

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COMMUNICATIONS CORPORATION)
OF JACKSONVILLE,)
)
Petitioner,)
)
vs.) Case No. 04-4468
)
DEPARTMENT OF HIGHWAY)
SAFETY AND MOTOR VEHICLES)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 9, 2005, via video teleconference in Jacksonville and Tallahassee, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: I. M. Rubin, Esquire
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For Respondent: Judson Chapman, Esquire
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STATEMENT OF THE ISSUE

The issue in this proceeding is whether the Department of Highway Safety and Motor Vehicles' cancellation of a contract for radar maintenance and repair should be upheld.

PRELIMINARY STATEMENT

On September 28, 2004, Respondent, Department of Highway Safety and Motor Vehicles (the Department) issued a Cancellation of contract of Bid 015-02 for Radar Maintenance and Repair to Mr. Richard W. White, President of Petitioner, Communications Corporation of Jacksonville (CCJ). The cancellation letter advised Petitioner that the Department relied on a provision of the contract entitled, "termination in the Best Interest of the State" and advised Petitioner that it had 30 days to take corrective action. The cancellation letter relied upon Florida Administrative Code Rule 60A-1.006(3).

On November 5, 2004, the Department issued another letter entitled Cancellation of contract of Bid 015-02 for Radar Maintenance and Repair. This second letter referenced an additional ground for cancellation from the contract entitled "Termination for Convenience."

Petitioner challenged the Department's intended action and filed a petition for an administrative hearing. The Department forwarded the case to the Division of Administrative Hearings on

or about December 15, 2004. A formal hearing was scheduled for March 9, 2005.

On March 3, 2005, the Department filed a Motion for Summary Final Order. Oral Argument was heard on the motion at the commencement of the hearing. The motion was denied.

At hearing, Petitioner presented the testimony Richard White. Petitioner's Exhibits numbered 5A and 11 were admitted into evidence. Petitioner's Exhibit numbered 5 was proffered. Respondent presented the testimony of Jim Fink, Stacy Wofford, and James Wells. Respondent's Exhibits A through G and I through L were admitted into evidence.

A one-volume Transcript of the hearing was filed on March 28, 2005. The parties requested more than 10 days in which to file proposed recommended orders and that request was granted. Petitioner and Respondent timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order. All citations are to the Florida Statutes (2004) unless otherwise indicated.

FINDINGS OF FACT

1. In 2002, the Department issued an Invitation to Bid 015-02 (ITB) for the maintenance and repair of Florida Highway Patrol (FHP) radar units located throughout the state.

2. As a result of correspondence from Richard White, to the Department, the ITB was amended to include the following:

The bidder must have the following minimum qualifications:

Be an authorized service center or have on staff certified repair technicians for at least two (2) of the following radar manufacturers, and agree that he will have on staff, within six (6) months, from start of contract, a certified technician(s) for all the following radar manufacturers:

- a. Decatur Electronics
- b. Kustom Signals
- c. MPH
- d. Applied Concepts

Failure to comply may result in termination of this contract.

3. In response to ITB 015-02, Petitioner submitted a bid and included documents showing that CCJ was included on a list entitled "Stalker Service Centers Private," which was "ACI trained," and that CCJ was an authorized service center for Kustom Signals, Inc. Petitioner was the successful bidder and entered into a contract with the Department for radar maintenance and repair services. The term of the contract was for 36 months with the option to renew for two one-year terms.

4. Applied Concepts, d/b/a Stalker Radar, is a radar manufacturer whose radar units are used by FHP and whose radar units were specifically identified in the ITB. On August 18, 2004, Jim Fink, a sales administration manager for Applied Concepts, wrote to Mr. White informing him that effective September 20, 2004, Applied Concepts would no longer continue

the Factory Authorized Service Center agreement with CCJ. The letter also informed Mr. White that all discounts would be rescinded and all parts, drawings, manuals, and schematics must be returned to Applied Concepts within 60 days of the letter.

5. As a result of this termination of agreement between CCJ and Applied Concepts, any warranty repair work submitted by FHP to CCJ would have to be forwarded to another factory authorized repair center instead of being performed at CCJ. Further, no one from CCJ would be allowed to attend any factory training for future or current factory support offered by Applied Concepts.

6. Mr. White called FHP Lt. Jim Wells, a contract manager for this contract, and informed Lt. Wells of the correspondence from Applied Concepts.

7. On September 1, 2004, Lt. Jim Wells, FHP, received an e-mail from Jim Fink of Applied Concepts confirming that CCJ would no longer be an authorized service center for Applied Concepts effective September 20, 2004. Lt. Wells became concerned as to whether CCJ could continue to effectively stay in compliance with the contract.

8. On September 28, 2004, the Department issued a Cancellation of Award of Bid 015-02 for Radar Maintenance and Repair. The explanation given in the letter signed by

Stacy Wafford, Chief of Purchasing and Contracts, reads in part as follows:

Mr. White:

Recently it has been brought to our attention that the business relationship between Communications Corporation of Jacksonville and Applied Concepts, Inc., manufacturer of Kustom Signals Radars^{1/} has been severed. The Florida Highway Patrol utilizes and relies upon the functionality of Stalker of speed detection radars throughout the State of Florida and it is critical that this equipment be certified for accuracy and maintained to the proper performance standards specified by the manufacturer.

Whereas, having been informed by Applied Concepts, Inc., that your certification has been revoked effective September 20, 2004. [sic] This action removes you as an authorized vendor to certify, maintain and repair this brand of radar. The Department of Highway Safety and Motor Vehicles, and the Florida Highway Patrol has no choice but terminate its relationship with Communications Corporation of Jacksonville, by the formal cancellation of Award of Bid 015-02 for Radar Maintenance and Repair.

Therefore, in accordance with the Mandatories of Bid 015-02 for Radar Maintenance and Repair in general and specifically the Section entitled TERMINATION IN THE BEST INTEREST OF THE STATE, the Department is herein exercising it(sic) right to terminate, upon 30 day notice to the contractor.

Therefore in accordance with Rule 60A-1.006 (3), FAC you are hereby notified that this agency is canceling award of Bid 015-02 for Radar Maintenance and Repair to Communications Corporation of Jacksonville

for failure to maintain the certification status to perform all the duties detailed in bid document 015-02. In accordance with the referenced rule, Communications Corporation of Jacksonville is hereby notified that it has 30 days after receipt of this letter to correct such failure to adhere to all terms and requirements of bid document 015-02.

In accordance with Rule 60A-1.006(3), FAC if the Contractor fails to provide written proof that he has taken corrective action to reestablish his ability to adhere to all terms and requirements of bid document 015-02 within this time period, the Department shall find the contractor in default and proceed with the reprocurement of services required in bid document 015-02. (emphasis in original)

The cancellation letter also provided a point of entry into the administrative hearing process.

9. On October 7, 2004, the Department posted an Invitation to Bid 010-05 on the Internet for Radar Maintenance, Repair and Laser Calibration.

10. On October 13, 2004, the attorney for Petitioner filed a document entitled Proof of Compliance and Objection to Agency Letter which reads in part as follows:

The agency has served CJJ with a Cancellation of Award of Bid 015-02 for Radar Maintenance and Repair letter, (Agency Letter) dated September 28, 2004.

The Agency letter included the following provisions:

1. Requirement that CCJ respond, within 30 days, with written proof that corrective action has been taken to comply with Award Bid 015-02, pursuant to Rule 60A-1.006(3), FAC.
2. Notice that the Award Bid 015-02 is cancelled, effective 30 days from receipt of the Agency Letter.
3. Notice that CCJ may elect for a Point of Entry Proceeding for Administrative Proceedings within 21 days from receipt of the Agency Letter.

The Agency Letter has taken a three-step process that is designed to provide due process to vendors and merged it into one action for its convenience and to expedite the ultimate conclusion that it has unilaterally arrived at, i.e. termination of CCJ. The agency's action has effectively eliminated the Notice of Default and Corrective Action portions of Rule 60A-1.006 (3) FAC. By combining these three steps, CCJ has been defaulted without due process or an opportunity to be heard. Had the agency followed the provisions of the FAC, CCJ would have been provided time in which to respond with proof that it is not in default of Award Bid 015-02.

The attorney's letter then set forth disputed issues of material fact.

11. On October 22, 2004, a telephone conference call took place between Mr. White, his attorney, Lt. Wells, and other personnel of the Department, in an attempt to resolve this matter. The matter was not resolved as a result of the telephone conference.

12. A Notice of Intended Award was posted on November 17, 2004, awarding Bid 010-05 to Communications International, Inc.^{2/}

13. On November 28, 2004, the Department sent another letter to Mr. White that read in pertinent part as follows:

On September 28, 2004 you were notified by letter that our Agency was canceling the award of Bid 015-02 for Radar Maintenance and Repair to your company for failure to maintain certification status to perform all duties detailed in the bid document. Specific reference was made to the September 20, 2004 notice by radar manufacturer Applied Concepts, Inc. that your certification was revoked. In addition, our letter based cancellation on the bid terms that permit termination in the best interest of the state.

On October 15, 2004, we received a Petition for Evidentiary Proceeding and Proof of Compliance and Objection to Agency Letter from your attorney, Mark Rubin, that was submitted in response to our letter.

On October 22, 2004 you, Mr. Rubin, and representatives from our purchasing office, FHP and legal conducted a telephone conference in an effort to resolve your Petition. We were not advised at that conference or since then that you have cured the loss of certification with Applied Concepts, Inc. and are therefore still not in compliance with bid terms requiring you to be an authorized service center or have staff certified technicians for Applied Concepts radar units. The Department declines to intervene on your behalf with Applied Concepts in an effort to resolve the loss of certification. Following the conference, we sent you a copy of ITB 010-05 that was advertised on October 7 and is intended to replace the contract cancelled with your company.

At this point, we are adding an additional ground for cancellation, which is the TERMINATION FOR CONVENIENCE provision on page 6 of the bid/contract and allows the Department to terminate the contract at its convenience. Because this is an added basis for termination, you have an additional 21 day period within which to file an amended petition and request an administrative hearing, as explained below.

Therefore, in accordance with the Mandatories of Bid 015-02 for Radar Maintenance and Repair in general and specifically the sections entitled TERMINATION IN THE BEST INTEREST OF THE STATE and TERMINATION FOR CONVENIENCE, the Department intends to terminate the contract. (emphasis in original)

14. The termination clauses referenced in ITB 015-02, read as follows:

TERMINATION FOR CONVENIENCE

The Department reserves the right to terminate the Contract or any part of the Contract at its convenience. The Department shall incur no liability for materials or services not yet ordered if it terminates for convenience. If the Department terminates for convenience after an order for materials or services has been placed, the Contractor shall be entitled to compensation upon submission of invoices and proper proof of claim, in that proportion which its services and products were satisfactorily rendered or provided, as well as expenses necessarily incurred in the performance of work up to time of termination.

TERMINATION IN THE BEST INTERESTS OF THE STATE

The Department reserves the right to terminate the Contract or any part of the Contract in the best interests of the state, upon 30 day notice to the contractor. The Department shall incur no liability for materials or services not yet ordered if it terminates in the best interests of the state. If the Department terminates in the best interests of the state after an order for materials or services has been placed, the Contractor shall be entitled to compensation upon submission of invoices and proper proof of claim, in that proportion which its services and products were satisfactorily rendered or provided, as well as expenses necessarily incurred in the performance of work time of termination.

The Department reserves the right to cancel this contract upon the Department of Management Services issuing a State contract for this type service for use by the agencies. A 30 day written cancellation notice will be sent to the Vendor.

15. The ITB does not specifically mention warranty work but appears to apply to all work necessary, i.e., warranty and non-warranty work, to conform to the requirements of the contract.

16. Lt. Wells acknowledged that CCJ never failed to perform contracted work on equipment presented for maintenance or repair under the terms of the contract.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569, and 120.57(1), Fla. Stat.

18. Petitioner challenges the Department's proposed agency action to cancel the award of the contract, which was the result of ITB 015-02. As Petitioner is the party asserting the affirmative of an issue, Petitioner has the burden of proof. Young v. State, Department of Community Affairs, 567 So. 2d 2 (Fla. 3rd DCA 1990); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

19. Florida Administrative Code Rule 12-26.002(3), reads in pertinent part as follows:

(3) Default- If a vendor is in default on any contract with an agency, the agency shall follow the procedures contained herein:

(a) The agency shall notify, in writing, any vendor who fails to adhere to contract terms and conditions. This notice shall state the nature of the failure to perform and provide a time certain for correcting the failure (such reasonable time should not generally be less than 10 days after receipt of such notice). The notification will also provide that, should it fail to perform within the time provided, the vendor will be found in default and removed from the agency's approved vendor list.

(b) Unless the vendor corrects its failure to perform within the time provided, or unless the agency determines on its own investigation that the vendor's failure is legally excusable, the agency shall find the vendor in default and shall issue a second notice stating (i) the reasons the vendor is considered in default, (ii) that the agency will reprocore or has reprocored the commodities or services, and (iii) and the amount of the reprocorement if known.

* * *

(d) Pursuant to Section 120.57, F.S., the defaulting vendor will be advised of the right to petition for an administrative hearing on the intended decision to remove the vendor from the list and shall be given a time certain within which to submit the petition.

20. The September 28, 2004, notification letter sent by the Department to Petitioner references Florida Administrative Code Rule 60A-1.006(3)(a), which concerns defaults and requires a written notification period of more than 10 days and the Termination In the Best Interests of the State provision of the ITB which references a 30-day notice period. The September 28, 2004, letter gave Petitioner 30 days to correct what the Department perceived to be failure to adhere to all terms of ITB 015-02 and to provide written proof within that time period that it corrective action had been taken.

21. Despite this language, merely nine days after the September 28, 2004, notification letter was sent, the Department advertised ITB 010-05 which the Department acknowledged in its

November 28, 2004, letter was intended to replace the contract resulting from ITB 015-02 cancellation with CCJ.

22. While the Department did not give CCJ 30 days to cure as represented in its September 28, 2004, notification letter, it did give Petitioner two points of entry into the administrative process, resulting in the de novo hearing conducted in this matter.

22. However, the Department's November 5, 2004, notification letter invoked the Termination for Convenience clause of the ITB. This clause does not provide for a period in which the vendor may cure any defect, or even that there need be any just cause whatsoever in terminating the contract.

23. Petitioner argues that the Termination for Convenience clause is ambiguous and should be interpreted against the drafter, the Department. However, Petitioner waived its right to contest this provision by failing to formally challenge the ITB language within 72 hours of the publication of the specifications in a bid solicitation protest. See Capeletti Brothers, Inc., v. Department of Transportation, 499 So. 2d 855, 877 (Fla. 1st DCA 1986); and Optiplan, Inc. v. School Board of Broward County, 710 So. 2d 569 (Fla. 4th DCA 1998).

24. Accordingly, despite the procedural errors arising from the September 28, 2004, notification letter, the Department

was entitled, under the express terms of the ITB, to terminate the contract at its convenience.

RECOMMENDATION

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

RECOMMENDED:

That the Department of Highway Safety and Motor Vehicles enter a final order canceling the award of the contract arising out of ITB 015-02 effective November 28, 2004, and to compensate Petitioner for any materials or services which had been placed prior to that date in accordance with the provisions of the Termination for Convenience clause.

DONE AND ENTERED this 26th day of April, 2005, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of April, 2005.

ENDNOTES

1/ The reference to Kustom Signals Radar is apparently in error, as the concern arose from Applied Concepts, d/b/a Stalker Radar.

2/ CCJ did not respond to ITB 010-05.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 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.