

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUNSHINE TOWING, INC,)
)
 Petitioner,)
)
 vs.) Case No. 06-2451BID
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent,)
)
 and)
)
 ANCHOR TOWING, INC.,)
)
 Intervenor.)
 _____)

AMENDED RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on August 31 through September 1, 2006, September 18 through 20, 2006, and September 28 through 29, 2006, in Miami, Florida.

APPEARANCES

For Petitioner: John C. Shawde, Esquire
Kelly A. O'Keefe, Esquire
Berger Singerman, P.A.
200 South Biscayne Boulevard, Suite 1000
Miami, Florida 33131-2398

For Respondent: C. Denise Johnson, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

For Intervenor: Miguel A. De Grandy, Esquire
Stephen M. Cody, Esquire
Miguel De Grandy, P.A.
800 Douglas Road, Suite 850
Coral Gables, Florida 33134

STATEMENT OF THE ISSUE

The issue is whether the Department of Transportation's (the "Department") intended award of RFP-DOT-04/05-6063DS to Anchor Towing, Inc. ("Anchor Towing"), after the re-evaluation of the proposals pursuant to the Department's Final Order on Motion to Remand is contrary to the agency's governing statutes, rules, or policies, or the bid or proposal specifications.

PRELIMINARY STATEMENT

Petitioner, Sunshine Towing, Inc. ("Sunshine Towing"), filed a Notice of Protest on June 5, 2006, and a Formal written protest on June 15, 2006. The protest was filed in response to the Department's posting of a Notice of Intent to Award RFP-DOT-04/05-6063DS to Intervenor, Anchor Towing. The Notice of Intended Award was posted on June 1, 2006, following a re-evaluation process conducted for RFP-DOT-04/05-6063DS pursuant to the Department's Final Order on Motion for Remand and Final Order on Motion for Reconsideration/Clarification in DOAH Case No. 04-1447BID.

The procurement for the services at issue, Road Ranger Service Patrol for State Roads 112, 836, 874, 878, and 924, was

originally evaluated in 2004, and the Department's initial posting awarded the contract to Sunshine Towing. Anchor Towing protested the award of the contract to Sunshine Towing, and the matter proceeded to hearing in 2004. A Recommended Order was issued on October 29, 2004, upholding the Department's intended award and dismissing the protest filed by Anchor Towing.

Subsequently, the Department issued a Final Order on November 29, 2004, that accepted the findings of fact and conclusions of law recommended by the Administrative Law Judge ("ALJ"), and no appeals were taken.

Subsequent to the issuance of the Final Order and contract execution with Sunshine Towing on January 12, 2005, Anchor Towing filed a Motion for Remand which raised issues of impropriety in the procurement and hearing processes. The Motion for Remand requested the Department to send the matter back to the Division of Administrative Hearings ("DOAH") for further proceedings. The Department denied the motion in part, but recognized the extraordinary circumstances presented by Anchor Towing. Therefore, the Department issued a Final Order on the Motion for Remand that required the Department's District Six to convene a new evaluation committee to review and score the original proposals submitted pursuant to this procurement. Additionally, a Final Order on Sunshine Towing's Motion for Reconsideration/Clarification provided that the newly

constituted re-evaluation committee be made aware of certain facts issued by the ALJ in DOAH Case No. 04-1447BID.

The re-evaluation committee consisted of Paul Clark, Alfred Nolton, Sergio Bravo, Keith Sheffler, and Matthew O'Brien. Based upon the evaluations and scoring of this committee, Anchor Towing is the Department's intended awardee of the subject contract for services.

In this proceeding, Sunshine Towing challenges the propriety of issuing a contract to Anchor Towing, asserting that the Department is administratively estopped from making the award, challenging the methodology employed by the re-evaluation committee, and alleging that Anchor Towing is a non-responsive and non-responsible bidder.

Sunshine Towing's Petition was referred to DOAH on July 13, 2006, for the assignment of an ALJ to conduct a formal hearing. The Department and the Intervenor did not consent to waive the time periods set forth in Section 120.57(3), Florida Statutes for bid protests. On July 26, 2006, a Notice of Hearing was issued setting the matter for hearing beginning on August 30, 2006, and continuing through September 1, 2006, in Miami, Florida. Due to the threat of a hurricane, an Amended Notice of Hearing was issued on August 29, 2006, that continued the start of the proceedings until August 31, 2006. The hearing was not

completed on August 31 and September 1, 2006, and was reconvened on September 18 through 20, 2006, and again on September 28 and 29, 2006, when it was completed.

The parties filed Unilateral Pre-hearing Statements setting forth their respective positions. Petitioner set forth its argument that the Department concluded in a prior proceeding that Anchor Towing was non-responsive and therefore should be estopped from changing its position and now awarding it the contract. Petitioner alleged that the evaluation process was arbitrary and capricious because the evaluators did not receive the same written instructions; one or more evaluators disregarded the criminal conviction of Christopher Savits; and one or more evaluators considered facts outside the submittals. Petitioner further alleged that the methodology employed by the evaluators was fundamentally flawed because several of the evaluators agreed on the maximum weights to assign each of the sub-subcategories. Further allegations included assertions that evaluator Paul Clark erred in deducting points from Sunshine Towing for failure to submit information, and an alleged bias or appearance of bias by evaluator Matthew O'Brien. Petitioner alleged that the Anchor Towing proposal is both non-responsive and non-responsible.

At the hearing, Petitioner presented the testimony of Ann Margaret Ramos; Juan Masdeu; Edward Tosco; Derrick Charleston;

Mark Chase; T. Monica Savits; Nancy Kay Lyons; Arnaldo Fernandez, Jr.; Paul Clark; Sergio Bravo; Matthew O'Brien; and Alfred Nolton, and offered Exhibits numbered 1 through 3 and 20 through 115, all of which were received into evidence, except Exhibits numbered 22, 49 (included in Petitioner's Exhibit numbered 50), 72, 73, 75, 81, 82, 83, and 110. Respondent presented the testimony of no witnesses, relying on the testimony previously offered by Petitioner, and offered Exhibits numbered 1 and 2, both of which were received into evidence. Intervenor presented the testimony of no witnesses and offered Exhibits numbered 1 through 14, all of which were received into evidence.

A Transcript was filed on October 11, 2006. After the hearing, Petitioner, Respondent, and Intervenor filed their Proposed Findings of Fact and Conclusions of Law on October 31, 2006. Respondent and Intervenor also filed Written Closing Arguments on that date.

References to statutes are to Florida Statutes (2005) unless otherwise noted.

FINDINGS OF FACT

1. On December 18, 2003, the Department's District Six, advertised Request for Proposal RFP-DOT-04/05-6063DS, for emergency service patrol "Road Ranger" services under the SunGuide Intelligent Transportation System. The RFP solicited

responses from qualified companies to provide towing and emergency roadside services for disabled vehicles on State Roads 112, 836, 874, 878, and 924.

2. Proposals for RFP-DOT-04/05-6063DS were due February 5, 2004.

3. The RFP was created by Nancy Kay Lyons, the Department's District Contract Administrator using the "boilerplate" language common to most Department RFPs.

4. The advertisement or "Notice for the RFP" is a summary of the RFP and identifies some of the specific requirements of the RFP. It is intended to give potential proposers enough information to decide whether they want to order the entire package.

5. The "boilerplate" language and the language found throughout the RFP was approved by the Department's office in Tallahassee, and underwent review by the Department's lawyers.

6. The RFP requested "written proposals from qualified Proposers." The RFP states that the Department "intends to award the contract to the responsive and responsible Proposer whose proposal is determined to be the most advantageous to the Department."

7. The RFP provides that the Department shall review a proposal for responsiveness. Section 11.2 of the RFP defined 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 the 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.

8. The RFP did not contain a definition of responsibility, or provide any explanation of how it is determined by the Department.

9. 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.

10. The requirement that "[t]he 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" is also found in Section 20.2.1.iii of the RFP.

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

12. One addendum was issued by the Department concerning the RFP.

13. A second document containing questions of proposers and the Department's response was also issued prior to the submission deadline. The questions and answers did not address any matter related to the issues in this protest.

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

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

16. 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 the minimum of five years in good corporate standing." She suggested that, to meet this requirement, proposers submit their corporate charters.

17. 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.

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

19. 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.

20. 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.

21. This section, which appeared in prior Road Ranger RFPs, was amended to add the second sentence, after the Department entered its contract for RFP-DOT-03/04-0653DS with Anchor Towing. This second sentence was added for the first time to this RFP to ensure that the Department did not contract with a company that was conducting illegal activity related to towing or storage, because the Department hoped to avoid negative feedback for its Road Ranger program.

22. Section 21.3 of the RFP established the point system for scoring the six categories of information provided by each proposer to the Department 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.

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

24. The RFP contained numerous provisions prescribed by agency rules or governing statutes. These provisions relate to Department conduct with respect to review of the proposals.

25. Section 6 of the RFP stated:

6) **RFP QUESTIONS & ANSWERS**

Any technical questions arising from this Request for Proposals must be forwarded, in writing, to the procurement agent identified below. In order for technical questions to be answered in a timely fashion, **technical questions must be received no later than January 15, 2004 at 5:00 p.m. local time.** There is no deadline for contract or administrative questions.

The Department's written response to the written inquiries submitted timely by potential Proposers will be posted on the Florida Vendor Bid System at www.myflorida.com (click on 'BUSINESS,' click on 'Doing Business with the State,' under 'Everything for Vendors and Customers,' click on 'Vendor Bid System (VBS),' then click on 'Search Advertisements'), under this proposal number. It is the responsibility of all potential Proposers to monitor this site for any changing information prior to submitting their proposal.

Only written inquires from potential Proposers, which are signed by persons authorized to contractually bind the Proposers, will be recognized by the Department as duly authorized expressions on behalf of potential Proposers.

WRITTEN TECHNICAL QUESTIONS should be submitted to:

Nancy Kay Lyons
District Contracts Administrator
Florida Department of Transportation,
Procurement Services Office
1000 Northwest 111th Avenue, Room #6252
Miami, Florida 33172
Telephone Number: (305) 470-5404
Fax Number (305) 470-5717
E-mail Address:d6.contracts@dot.state.fl.us

(Emphasis in original.)

26. Section 7 of the RFP stated:

7) **ORAL INSTRUCTIONS/CHANGES TO REQUEST FOR PROPOSALS (ADDENDA)**

No negotiations, decisions, or actions will be initiated or executed by a potential Proposer as a result of any oral discussions with a State employee. Only those communications which are in writing from the Department will be considered as a duly authorized expression on behalf of the Department.

Notice of changes (addenda) will be posted on the Florida Vendor Bid System at www.myflorida.com (click on 'BUSINESS,' click on 'Doing Business with the State,' under 'Everything for Vendors and Customers,' click on 'Vendor Bid System (VBS),' then click on 'Search Advertisements'), under this proposal number. It is the responsibility of all potential Proposers to monitor this site for any changing information prior to submitting their proposal. **All addenda will be acknowledged by signature and subsequent submission of addenda with the technical proposal when so stated in the addenda.**

(Emphasis in original.)

27. Section 8 of the RFP stated, in relevant part:

8) **MANDATORY PRE-PROPOSAL MEETING**

A **MANDATORY** pre-proposal meeting is scheduled for **January 8, 2004** at **10:00 a.m.** The meeting will be held at the **Florida Department of Transportation District Six 'Auditorium.' 1000 Northwest 111th Avenue, Miami, Florida 33172.** The purpose of this meeting is to provide an open forum for the Department to review the Scope of Services and respond to questions from the RFP recipients on: Scope of Service, RFP requirements, contractual requirements, methods of compensation and other appropriate

attachments to the RFP. Any changes and/or resulting addenda to the RFP will be the sole prerogative of the Department.

(Emphasis in original.)

28. Section 9 of the RFP stated, in relevant part:

9) **PROTEST OF REQUEST FOR PROPOSAL SPECIFICATIONS**

Any person who is adversely affected by the specifications contained in a Request For Proposal must file the following with the Department of Transportation, **Clerk of Agency Proceedings, Office of General Counsel, 605 Suwannee Street, Tallahassee, Florida 32399-0450.**

1. A written notice of protest within seventy-two (72) hours after the posting of the solicitation, and

2. A formal written protest in compliance with Section 120.57(3), Florida Statutes, within ten (10) days after the date on which the written notice of protest is filed.

Failure to file a notice of protest or failure to file a written protest within the time prescribed in Section 120.57(3), Florida Statutes, shall constitute a waiver of proceedings under Chapter 120, Florida Statutes.

(Emphasis in original.)

29. 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.

30. 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.

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

32. 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 rejection of the proposal.

33. Section 7 of the RFP's Scope of Services sets forth the Service Patrol Vehicle Operator Requirements. Section 7.3.1 specifically states that "[i]ndividuals with criminal records shall not be hired."

34. Section 20.2.1.ii.)a) provides in part:

The Proposer shall provide the description, location and availability of all the Proposer's facilities, staff and equipment as they currently exist and as they will be employed for the purpose of this contract. This shall include the following:

. . .

iv) Any employees and services that are being provided by the sub-consultants/sub-contractor should be identified by the name of the sub-consultant/sub-contractor, their address, telephone number and contact name.

v) Proposers shall include some form of agreement/acknowledgment from the subcontractor/sub-consultant showing that they will be providing these services as applicable.

35. Section 20.2.1.iii.)e) also requires all proposers to include a Certificate of Occupancy in their proposals.

36. Six companies submitted technical proposals in response to the RFP. None of the responding companies were disqualified in the original posting of the award.

37. The original Selection Committee members chosen to evaluate the proposals were Aurelio Carmanates, Arnaldo Fernandez, Omar Meitin, and Angel Reanos, all of whom had prior experience as selection Committee members on previous RFP solicitations.

38. The Department recommended that the contract be awarded to Sunshine Towing.

39. Anchor Towing filed a timely protest of the intended award.

40. The protest was referred to DOAH and a hearing was held on July 20, 21, and August 10, 2004, in Miami, Florida.

41. In the course of testimony in the final hearing, two of the evaluators, Aurelio Carmenates and Angel Reanos denied having socialized with Alexis Ramos, a principal of Sunshine Towing.

42. Following the hearing, the undersigned entered an Order recommending that the Department's decision to award the contract to Sunshine Towing be sustained.

43. Anchor Towing filed exceptions to the Recommended Order. The Department rejected the exceptions, adopted the Recommended Order, and entered into a contract with Sunshine Towing on January 12, 2005.

44. Subsequent to the award, Anchor Towing complained to the Department's Inspector General that Mr. Ramos and the two named evaluators had lied under oath. As a result of the investigation, Mr. Carmenates and Mr. Reanos admitted they had socialized with Mr. Ramos at the Pink Pony, an adult entertainment club in Hialeah, Florida, during the same month the Department issued the RFP. Mr. Reanos admitted to giving false testimony on the stand at the previous hearing on the bid protest.

45. After obtaining a copy of the Inspector General's report, Anchor Towing moved for a remand of the case back to

DOAH. On April 15, 2005, the Department issued its Final Order on Remand, in which it ordered that a new evaluation committee be empanelled.

46. In its Final Order on Remand, the Department stated that:

Based upon an analysis of the law, and a review of the record in its entirety, it is concluded that the **DEPARTMENT** has the authority to alter its final order dated November 29, 2004. The law and the record also establish that an admission of lying by a member of a technical review committee is, indeed, an extraordinary circumstance. It is also an extraordinary circumstance to have the integrity of a second member of a technical review committee investigated and challenged regarding the same social gathering that included one of the bidders. As such, the **DEPARTMENT** has concluded that it should exercise its authority and authorize the **DEPARTMENT'S** District VI to select a minimum of three other individuals with the background, experience, and/or professional credentials in the service areas relevant to the subject RFP, to newly evaluate the submissions responsive to the subject RFP. The **DEPARTMENT'S** District VI should then proceed to determine the lowest responsible bidder and issue its notice of intent to award the subject contract to the successful bidder.

47. Sunshine Towing moved for a clarification of the Final Order on Remand. The Department issued a subsequent Order requiring that the members of the new evaluation committee be made aware of the following findings of fact and accept them as true:

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.

Sunshine Towing's response to the RFP did not disclose the litigation history of the firm or its owners.

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.

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) [sic] of the RFP.

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.

Petitioner failed to disclose a small claims court matter filed against Anchor Towing on May 3, 2002.

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.

Other facts made known to the re-evaluation committee were:

Sunshine Towing's response to the RFP did not disclose the litigation history of the firm or its owners.

Petitioner failed to disclose a small claims court matter filed against Anchor Towing of May 3, 2002.

48. The Department's Clarification Order specifically stated, "The **DEPARTMENT** recognizes that the administrative law judge made certain findings of fact concerning proposals submitted by **SUNSHINE TOWING** and **ANCHOR TOWING**. Because those findings have gone unchallenged, they are final and binding on the parties."

49. The Clarification Order noted that it was final agency action that could be appealed pursuant to Section 120.68, Florida Statutes. Neither the Department, Anchor Towing, nor Sunshine Towing took an appeal from the Order.

50. The new five-member technical review committee consisted of Matthew O'Brien, Operations Analyst; Sergio Bravo, ITS Systems Manager; Alfred Nolton, Traffic Operations Analyst; Keith Sheffler, Miami-Dade Expressway Authority Tolls System Manager; and Paul Clark, Statewide Traffic Incident Management & Road Ranger Project Manager.

51. A meeting of the evaluators was held on December 12, 2005, at the Department's District Six offices in Miami, Florida. Each of the evaluators was present at the meeting, except for Mr. Clark, who appeared by telephone.

52. The Department provided each of the evaluators with instructions for grading the proposals received.

53. Each of the evaluators received a package containing the RFP, the five technical proposals to be evaluated (one of the original Proposers had gone out of business), and the Findings of Fact, which they were instructed to accept as true.

54. At the December 12 meeting, the evaluators and Ms. Lyons discussed how to grade the proposals, including assigning a specific maximum number of points to the sub-subcategories.

55. A mandatory pre-proposal meeting was held at the Department's Miami-Dade County office on January 8, 2004. This was a joint pre-proposal meeting for RFP-DOT-04/05-6063DS and RFP-DOT-04/05-6062DS. Both Sunshine Towing and Anchor Towing attended the meeting.

56. Nancy Kay Lyons conducted both meetings for the Department.

57. Ms. Lyons informed those present that the decision on which Proposer would be awarded the contract would be based solely on the contents of the proposals.

58. Ms. Lyons reviewed the scoring process at the meeting and confirmed the category and sub-category scoring would be as follows:

The administration management plan will consist of up to a total of 55 points divided into: 20 for administration management, 15 for identification of key personnel, 20 for business history

experience of the contractor. The proposal's technical plan is up to 45 points, technical approach is 20, facilitating equipment capabilities is 20 and insurance is up to 5.

59. At the pre-proposal meeting, Ms. Lyons gave an explanation of the five years of corporate experience requirement called for in Section 20.2.1.iii)b):

We would use your experience, OK. We would go ahead and use your experience since it is the same officers for both companies that are forming another company so we would use your experience for that. OK. We would take that into account, but we cannot contract with more than one entity. DOT cannot contract with Midtown Towing and Downtown Towing on the same contract. So either you are going to be the prime, or they are going to be the prime and you will be the sub, or what you have to do is turn around and form another corporation. Whoever is the prime, however, is the one that the insurance certificates, etc. are going to be in. That sub, you are going to notify us as to who the sub is, and we will look at their qualifications as a sub, but we will not take their qualifications in consideration as a prime.

60. Ms. Lyons did not believe that this oral statement made at the pre-proposal conference changed the terms of the RFP. Her position was that only a written addendum or modification of the RFP could change its terms.

61. Ms. Lyons interpreted the five years of corporate existence requirement to allow a firm that was in business at least five years, even if not incorporated the entire five

years, to qualify as a Proposer so long as the firm was in business under the same name prior to being incorporated.

62. Ms. Lyons would count the years of existence prior to incorporation only if the owners of the business were the same for the entire time the company had been in business. Her concern was that both the firm and the individual had been in the business of management of the company for the five-year period.

63. Paul Clark, Sergio Bravo, and Alfred Nolton, evaluated the proposals on the bases of their content, the Findings of Fact, and the RFP.

64. Matthew O'Brien evaluated the proposals on the bases of the proposals' content, the Findings of Fact, and the RFP. However, Mr. O'Brien also verified information contained in the proposals submitted by all the Proposers by checking various websites on the Internet.

65. No evidence was submitted as to how Mr. Sheffler evaluated the proposals.

66. Evaluators Bravo, Nolton, and O'Brien further divided the six subcategories into 24 sub-subcategories for evaluation purposes. These individual evaluators assigned differing maximum points to the sub-subcategories based upon their personal experiences.

67. Evaluators Clark, Bravo, Nolton, and O'Brien scored the proposals independently from one another and outside influence and assigned point values.

68. None of the four evaluators who testified at hearing, Bravo, Clark, Nolton, or O'Brien, were influenced by bias against Sunshine Towing or favoritism towards Anchor Towing in their scoring of either company's proposals. Petitioner presented evidence that Mr. O'Brien might be biased because he was in the middle of an issue with Sunshine Towing concerning the slow payment of invoices submitted to him by Ms. Ramos. Petitioner argued that Mr. O'Brien's attitude towards Ms. Ramos became more businesslike when she complained to his supervisors that payment of her invoices was slow in coming.

69. The Evaluation Committee reviewed each proposal independently, awarding Anchor Towing 101.267 points (88.20 technical and 12.857 price) and Sunshine Towing 96.257 points (83.40 technical and 12.857 price).

70. The scoring breakdown by the members of the Evaluation Committee was as follows:

	Anchor Towing	Downtown Towing	Midtown Towing	Molina Towing	Sunshine Towing
Paul Clark	90	70	86	69	88
Sergio Bravo	84	76	85	74	80
Alfred Nolton	89	80	88	83	76
Matthew O'Brien	97	73	83	56	80
Keith Sheffler	81	68	69	60	93
Total	441	367	411	342	417
Average of 5	88.2	73.4	82.2	68.4	83.4

71. Since Sunshine Towing and Anchor Towing submitted identical price proposals, they received identical price proposal scores.

72. Anchor Towing received the most points from the five-person Evaluation Committee and was recommended by the Department to receive the subject contract through its Notice of Intent to Award posted on June 1, 2006.

73. Sunshine Towing, Inc., is a domestic, for-profit corporation authorized to do business in Florida since June 20, 2000. At the time it submitted its proposal, Sunshine Towing had been incorporated less than five years. This information was confirmed by Sunshine's proposal which contained a copy of its corporate charter.

74. At the time of the submittal of its proposal in February 2004, Sunshine Towing's officers were Alexis Ramos, president, and Ann Margaret Ramos, vice president.

75. Sunshine Towing currently provides service patrol highway assistance services to motorists with disabled vehicles under contract with the Department.

76. On June 3, 1994, Alexis Ramos registered the fictitious name "Sunshine Towing" with the Florida Department of State. The registration lists only Alexis Ramos as the owner of

the fictitious name. The registration form, which is verified as though under oath, was prepared by Ann Margaret Ramos for her husband's signature.

77. On November 11, 1999, Mr. Ramos renewed his registration of the fictitious name "Sunshine Towing" with the Florida Department of State. The renewal listed only Alexis Ramos as the owner of the fictitious name. The renewal form contained the following certification:

I (we) the undersigned, being the sole (all the) party(ies) owning an interest in the above fictitious name, certify that the information indicated on this form is true and accurate. I (we) understand that the signature(s) below shall have the same legal effect as if made under oath. I further certify that the names of individuals listed on this form do not qualify for an exemption under section 119.07(3)(i), F.S. (At least one signature required).

78. Only Mr. Ramos signed the fictitious name renewal form.

79. From the time of its incorporation, Ann Margaret Ramos has been the majority shareholder of Sunshine Towing, while Alexis Ramos has been a minority shareholder.

80. Sunshine Towing's proposal did not contain any proof of Mr. Ramos' fictitious name registration.

81. The two joint tax returns filed by Mr. and Ms. Ramos for 1998 and 1999 included a Schedule C listing income and expenses related to the operation of Sunshine Towing prior to its incorporation. Schedule C lists both Mr. and Ms. Ramos as the

taxpayer, but used only Mr. Ramos' Social Security Number. Schedule C is designated for use by a "Sole Proprietor."

82. Sunshine Towing submitted the resumes of Alexis Ramos and Ann Margaret Ramos with its proposal.

83. Mr. Ramos' resume stated that from 1992 through the submittal of Sunshine Towing's proposal, he had been "President" of Sunshine Towing, Inc. The notation is incorrect since Sunshine Towing was not incorporated until June 2000, and even the fictitious name registration was not made until 1994. Ms. Ramos admitted during her testimony that the notation was incorrect since Sunshine Towing was not incorporated until 2000.

84. Ms. Ramos' resume stated that from 1996 through the time of the submittal of Sunshine Towing's proposal, she had been "Vice President" of Sunshine Towing, Inc. Ms. Ramos admitted during her testimony that this was incorrect since Sunshine Towing had not been incorporated until June 2000.

85. Ms. Ramos holds the majority interest in the corporation.

86. If Mr. and Ms. Ramos both owned the entity "Sunshine Towing," they would both be required to be listed on the fictitious name registration.

87. The owner of the fictitious entity "Sunshine Towing" is different from the owners of the shares of "Sunshine Towing, Inc."

88. Sunshine Towing's proposal did not disclose the litigation history of the firm or its owners.

89. Sunshine Towing's proposal did not disclose Alexis Ramos' criminal history in that when he was 16 or 17 he was arrested for driving with a suspended license, was taken into custody, fingerprinted, and photographed.

90. Sunshine Towing's proposal did not disclose that Alexis Ramos had been served with a Violation Notice from Miami-Dade County for operating a business without an occupational license.

91. Sunshine Towing's proposal did not disclose that Nardia Sutherland filed a lawsuit against it in 2002.

92. Sunshine Towing's proposal did not disclose that Jose Fadul filed a lawsuit against it in 2002.

93. Anchor Towing, Inc., was incorporated on July 3, 1995. Brian Savits, Monica Savits' brother-in-law, was initially the sole officer and shareholder of the corporation. At the time of incorporation, Ms. Savits, and her husband, Christopher Savits, worked with Brian Savits in the business.

94. Anchor Towing's proposal did not contain a copy of the company's Certificate of Occupancy for the business premises from which to conduct the services described in the RFP.

95. Christopher Savits is the husband of Monica Savits, the president of Anchor Towing. They had been married almost 12 years at the time of the prior bid protest hearing.

96. Christopher Savits was never an officer or director of Anchor Towing.

97. Christopher Savits was no longer an employee of Anchor Towing after 2000.

98. Christopher Savits was never a shareholder in Anchor Towing.

99. On numerous occasions, Christopher Savits attended Department-sponsored meetings related to service patrol highway services, also known as the "Road Ranger" program.

100. After 2000, Christopher Savits continued to be listed as an authorized driver on Anchor Towing's corporate automobile insurance policy.

101. Mr. Savits performed duties for Anchor Towing from 2000 through 2004, including participation in safety meetings, working on company trucks, appearing at accidents, and giving direction to drivers.

102. On one occasion after 2000, Mr. Savits went on his wife's behalf to deliver a tow truck to an Anchor Towing employee in the middle of the night.

103. On occasion, after 2000, Mr. Savits helped clean the yard at Anchor Towing without pay.

104. Mr. and Ms. Savits attended tow shows together after 2000.

105. Mr. Savits assisted Ms. Savits with the acquisition of tow trucks after 2000.

106. Mr. Savits attended meetings related to the "Road Ranger" program between 2000 and the time Anchor Towing submitted its proposal.

107. Mr. and Ms. Savits attended a meeting with the Department on February 14, 2003, to address an accident that occurred that night.

108. In its proposal, Anchor Towing included letters of reference in which companies doing business with Anchor Towing refer to Christopher Savits as an owner or co-owner of Anchor Towing.

109. In 2004, Christopher Savits took a diversity training course given by Anchor Towing at its office.

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

111. Mr. and Ms. Savits' joint federal income tax return for 2003, listed Mr. Savits' occupation as "towing."

112. On July 11, 2003, a felony conviction was entered against Mr. Savits in the case styled State of Florida v. Christopher Lee Savits, Case No. F03-015107. The felony

conviction arose out of a guilty plea entered by Mr. Savits to a violation of Section 319.30(2)(b), Florida Statutes, which involved an Anchor Towing truck.

113. At least some officials with the Department believed Mr. Savits to be an owner of Anchor Towing after 2000.

114. At the time that Anchor Towing submitted its proposal in February 2004, Christopher Savits was not an employee of Anchor Towing.

115. Monica Savits' resume, included with Anchor Towing's proposal, states that from 1995 to the time of submittal, she was the "Owner/Operator" of Anchor Towing.

116. Anchor Towing uses an employee leasing firm to process its payroll and pay its employees. All decisions concerning the hiring and firing of employees, as well as the ability to direct and control employees acts related to conducting Anchor Towing's business rest with Ms. Savits.

117. Although using an employee leasing firm, Ms. Savits has not relinquished her power to run the business, to hire employees she wants to hire, or to control what tasks employees perform, when they perform them, and how they perform them.

118. Anchor Towing did not disclose in its proposal that a tax lien for unpaid unemployment taxes totaling \$325.49 was outstanding at one time, but had been satisfied prior to submittal of the proposal.

119. In its proposal, Anchor Towing disclosed that it proposed to operate the contract contemplated by the RFP from 7444 Northwest 8th Street, Miami, Florida. Anchor Towing had not bought or leased this location at the time it submitted its proposal. Anchor Towing also listed the location of its current property in its proposal.

120. Petitioner did not produce evidence at hearing to demonstrate that the Department determined in the prior proceeding that Anchor Towing's proposal was non-responsive for failure to disclose Christopher Savits' felony conviction related to towing and storage services.

121. Petitioner introduced a document relating to a forfeiture proceeding against Monica Savits. The Circuit Court in and for Dade County, Florida, issued a "no action" on June 11, 2003, and the matter was dismissed.

122. Petitioner introduced another RFP, RFP-DOT-03/04-6053DS. This RFP was to provide Road Ranger services on State Road 826 and I-75. That RFP included an addendum which provided:

9) THE FOLLOWING REQUIREMENT IS CLARIFIED AS FOLLOWS:

REQUIREMENT ON ADVERTISEMENT:

The Proposer shall provide proof that the firm not the individual has been providing the type of services required for a minimum of five(5) years in good corporate standing.

CLARIFICATION:

If the firm was in business under the same name prior to being incorporated, the Department shall accept that experience as part of the five (5) years. i.e. ABC firm was in business for ten (10) years, and then became a corporation and is now named ABC, Inc.

PLEASE NOTE: OWNERS MUST BE THE SAME

123. Sunshine Towing did not seek a clarification from the Department related to the subject RFP, which may have allowed the Department to accept its pre-incorporation existence.

CONCLUSIONS OF LAW

124. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, and 120.57(1) and (3), Fla. Stat.

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

126. 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.

127. 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). The de novo proceeding conducted pursuant to Section 120.57(3)(f), Florida Statutes, is a form of intra-agency review. The object of the proceeding is to evaluate the action taken by the agency at the time it took the action. State Contracting and Engineering, supra, at 609. The RFP specifications provide broad discretion as to the evaluation and scoring process.

128. 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).

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

130. 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 is mirrored in Florida Administrative Code Rule 28-106.201(e).

131. Model Rules of Procedure 28-106.202, 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.

132. Before Sunshine Towing can proceed with a protest of the award to Anchor Towing, it must demonstrate that it was a

responsible and responsive bidder. Sunshine Towing has failed to meet this requirement. Because it was incorporated on June 20, 2000, it did not have the five years of corporate existence on February 5, 2004, the date of the opening of proposals under the subject RFP.

133. Under Florida law, corporate existence is a creation of statute which enables the incorporators to act as an entity. The fictitious person created by incorporation is exempt from personal liability for corporate acts and obligations so long as the corporation complies with the legal requirements for corporate existence and governance. A corporation has no "corporate existence" prior to the filing of its articles of incorporation with the Florida Department of State.

§ 607.0302(1), Fla. Stat. It follows that "good corporate standing" cannot be conferred on an entity that has not been incorporated in accordance with Florida law.

134. The RFP's use of the phrase "the firm not the individual" when describing the five-year requirement does not support Petitioner's assertion that the fictitious name registration of "Sunshine Towing" in some manner confers corporate status on Petitioner. The greater weight of the evidence produced at hearing leads to the conclusion that the fictitious entity "Sunshine Towing" was a sole proprietorship of Alexis Ramos. The language of the RFP states that the

requirement is that "the firm not the individual has been providing the type of services required for a minimum of five (5) years in good corporate standing." Regardless of the alleged inconsistency within this language, which Ms. Lyons believes can allow an unincorporated firm to somehow be in "good corporate standing," the only appropriate legal conclusion that can be drawn is that only a legally existing corporation can be in "good corporate standing." Further, no addendum was issued by the Department to allow non-corporate existence to be counted towards the five-year requirement. Therefore, Sunshine Towing cannot count the time prior to its incorporation to confer any corporate standing upon itself.

135. Further, the RFP required a Proposer to submit proof that it meets the requirement of five years in good corporate standing. Sunshine Towing's proposal did not provide any information concerning the fictitious name registration. Even if this were relevant, Petitioner's failure to provide the information in its proposal provided the evaluators only with the fact that the company was in existence for less than five years.

136. Had Sunshine Towing desired to clarify or challenge the requirement in the RFP that the Proposer have five years of corporate existence, the procedure for doing so was set forth in the RFP. Section 9 of the RFP required the filing of a written

notice of protest of the terms of the RFP within 72 hours of its posting, followed by a formal written protest in accordance with Section 120.57(3), Florida Statutes, within 10 days thereafter.

Section 120.57(3), Florida Statutes, provides:

With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation. The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter.

137. Having failed to file a protest within the time frames specified, Sunshine Towing has waived its right to challenge the terms of the RFP or to have those terms modified. Therefore, the evidence at hearing and the pertinent case law lead to the conclusion that Petitioner lacks standing to challenge the award of the contract to Anchor Towing.

138. Petitioner has claimed that a small unemployment tax lien against Anchor Towing should defeat its own "good corporate standing." Section 443.141, Florida Statutes, governs unemployment tax liens. While a fine may be collected for failure to timely pay the taxes, dissolution of the corporation is not a remedy prescribed by the lien law. Further, Petitioner

lacks standing to raise the issue of lack of good corporate standing since, as stated above, its proposal suffers from the same defect.

139. 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.

140. Sunshine Towing is also barred by the holding in Intercontinental Properties from protesting the award to Anchor Towing on the grounds that Anchor Towing failed to fully disclose its litigation history by failing to reveal that a forfeiture proceeding had been initiated against it. Sunshine Towing failed to prove that any forfeiture complaint had been filed against either Monica Savits or Anchor Towing. Further, Sunshine Towing failed to make any disclosure of its litigation history. The evidence at hearing proved that at least two lawsuits had been filed against Sunshine Towing. Since Petitioner's proposal suffers from the same defect as it alleges

Anchor's does, Petitioner lacks standing to challenge the failure to disclose Anchor Towing's litigation history under Intercontinental Properties.

141. Sunshine towing is also barred by the holding in Intercontinental Properties from protesting on the grounds that Anchor Towing hired someone with a criminal record. The evidence shows that Alexis Ramos, the president of Sunshine Towing, was aware he had a criminal record and had been arrested for driving with a suspended license. The fact that Petitioner testified that it had a criminal background check conducted on Mr. Ramos, and that such check did not reveal his arrest, does not forgive it of its obligation to have reported the arrest in its proposal if it intended to challenge Anchor Towing's hiring of individuals with prior criminal records. Additionally, the Scope of Service language in the RFP concerning the hiring of persons who have criminal backgrounds applies prospectively to the company awarded the contract. No evidence was produced that would demonstrate that Anchor Towing intended to hire any tow truck operators with criminal records to perform under this contract.

142. Much has been made in this hearing and in the prior proceeding involving these parties about whether Christopher Savits continued to be an employee of Anchor Towing after the year 2000 when he received his last paycheck from the

company. Under Florida law, an employee is one who, for consideration, agrees to work subject to the orders and directions of another, usually for regular wages but not necessarily so, and, further, agrees to subject himself at all times during the period of service to the lawful orders and directions of the other in respect to the work to be done. City of Boca Raton v. Mattef, 91 So. 2d 644 (Fla. 1956). In Saudi Arabian Airlines Corp. v. Dunn, 438 So. 2d 116 (Fla. 1st DCA 1983), the court held that:

[T]o determine whether an employer-employee relationship exists in this case, we must look to the law of master and servant. At common law, four elements were considered in making a determination whether a master and servant relationship exists--the selection and engagement of the servant, the payment of wages, the power of dismissal, and the control of the servant's conduct--the essential element being the right of control and the right to direct the manner in which the work shall be done, the payment of wages being the least important factor. When the element of control is present, the absence of monetary consideration does not preclude the existence of the master-servant, employer-employee relationship.

Id. at 120 (footnote omitted). The essential element in determining whether an employer-employee relationship exists is the power to control and direct the manner in which work shall be done. Ware v. Money-Plan International, Inc., 467 So. 2d 1072 (Fla. 2d DCA 1985). The primary test for determining the existence of an employer-employee relationship is whether the

person being served exercises control over the person performing the service with respect to the manner in which the work is performed rather than merely the result to be obtained. Moles v. Gotti, 433 So. 2d 1380 (Fla. 2d DCA 1983). See Boyle v. Howe, 126 Fla. 662, 171 So. 667 (Fla. 1935) (An employee is one who, for valuable consideration, engages in the service of another and undertakes to observe his directions in some lawful business; he must remain entirely under the control and direction of his master while that relationship exists.)

143. Sunshine Towing has produced a wealth of evidence that Christopher Savits has performed many duties since 2000 as the husband of Monica Savits. These duties included attending Department "Road Ranger" meetings on her behalf; delivering an Anchor Towing truck to a driver in the dead of night; cleaning the yard at Anchor Towing's place of business; and attending tow conventions with his wife. Sunshine has not, however, produced any evidence that Mr. Savits performed any of these duties as an employee of Anchor Towing. Further, since Anchor Towing is a Florida corporation, and Mr. Savits has never been a shareholder, as a matter of law, he has never been an owner of the corporation. The fact that a handful of vendors doing business with Anchor Towing refer to Monica and Christopher Savits as "owners" of the company do not make the statements true.

144. In spite of the fact that Mr. Savits has never been proven to be an employee or owner of Anchor Towing, the evaluation committee members were advised, at the time they were to conduct their evaluation of the proposals, that Anchor Towing did not disclose the felony conviction of Christopher Savits dated August 5, 2003. Even though Mr. Savits has not been determined to be an employee or owner of Anchor Towing, and thus the Proposer was not required to disclose any conviction he had, the evaluators were aware of the conviction at the time they evaluated the proposals.

145. Petitioner has attempted to argue that the Department is judicially estopped from awarding the subject contract to Anchor Towing on the grounds that in the prior proceeding Anchor Towing's response to the RFP was deemed non-responsive for failure to list Mr. Savits' felony conviction related to towing and storage activities. Petitioner failed to introduce any evidence that the Department had taken such a position in the prior protest. This renders its estoppel argument moot. Moreover, judicial estoppel is a creature of equity. The administrative tribunal, created by Chapter 120, Florida Statutes, is not a court of equity. Therefore, the concept of estoppel is rarely applied in the administrative context.

146. Anchor Towing was not required to disclose the name of its employee leasing firm in its proposal since the firm was

not a "subcontractor" as that term is understood in the law and under the terms of the RFP, in that the employee leasing firm was not to perform any of the work contemplated by the RFP. The work of the contract is to operate tow trucks on Florida expressways. See Vasquez v. United Enterprises of Southwest Florida, Inc., 811 So. 2d 759 (Fla. 3d DCA 2002).

147. Petitioner failed to establish that evaluator Matthew O'Brien was biased against Sunshine Towing. Changing to a more professional demeanor when dealing with the business of paying invoices for "Road Ranger" services in a timely fashion does not evidence any bias on his part against Sunshine Towing. Moreover, even if Mr. O'Brien's scores were removed from the mix due to alleged bias on his part, Anchor Towing would still have received the highest score when averaging the other four evaluators.

148. Anchor Towing's failure to provide its Certificate of Occupancy ("C.O.") for the location of its business is a minor irregularity that can either be waived by the Department or result in the loss of points by the evaluators. Unlike the five-years-in-business and in good corporate standing requirement which is set forth as mandatory in the Notice of Request for Proposals, as well as in the technical requirement section of the RFP, the C.O. requirement is listed only in the technical proposal section of the RFP. In the case of inclusion

in the former, "failure to adhere to this directive shall result in the successful proposer's proposal being declared non-responsive." No such language is included within the technical proposal related to the C.O. found at Section 20.2.1.iii)b) of the RFP.

149. The final argument raised by Petitioner is that the scoring methodology employed by four of the five 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, and left these 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. The use of sub-subcategories was not 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.

150. 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 each of the four members of the Evaluation Committee who testified at hearing proves their diligence and thoughtfulness in evaluating all the materials before them during the scoring process.

151. The evaluators exercised reasonable discretion and provided comments and responses for the scores provided in the evaluation. Some of the evaluators reached different conclusions as to which proposal was better. Not every evaluator ranked Anchor Towing's proposal as his number one choice. One evaluator ranked Sunshine Towing as his first choice, while another ranked Midtown Towing as his. This does not show favoritism or bias towards one Proposer over another. It also demonstrates that the scoring was done in a thoughtful manner, not without deliberation or reason. 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.

152. Petitioner's challenge to the scoring methodology was mainly premised on its argument that the evaluators scored the sub-subcategories individually, something that was not specifically spelled out in the RFP. 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.

153. The Department conducted the RFP solicitation process in accordance with Chapter 287.057, Florida Statutes; Florida Administrative Code Rules 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.

RECOMMENDATION

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

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

2. That Petitioner's Formal Written Protest be dismissed as it relates to the issue of Intervenor's failure to disclose the felony conviction of Christopher Savits; and

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

DONE AND ENTERED this 27th day of November, 2006, in Tallahassee, Leon County, Florida.



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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.