of which were received into evidence.

The Petitioner presented the testimony of Richard Kelly, P.E., Grant Ralston, P.E., both of AMEC; and Shannon Douglas, paralegal for Petitioner's counsel. In addition, the Petitioner presented the testimony in direct examination of Allan Moyle, P.E., Jacksonville Construction Engineer for Department of Transportation, and Jack Box, P.E., of H.W. Lochner, Inc.,

design engineer for the subject project. Petitioner offered Exhibits numbered 9, 21, 24, 30, 33, 44, 63, 64, 68 through 72, 74, 89, 90, 91, 96 through 98, 101 through 107, all of which were received into evidence.

The Intervenor, Superior Construction, offered the testimony of Richard (Dick) Ayers.

Petitioner also presented the rebuttal testimony of David Leonard, President of AMEC, and Jack Palmer, Operations Manager for AMEC Civil.

At the close of the proceedings, the ALJ ordered that proposed recommended orders would be due ten (10) days from the date the transcript was filed. The transcripts were filed on November 17, 2004. Ten (10) days from November 17, 2004, would make the proposed recommended orders due on November 27, 2004, a Saturday. Therefore, all of the proposed recommended orders were due on November 29, 2004, the next business day.

Intervenor filed its Proposed Recommended Order on November 24, 2004; the Department of Transportation filed its Proposed Recommended Order on November 29, 2004; and the Petitioner filed its Proposed Recommended Order on November 30, 2004, after requesting an extension. All of the proposed orders were read and considered.

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

FINDINGS OF FACT

1. On April 1, 2004, the Department of Transportation advertised its Bid Solicitation Notice (BSN), for the JTB Project.

2. H. W. Lochner, Inc. (Lochner) designed the JTB Project.

3. Petitioner, Superior Construction, and Archer Western Contractors, LTD, submitted bids on May 26, 2004. Petitioner had the apparent low bid, and Superior had the second apparent low bid.

4. On or about May 27, 2004, Robert Burleson, President of the Florida Transportation Builders Association ("FTBA"), contacted the State Construction Engineer, Ananth Prasad, P.E., and alerted him to potential issues regarding MOT phasing. (T. p. 876, lines 18-24; p. 880, lines 14, 15).

5. Richard Ayers, of Superior Construction, called the Jacksonville Urban Office of the Department of Transportation, District 2, alerting the District to the concerns regarding the maintenance of traffic issues. Ayers had reviewed the bid and plans generally to assess its bid in light of the Petitioner's bid, and had discovered in the process MOT issues that he believed would add substantially to the costs and time required to construct the project.

6. As a result of these calls, Robert Hansgen, P.E., District 2 Resident Engineer, was directed by someone within the Department to review the MOT plans.

7. On June 1, 2004, Mr. Hansgen forwarded to Henry Haggerty and Al Moyle a memorandum outlining seven areas of MOT concern relating to the "constructability" and safety of the JTB project.

8. On June 1, 2004, Hansgen's memorandum was forwarded to Mohammed Majboor, P.E., Design Consultant Engineer for the Department, who forwarded the memo to Lochner.

9. Lochner reviewed its plans in light of the Hansgen memorandum and forwarded its response on June 3, 2004, to Hansgen, who reviewed the responses and added his comments. He e-mailed Henry Haggarty seven concerns he had with the MOT plans.

10. On June 2, 2004, Allen Moyle, Jacksonville Construction Engineer, received Hansgen's and Lochner's responses regarding the MOT plans and determined that the project plans needed revisions because of safety issues. Moyle concluded that all the bids needed to be rejected in light of the MOT revisions. He transmitted a request to Cathy Thomas at the Department's headquarters to arrange a meeting with Lochner to commence revision of the plans at the earliest possible date.

11. On June 8, 2004, Hansgen briefed the District 2 Secretary, Schroeder, and other District 2 staff members on the issues regarding maintenance of traffic issues based on his memo, a marked-up copy of the MOT sheets, and pictures. Rejection of all bids was discussed at this meeting.

12. Mr. Hansgen testified at the formal hearing concerning his findings and his actions with the aid of the original memorandum and Respondent's Exhibits 1 and 2.

13. Mr. Hansgen's concerns were about safety issues and included the reduction of traffic lane widths in areas to 11 feet where barrier walls would be erected on both the inside and outside medians where traffic would be traveling at 55 miles per hour. Another concern was the length of these lanes that would be restricted by concrete barriers. These barriers prevented easy access of emergency vehicles in these areas, which presented a significant hazard at this interchange, which accesses a major hospital complex.

14. Mr. Hansgen's also identified an inconsistency regarding where the contractor could work in an area close to the barrier wall; a portion of the roadway where a cross slope or tilting of the traveling lane created dangerous vehicle control issues; and plans to widen a portion of the roadway while vehicles traveled on the same portion of roadway which would require further narrowing of lanes.

15. Because the State of Florida has one of the highest fatality records in the nation in work zones, the Department is very concerned about this issue.

16. After the meeting on June 2, 2004, the Jacksonville Urban Office for District 2 recommended rejection to DOT in Tallahassee of all bids based on the need to "clarify uncertainties within the phasing of the maintenance of traffic (MOT) plans."

17. The recommendation of District 2 was reviewed by the Technical Review Committee, which is comprised of six voting members. On June 9, 2004, the Technical Review Committee recommended rejection of all bids on the JTB Project to the Contract Awards Committee based upon MOT safety issues.

18. The Contracts Award Committee, composed of three voting members, met on June 15, 2004, to consider the recommendations regarding the JTB Project of the Technical Review Committee and District 2. The Contracts Award Committee concurred with the recommendations of the Technical Review Committee and District 2 and rejected all bids based upon MOT safety issues.

19. The Department posted its notice of intent to reject all bids on June 17, 2004.

20. The Petitioner filed a Notice of Intent to Protest the Department's rejection of all bids with a Formal Written Protest, filed on July 1, 2004, including an appropriate protest bond.

21. The Department's engineers met with engineers from H.W. Lochner, Inc., to discuss the issues of concern raised in the Hansgen memorandum. The Department commissioned Lochner to revise the plans to enhance the safety features for MOT, and certain other enhancements.

22. Lochner and the Department entered into Supplement Agreement #13 that included both the requested enhancements and the changes to accommodate the concerns referenced in the Hansgen Memorandum.

23. Richard Kelly testified regarding "animus," and "dislike" displayed by employees of the Department. He pointed to past decisions and actions of Department employees as proof of "dislike" and "animus." These included a Letter of Concern to the Petitioner, on April 16, 2004, from the Department outlining five areas the Department had identified as important in making a determination on the pre-qualification of the Petitioner for bidding on Department contracts for the 2004-2005 fiscal year. Also mentioned were disputed issues between the Department and the Petitioner arising during construction of the I-95/I295 Interchange Project, including Jacksonville ordinances

on noise ordinance, and trees and deficiency letters from the Department to AMEC Civil. In addition, the disqualification of Morse Diesel, LLC, as the Petitioner was formerly named, from bidding on construction contracts with the State of Florida, and in 2002, the revocation of the pre-qualification of the Petitioner to bid on DOT projects were described.

24. Ananth Prasad, P.E., who was identified by the Petitioner's witnesses as a primary source to opposition to the Petitioner, testified that he did not hold the position of State Construction Engineer in 2000, and was not involved in the decision to deny pre-qualification of Morse Diesel. Mr. Prasad also was not involved with the initial decision to revoke the pre-qualification of AMEC in 2002.

25. Mr. Prasad does not personally hold a position on the Technical Review Committee.

26. Mr. Prasad did not vote on the decision to recommend rejection of all bids on the JTB project.

27. The decision to reject all bids for the JTB Project was made by the Contracts Award Committee based on recommendations from the Technical Review Committee, and District 2. The Department's Contracts Award Committee exercised its statutory authority to reject all bids based on concerns regarding the MOT phasing.

CONCLUSIONS OF LAW

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

29. AMEC has standing to challenge the rejection of all bids. Superior Construction has standing to intervene, and participate in this proceeding as second low bidder.

30. Subsection 120.57(3)(f), Florida Statutes, provides in pertinent part:

In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

31. The same section also provides that, unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action.

32. As set forth above, under Subsection 120.57(3)(f), Florida Statutes, the standard of review is whether the proposed agency action was illegal, arbitrary, dishonest, or fraudulent. Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 914, (Fla. 1988).

33. The Petitioner bears the burden of proof to show that the Department's rejection of all bids was due to fraud or collusion or the rejection was a means of averting competition.

34. Section 337.11, Florida Statutes, is applicable to this bid protest proceeding. Subsection 337.11(4), Florida Statutes, provides in pertinent part that:

The department may award the proposed construction and maintenance work to the lowest responsible bidder . . . or it may reject all bids and proceed to rebid the work in accordance with subsection (2) or otherwise perform the work.

35. Subsection 337.11(2), Florida Statutes, provides that:

The department shall ensure that all project descriptions, including design plans, are complete, accurate, and up to date prior to the advertisement for bids on such projects.

36. Petitioner has not met its burden of proof as it failed to establish, by a preponderance of evidence, that the Department's act of rejecting all bids was due to fraud or collusion or the rejection was a means of averting competition.

37. The evidence established that on May 26, 2004, the Petitioner submitted the low bid on the JTB Project; however, after bids were received, but before awarding the project, the Department determined that the MOT plans for the JTB Project contained problems. The District 2 analysis concluded that the MOT problems would create safety issues for workers and

travelers within construction zones. District 2 recommended to the Technical Review Committee that all bids be rejected.

38. Based on District 2's recommendation pursuant to statutory authority, the Department's Technical Review Committee recommended to the Contract Awards Committee to reject all bids. Its recommendation was based on the same MOT phasing problems that District 2 considered.

39. There was no evidence introduced that the Contract Awards Committee rejected all bids for any reason other than the concerns raised about the MOT plans and phasing for the JTB Project.

40. The reasons stated for rejecting all bids on the JTB Project were supported by the evidence considered at the time by the individuals making recommendations, making the decision to reject all bids and by the evidence presented at hearing. The decision to reject all bids was not shown to be illegal, arbitrary, dishonest, or fraudulent. The decision was not shown to subvert the competitive bidding process.

41. While the evidence shows that the Department issued a Letter of Concern to Petitioner and that Department employees or representatives involved with construction on the I-95/I-295 Southern Interchange project may have some personal "dislike" or "animus" toward Petitioner or its corporate officers, Richard Kelly and Jack Palmer, these factors do not change the

impression that the rejection of all bids on the JTB project was for reasons other than safety concerns over the MOT plans.

RECOMMENDATION

Based on the foregoing findings of fact and Conclusions of Law, it is

Recommended that the Department of Transportation enter a final order dismissing Petitioner's Formal Written Protest concerning the bid rejection for the project in this litigation.

DONE AND ENTERED this 28th day of December, 2004, in Tallahassee, Leon County, Florida.



STEPHEN F. DEAN
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Filed with the Clerk of the
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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.