

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HYDROGAGE, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 06-2239BID
)
 SUWANNEE RIVER WATER)
 MANAGEMENT DISTRICT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On August 7, 2006, a hearing was held in Tallahassee, Florida, pursuant to the provisions of Sections 120.569 and 120.57(1), Florida Statutes, for the purpose of considering Petitioner's formal written protest. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

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For Respondent: Tom W. Brown, Esquire
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STATEMENT OF THE ISSUE

Whether the Suwannee River Water Management District's (SRWMD's) decision to award the contract contemplated in its

Request for Proposals, RFP No. 05/06-036WR, Hydrologic Services and Recorder Station Maintenance (Maintenance Contract), to Hydrologic Data Collection (HDC) is contrary to the agency's governing statutes, the agency's rules or policies, or the proposal specifications.

PRELIMINARY STATEMENT

The SRWMD issued a request for proposals entitled RFP Number 05/06-036, Hydrologic Services and Recorder Station Maintenance. Three companies responded to the RFP. After review of the proposals, the proposers were notified that the Selection Committee would recommend to the Governing Board of SRWMD that the contract be awarded to HDC. Petitioner, whose proposal came in second, filed a Petition protesting the award of the Maintenance Contract on June 14, 2006. On June 23, 2006, the Petition was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge.

Hearing was originally scheduled for July 20, 2006; however, based upon a stipulation of the parties, the matter was continued until August 7, 2006. HDC, the winning proposer, did not file a petition to intervene and did not participate in the proceedings. The parties filed a Pre-hearing Stipulation August 4, 2006, and stipulated to certain

findings of fact which are incorporated into the Findings of Fact in this Recommended Order.

At hearing, Petitioner presented the testimony of Bill Hilbrand, Kirk Webster, John Dinges and Carolyn Purdy, and Petitioner's Exhibits one through seventy-five were admitted into evidence. Respondent presented the testimony of Tom Mirti and Respondent's Exhibits one through eight were admitted.

A hearing transcript was prepared. The parties were granted until August 31, 2006, to file proposed recommended orders. Respondent's proposed recommended order was filed August 31, 2006, while Petitioner's was filed September 1, 2006.^{1/} Both have been considered in the preparation of this recommended order.

FINDINGS OF FACT

1. Petitioner Hydrogage, Inc. (Hydrogage), is a Florida corporation with its principle place of business located at 2726 Lithia Pinecrest Road, Valrico, Florida 33954.

2. On March 31, 2006, Respondent issued a request for proposals: RFP Number 05/06-036, Hydrologic Services and Recorder Station Maintenance.

3. Petitioner timely submitted its proposal prior to the May 9, 2006, 3:45 p.m. deadline. Two other proposals were

also timely submitted: one by HDC and one by Microcom Design, Inc. (Microcom).

4. Petitioner's proposal contained all of the elements requested by RFP 05/06-036WR.

5. SRWMD has a policy that is used when procuring services via competitive procurement, which is labeled as "6.6.4 RFP Other Services (Policy 6.4.4)." That policy provides in pertinent part:

10. A Selection Committee consisting of three members of Senior Management or appropriate alternates shall act as a corporate body to evaluate the proposals, rank the respondents, and select the individual or firm with the best relative ability to perform the services desired. The meeting or meetings in which the selection committee performs the above procedures are public meetings and may be observed by Contractor Respondents. In the case where presentations are required from the entities on the short list, three Selection Members must be present at short list presentations.

Beyond this statement, there is no guidance in Policy 6.4.4 concerning how Selection Committees are to evaluate responses to an RFP.

6. Likewise, the RFP at issue provides little guidance beyond the review form itself. The RFP states:

Evaluation by District Selection Committee:
The District Selection Committee composed of three (3) persons will review the qualifications of respondents and compare the proposals based on the items listed in Exhibit B, "Review Form," in Section 6.

This form will be used by the Selection Committee in ranking the proposals.

* * *

Rejection of Responses: Pursuant to Rule 40B-1.812, Florida Administrative Code, the District reserves the right to reject any and all bids or other proposals submitted in response to District invitation. District also reserves the right to waive any minor deviations in an otherwise valid proposal.

7. Florida Administrative Code Rule 40B-1.812, referenced by the RFP, provides:

The District shall reserve the right to reject any and all bids or other proposal submitted in response to District invitation, and such reservation shall be indicated on all advertising and invitations. The District may waive minor irregularities in an otherwise valid bid. A minor irregularity is a variation from the terms and conditions which does not affect the price of the bid, or give the bidder an advantage or benefit not enjoyed by other bidders, or does not adversely impact the interest of the District. Variations which are not minor may not be waived. A bidder may not modify bid after opening. Mistakes clearly evident on the face of the bid documents, such as computation errors, may be corrected by the District.

8. The review form in Exhibit B of the RFP lists three categories for evaluation of proposals: 1) "Qualifications and Relevant Experience" (70 possible points); 2) "Financial

Considerations" (25 possible points); and 3) "Data Delivery" (5 possible points).

9. A similar review form to the one used for this procurement has been used by past Selection Committees reviewing proposals for the services at issue, with the distinction that the current procurement added a Data Delivery category for ability to use the Hydstra format. Previously, the review form contained only two categories: Qualifications and Relevant Experience (70-75 possible points); and 2) Financial Considerations (25-30 possible points). With one exception, it appears that the Selection Committees considered the qualifications of past bidders corporately consistent with Policy Number 6.6.4.

10. This was not the first time Hydrogage submitted a proposal to perform these services. On several different occasions since 1997, Hydrogage submitted proposals that were accepted as timely and complete, but were not considered the winning proposal. On those occasions Hydrogage routinely requested the proposals submitted by other companies, as well as the review forms completed by the Selection Committees, in order to improve on its proposals for future submittals.

11. The review forms used by past Selection Committees contained some variations but were generally consistent. For the Qualifications and Relevant Experience category, there are

six subcategories reflected on the review sheet: proposed staff experience with similar projects; demonstrated understanding of scope of work; ability to perform all tasks in scope of work; references; availability/responsiveness of qualified personnel; and resources/equipment availability. These same subcategories are listed on the current review form.

12. The review form for RFP 96/97-29WR included a listing of the points the Selection Committee could award for each subcategory under Qualifications and Relevant Experience, with the subcategory "proposed staff experience with similar projects" broken down even further according to the type of equipment to be used. For the Financial Considerations category, the lowest cost proposal was awarded the full thirty points, and each remaining proposal was awarded points in proportion to how its cost proposal corresponded to the lowest one. The review forms for RFP 96/97-29WR were signed by all three reviewers. The winning proposal was submitted by Sutron Corp., with Hydrogage placing second.

13. The review form for RFP 99/00-41WR contained the same subcategories under Qualifications and Relevant Experience, but did not break down the points attributable to each subcategory. The review form simply listed the total points available for the entire category. Reviewers on the

Selection Committee signed individual review forms, with only one reviewer detailing the points he awarded for each subcategory. The winning proposal was submitted by Sutron Corp., with Hydrogagge listed as third. Hydrogagge submitted the lowest cost proposal for this RFP, and Sutron Corp. submitted the third lowest.

14. The review form for RFP 02/03-008WR contained the same categories but did not break down the points attributable to each subcategory. Like the review form for 99/00-41WR, it simply listed the total points available. Review forms for this bid were signed by all three reviewers.

15. RFP 02/03-008WR was awarded to Safe Harbor Associates, and Hydrogagge's proposal was ranked second. Hydrogagge filed a protest to the award and after a hearing before the Water Management District Governing Board, all proposals were rejected and the project was re-bid through RFP 02/03-040WR. As with RFP 02/03-008WR, for 02/03-040WR no detail was provided on the review forms for the points attributable to each subcategory in the Qualifications and Relevant Experience component, and all three Reviewers signed each review form. The project was awarded to HDC, with Hydrogagge coming in fourth.

16. Petitioner did not challenge the specifications of the current RFP. Petitioner's representative believed that,

consistent with past practice of the District and its rules and policies governing procurement procedures, the proposals would be scored using the same method by each Selection Committee member because they would make their decision as a group and that the financial aspect of the bid would be scored on a proportionate basis based on the relationship to the lowest bid.

17. The budgets submitted by the three proposers under the Financial Considerations category of the current RFP were a) Hydrologic Data Collection - \$72,910.00; b) Hydrogage - \$81,149.40; and c) Microcom Design, Inc. - \$185,241.00.

18. All three Reviewers of the Selection Committee awarded 25 points to HDC for its cost proposal under Financial Considerations.

19. Two of the Reviewers awarded Hydrogage 13 points and the third awarded 22 points. The first two Reviewers awarded zero points and five points, respectively, to Microcom.

20. Unlike HDC, Hydrogage could deliver data in Hydstra format. The ability to do so meant that SRWMD personnel did not have to convert the data received into Hydstra format, which could save the District between \$1,500 and \$2,000 per year. Both Hydrogage and Microcom received five points from each member of the Selection Committee in the Data Delivery category, whereas HDC could not deliver data in this format

and received no points from any member of the Selection Committee.

21. With respect to the current solicitation, the review sheets for each reviewer were signed separately. The reviewers independently considered the proposals submitted and met individually with SRWMD staff to discuss references. The public meeting by the Selection Committee was limited to a tabulation of the scores previously determined by each individual Reviewer. In other words, the Selection Committee did not "act as a corporate body to evaluate the proposals, rank the respondents, and select the individual or firm with the best relative ability to perform the services desired," as required by Policy 6.6.4.

22. Kirk Webster is the Deputy Executive Director of the Department of Water Resources for the SRWMD, and was a member of the Selection Committee. Mr. Webster has worked for the SRWMD since 1976 and has served on several Selection Committees, including those assigned to evaluate 96/97-29WR, 99/00-41WR and 02/03-008WR. Mr. Webster awarded HDC 65 of 75 points for Qualifications and Relevant Experience, and awarded Hydrogage 60 points. Mr. Webster considered the subcategories in this category to be of varying levels of importance, and did not necessarily separate out points for each subcategory. Nor did he deduct points for specified deficiencies in a

proposal, but viewed the overall category as a composite. He did not award a perfect score in the Qualifications and Relevant Experience category to any bidder, because in his view there are no perfect companies.

23. With respect to the Financial Considerations category, he awarded HDC the full 25 points available because it submitted the lowest bid. He awarded Hydrogage 22 points: approximately 10 percent fewer points than HDC because its bid was approximately 10 percent higher than HDC's. Based on his prior experience on selection committees, he used a mathematical calculation that was in direct proportion to the bid amounts of the three proposals submitted. Mr. Webster's method of awarding points in the Financial Considerations category was consistent with past practice of the SRWMD.

24. John Dinges, Director of Resource Management for the SRWMD, also served on the Selection Committee. Mr. Dinges previously served on the Selection Committee for 02/03-008WR. He felt that the six subcategories in the Qualifications and Relevant Experience category were factors to consider, but not necessarily entitled to the same point value. If a proposer left a subcategory out of the RFP response, he would have awarded fewer points for the overall category. Mr. Dinges awarded the full 70 points in this category for all three companies.

25. With respect to the Financial Considerations category, Mr. Dinges did not use a proportional method of awarding points as Mr. Webster. Instead, he awarded HDC the full 25 points for the lowest cost proposal. For Hydrogage, he "split the difference" between 0 and 25 and rounded up to thirteen. He awarded 5 points to Microcom, whose financial proposal was over twice as high as either other proposal, because it had submitted a proposal. Because Policy Number 6.4.4 does not specify how to calculate the financial component, Dinges felt that a Reviewer should not look at past practice of the agency but should look at the RFP itself and use his or her own judgment.

26. Carolyn Purdy, the third Reviewer, is the Executive Office Coordinator for the District. Ms. Purdy has been employed by SRWMD for over 30 years and has served on several Selection Committees before this one, including the ones assigned to review proposals for 99/00-41WR and 03/04-40WR. Ms Purdy also awarded all three proposals the 70 points in the Qualifications and Relevant Experience category. In the Financial Considerations category, she awarded HDC 25 points, and like Mr. Dinges, "split the difference" between 0 and 25 and rounded up, awarding 13 points to Hydrogage. She awarded no points to Microcom. When serving on the Selection Committee for 99/00-41WR and 03/04-40WR, she had used the same

or a similar method for evaluating the Financial Considerations category as that used by Mr. Webster in this case. She had no real explanation for changing her scoring method, other than that the SRWMD policy gives no criteria for scoring and she thought this was fair.

27. One of the subcategories listed for the Qualifications and Relevant Experience category on the review form was "references." The Selection Committee members reviewed only Policy 6.4.4, the actual RFP and the three proposals submitted by HDC, Hydrogage and Microcom. The individual members did not check references supplied by the companies bidding on the project, but relied on staff to do so. Tom Mirti, the SRWMD's water resources networks program manager and hydrologist, was tasked with checking the references contained in the proposals. Mr. Mirti then met with each member of the Selection Committee to report the results of his reference checks.

28. Hydrogage's proposal contained a section entitled "Client References" listing the names, addresses and telephone numbers for contact people at other water management districts, as well as a summary of the work performed for those districts. In addition, Hydrogage's proposal contained a listing of "Streamgaging/ADCP/Dye Dilution Clients" for the years 2004-2006 under its description of its work experience.

Microcom also submitted a list of prior projects with contact information for each. HDC, on the other hand, in a section entitled "References," provided what is better described as a bibliography. It did not submit a list of business references or the names and telephone numbers of any other entities for whom it had performed similar work.

29. The RFP specified that the proposal document must provide "Information on the geographic location of the contractor's firm and staff (resumes and experience on similar projects) that the contractor currently has available to perform the work." Arguably, providing information in response to this requirement would also provide the references that the review form identified as one of the criteria for evaluating the Qualifications and Relevant Experience component of the proposals. HDC's proposal, however, did not list "similar projects." Instead, the proposal relied heavily on the aggregate experience of the staff members identified for the project, referring repeatedly to "over 245 years of stream gaging experience with the USGS and private sector," and stating that it is "currently conducting stream gaging activities at 69 daily discharge stations, 8 periodic discharge stations, 9 acoustic velocity stations, 5 raingage stations and 2 water quality monitor stations in Florida and south Georgia." Clients for this work are not identified.

30. Mr. Webster and Mr. Dinges believed that the term "references" on the review form meant references to other clients for whom a company had performed work. Both agreed that if a proposal left something out that was required, including references, points should be deducted for the deficiency. However, neither deducted points from HDC for not including business references. Ms. Purdy also believed that the response should include references to other agencies for whom the proposer had performed work, but felt that HDC's submission of bibliographical entries was reasonable because the people preparing the response are scientists.

31. More importantly, she felt no need to check business references for HDC because it had worked for the SRWMD in the past and its representatives "do good work." Mr. Dinges and Mr. Webster expressed a similar view. Indeed, Mr. Webster testified that he would rely on the fact that a contractor had worked for the SRWMD in the past, perhaps to the detriment of other companies, if it had done good work.

32. Regardless of the value each Selection Committee member would attribute to references, the RFP and past practices of the Division require that some deduction be made for failing to provide this information. No such deduction was made to HDC's score for this deficiency by any member of the Selection Team.

33. Tom Mirti, the staff person tasked with checking the references, acknowledged that HDC did not submit business references. However, in light of the work HDC had done for the District previously, he decided that he could serve as a reference for HDC. He had in the past given HDC's name to other entities because he liked the quality of its work, and called those to whom he had given HDC's name to confirm that the work HDC had done was satisfactory.

34. The information that Mirti supplied, i.e., serving as a reference himself and contacting other entities regarding HDC, was not information readily available from the response to the RFP itself. Mr. Mirti's actions, while well-intentioned, served to supplement HDC's proposal and provided to HDC an advantage not enjoyed by other bidders. Likewise, the failure to provide references was not an error, such as a computation error, that could or should be corrected by the Division.

35. When the totals for all three reviewers are added up for each proposal, HDC received 280 points, Hydrogage received 263 points, and Microcom received 230 points. If two of the Selection Committee members, consistent with their own prior practice and with the prior practice of the SRWMD, had awarded points in the Financial Considerations category in proportion

to the lowest bid, Hydrogage would have received more overall points than any other bidder.

36. Similarly, where a point value for references has been identified in past solicitations, the subcategory was generally awarded 10 points. There is no requirement that 10 points be deducted, but all three Reviewers agreed that some deduction should have been made. If points had been deducted from HDC's score for failure to provide references, its point total may have been lowered so that Hydrogage may have received the highest overall total.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

38. Petitioner, as the party challenging the proposed agency action, has the burden of proof in this proceeding and must show that the agency's proposed action is contrary to the agency's governing statutes, rules or policies, or the bid or proposal specifications. A de novo hearing was conducted to evaluate the action taken by the agency. Section 120.57(3)(f), Florida Statutes; State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998). The administrative law judge may

receive evidence, as with any hearing held pursuant to Section 120.57(1), but the purpose of the proceeding is to evaluate the action taken by the agency based on the information available to the agency at the time it took the action. Id.

39. Agencies enjoy wide discretion when it comes to soliciting and accepting proposals, and an agency's decision, when based upon an honest exercise of such discretion, will not be set aside even where it may appear erroneous or if reasonable persons may disagree. Baxter's Asphalt and Concrete, Inc. v. Department of Transportation, 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985); Capeletti Brothers, Inc. v. State, Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). Section 120.57(3)(f) establishes the standard of proof as whether the proposed action was clearly erroneous, contrary to competition, arbitrary or capricious.

40. A decision is considered to be clearly erroneous when although there is evidence to support it, after review of the entire record the tribunal is left with the definite and firm conviction that a mistake has been committed. United States v. U.S. Gypsum Co., 333 U.S. 354, 395 (1948). An agency action is capricious if the agency takes the action without thought or reason or irrationally. Agency action is arbitrary if is not supported by facts or logic. See Agrico Chemical Co. v. State Department of Environmental Regulation,

365 So. 2d 759, 763 (Fla. 1st DCA 1978). An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding. See Wester v. Belote, 103 Fla. 976, 138 So. 721, 723-24 (1931).

41. Petitioner's challenges to the proposed award to HDC fall into three categories: 1) whether Respondent has a system of coordinated, uniform procurement policies, procedures and practices in place for acquiring contractual services; 2) whether the Selection Committee complied with its governing statutes, rules and policies; and 3) whether the SRWMD's actions were clearly erroneous, contrary to competition, arbitrary or capricious.

42. To the extent that Petitioner is challenging the policies of Respondent, and the procedures (or lack thereof) for evaluating the proposals, Petitioner's argument must fail. To be sure, Respondent provides little instruction to its Selection Committees in terms of its rules, policies, and the RFP itself as to how proposals should be evaluated. However, in order to challenge the adequacy of the selection procedures, Petitioner must have filed a challenge to the RFP specifications. Having failed to do so, it cannot challenge the adequacy of those procedures in this proceeding.

Capeletti Brothers, Inc. v.

Department of Transportation, 499 So. 2d 855 (Fla. 1st DCA 1986).

43. Whether SRWMD complied with its stated policies is another matter. As referenced in finding of fact number five, the written policy of the SRWMD is to act

as a corporate body to evaluate the proposals, rank the respondents, and select the individual or firm with the best relative ability to perform the services desired. The meeting or meetings in which the selection committee performs the above procedures are public meetings and may be observed by Contractor Respondents.

Given the express requirement that the Selection Committee evaluate the proposals corporately, the policy contemplates that a single method of evaluation be employed.

44. In this case, the Selection Committee did not meet corporately to evaluate the proposals. The public meeting was limited to tabulating the already completed score sheets from each independent reviewer. The Selection Committee's failure to work as a body when the written policy of SRWMD requires such action is a violation of the standard enunciated in Section 120.57(3). Moreover, had the Selection Committee met corporately to evaluate the proposals, it is doubtful that multiple methods of evaluation would have been used by the Selection Committee members.

45. The written policies of the SRWMD do not provide that the cost proposals be scored in proportion to the lowest

bid. However, prior agency practice consistently used that method for scoring. Contrary to the view expressed by one member of the Selection Committee, it is reasonable and appropriate for both bidders and the Selection Committee to consider past practice of the agency. See, e.g., Section 120.68(7)(e)(3), Florida Statutes (2005); Caber Systems, Inc. v. Department of General Services, 530 So. 2d 325, 334-35 (Fla. 1st DCA 1988); Aurora Pump v. Goulds Pumps, Inc., 424 So. 2d 70 (Fla. 1st DCA 1982). If Respondent wished to change its method of scoring from that employed in past iterations of the solicitation, it should have provided notice to potential bidders by either changing its written rules or policies, or providing additional information in the RFP itself. It did not do so.

46. Moreover, Mr. Dinges and Ms. Purdy's decision to simply "split the difference" between zero and twenty-five has no real basis in logic or reason. As noted above, the dollar difference between HDC and Hydrogage's bids was approximately \$8,000. The difference between Hydrogage and Microcom's bids was approximately \$104,000. There is no logical relationship between the scores accorded to the three proposals by either Dinges or Purdy, and they had no explanation for changing their scoring method from past solicitations. Under these circumstances, the scoring of the Financial Considerations

category by these two members of the Selection Committee was arbitrary.

47. Finally, the lack of references in HDC's proposal raises two issues: what consequences should have occurred as a result of this deficiency in HDC's proposal, and the propriety of the action taken by the SRWMD to supply references on behalf of the winning proposer.

48. Petitioner did not allege that HDC's proposal was nonresponsive as a result of not providing business references, and has not requested that HDC's proposal be rejected as not being responsive to the RFP. Petitioner has argued that failure to deduct points for not including references deviates from the provisions of the RFP. Petitioner has demonstrated this to be the case.

49. The proposals were to be evaluated based upon the information provided in those proposals, in accordance with the terms of the RFP, the rules of the SRWMD and its policies. Florida Administrative Code Rule 40B-1.812 specifically provides that a bidder may not modify a bid after opening, and that only mistakes clearly evident on the face of the document, such as computation errors, may be corrected by the District. Therefore, HDC's proposal should have been evaluated based on the information in the proposal itself.

50. Rule 40B-1.812 does not allow the District to supply

information for a particular bidder that should have been included in the proposal but was not.^{2/} Yet that was precisely what was done in this case. Mr. Mirti, who was assigned the responsibility to check references by the bidders, actually supplied references for HDC because their proposal did not include them.

51. By supplying references for HDC where its proposal did not include this information, the agency's action is both contrary to its existing rules and policies, and contrary to competition.

The bid procedure was fashioned to discourage discriminatory governmental awards and to assure the procurement of the best value in exchange for public funds. When the procedure is not followed, those objectives are not achieved.

Courtenay v. Department of Health and Rehabilitative Services,

581 So. 2d 621, 623 (Fla. 5th DCA 1991). The purpose of the bidding process is settled in the law:

[T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the county at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the county, by affording an opportunity for an exact comparison of bids.

Wester v. Belote, 103 Fla. 976, 138 So. 721, 723-24 (1931):

see also Harris v. School Board of Duval County, 921 So. 2d 725 (Fla. 1st DCA 2006); Department of Lottery v. GTech Corp., 816 So. 2d 648, 652 (Fla. 1st DCA 2001); Aurora Pump v. Goulds Pumps, Inc., 424 So. 2d 70, 75 (Fla. 1st DCA 1982); Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977); Wood-Hopkins Contracting Co. v. Jacksonville Electric Authority, 354 So. 2d 446 (Fla. 1st DCA 1978).

52. The evidence viewed as a whole revealed that while HDC submitted the lowest cost proposal, the RFP was not to be evaluated based on cost alone. Indeed, by the very terms of the RFP, cost was to make up only 25 percent of the total score available. Members of the Selection Committee and staff working with them favored HDC's proposal not simply because of cost, but because the company and the technicians working for it were a known quantity. As a consequence, the Respondent made accommodations for HDC that were not afforded to other companies who submitted proposals. These actions infected the process with just the type of favoritism that competitive procurement was designed to prevent.

53. As a remedy, Petitioner has requested that the undersigned require that the points be retabulated and that Hydrogag be recommended to the Governing Board for award of the contract. However, administrative law judges are without

the authority to direct how an agency must respond once a finding is made that the procurement process violated applicable law. The administrative law judge's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegality or dishonestly. Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988); see also Moore v. State, Department of Health and Rehabilitative Services, 596 So. 2d 759 (Fla. 1st DCA 1992); Courtenay v. Department of Health & Rehabilitative Services, 581 So. 621 (Fla. 5th DCA 1991).

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered that rescinds the recommendation that RFP No 05/06-036WR be awarded to Hydrologic Data Collection, Inc.

DONE AND ENTERED this 13th day of September, 2006, in
Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of September, 2006.

ENDNOTES

1/ Florida Administrative Code Rule 28-106.104 specifies that the filing date for documents filed electronically is the date the agency clerk receives the complete document. Inasmuch as the final pages of Petitioner's proposed recommended order were received after 5:00 p.m. August 31, 2006, it was docketed the next morning.

2/ Respondent took the position at hearing that while references did need to be checked, there was no requirement that the references come from a company's proposal. This argument has no merit. The RFP clearly provided that the proposals would be compared based on the items listed on the review form. There is certainly no provision for Respondent to look elsewhere for information to supplement the proposals.

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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.