

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RN EXPERTISE, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 06-2653BID
)
 MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on September 26, 2006, at Miami, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Holiday Hunt Russell, Esquire
The Law Offices of Holiday
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Hollywood, Florida 33020

For Respondent: Stephen L. Shochet, Esquire
Miami-Dade County School Board
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STATEMENT OF THE ISSUE

Whether, in evaluating the responses to an Invitation to Bid and in making a preliminary decision to award the subject contract for drug screening services, Respondent acted contrary

to a governing statute, rule, policy, or project specification; and, if so, whether such misstep(s) was/were clearly erroneous, arbitrary or capricious, or contrary to competition.

PRELIMINARY STATEMENT

Respondent issued ITB Number 056-FF10 (the subject ITB) on May 4, 2006, for services relating to drug and alcohol testing of its employees and prospective employees. Bids were to be opened on May 16, 2006. On May 10, 2006, Respondent issued Addendum 1 to the subject ITB. The date for the opening of bids was postponed until May 23, 2006, in response to a request from Petitioner.

Bids were opened and evaluated by Respondent on May 23, 2006. Respondent determined that the first and second lowest, responsible, responsive bidders were, respectively, Mercy Hospital Laboratory (Mercy) and Petitioner. Respondent determined to award the subject ITB to Mercy. Thereafter, Petitioner timely filed its notice of intent to file bid protest and subsequently timely filed the instant protest.

Succinctly stated, Petitioner contends that Mercy was not a responsive bidder and that it (Petitioner) should be awarded the subject ITB. Petitioner contends that Mercy did not comply with the technical specifications of the ITB pertaining to laboratory certification, the designation of a medical review officer (MRO), the location of collection sites, and the selection of a

third party administrator (TPA). Respondent contends that Mercy provided all required information, thereby complying with the technical specifications of the subject ITB.

At the final hearing, Petitioner presented the testimony of Christine Steele (the owner of Petitioner), Suzanne Fahmy (an employee of Respondent's Procurement Management Services), and Alberto Rey (the laboratory director of Mercy). Respondent presented the testimony of Barbara Jones (the director of Respondent's Procurement Management Services). The parties offered nine Joint Exhibits, each of which was admitted into evidence.

Petitioner filed a Motion for Attorney's Fees and Costs on December 4, 2006. Jurisdiction to rule on that motion following the entry of a Final Order by Respondent in this matter will be reserved.

A Transcript of the proceedings was filed on November 22, 2006. Each party filed a Proposed Recommended Order, which has been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times relevant to these proceedings, Respondent has been the duly-constituted school board for Miami-Dade County, Florida.

2. Respondent issued the subject ITB to obtain the services of an organization to screen applicants for employment and existing employees for drug use. Screening of employees subject to the Omnibus Transportation Employee Testing Act (OTETA) was included in the subject ITB. The purpose of the subject ITB was stated as follows in paragraph 1 of the section styled "Special Conditions":

The purpose of this bid is to obtain the services of an organization to conduct applicant and employee specimen collection and drug screening services, both to meet the general requirements for collection and drug screening services and the Omnibus Transportation Employee Testing Act (OTETA) requirements for collection and drug screening services. These professional services are described in the Miami-Dade County Public Schools (M-DCPS) Drug-Free Workplace Technical Guide. . . .^[1]

3. Petitioner and Mercy timely filed responses to the ITB.

4. Following the bid opening on May 23, 2006, Respondent determined that the bid award should go to Mercy, which was the low bidder. After Mercy, Petitioner was the next low bidder.² Petitioner thereafter timely filed its notice of intent to file a bid protest, which was followed by a timely filed bid protest.

5. Paragraph 4 of the Special Conditions Section of the ITB (paragraph 4) pertained to technical requirements and provided, in part, as follows:

TECHNICAL REQUIREMENTS: . . . The following items, which shall constitute

proof of technical competency, are requested to be submitted with the bid, or within three (3) days of request:

* * *

b. Copies of the certifications/licenses of all collection site staff and laboratory staff who will be handling specimens in the chain of custody as indicated in Attachment B.

c. A copy of the quality assurance program of the testing laboratories, which must encompass all aspects of the testing process as indicated in Attachment B and Attachment E.

d. List all collection sites, which must include the site address and copy of the certification of each site to be considered for this bid.

e. Number of mobile sites available and proof of compliance and/or certification of mobile sites, if applicable.

6. When it submitted its initial response to the ITB, Mercy did not specifically respond to the items listed in subparagraphs b., c., d., and e. of paragraph 4.

7. On May 24, 2006, Respondent wrote to Mr. Rey, Mercy's, laboratory director and the person responsible for Mercy's response to the ITB, requesting copies of documents responsive to subparagraphs b., c., d., and e. of paragraph 4. Mercy thereafter timely supplied the requested information.

CERTIFICATION

8. Attachment B to the ITB contained the following pertaining to certification:

A laboratory must be certified by the United States Department of Health and Human Services (DHHS). DHHS has established comprehensive standards for laboratory policies, procedures, and personnel, which provide quality assurance and performance testing specific to urine testing.

To be certified, a laboratory must be capable of testing for, at a minimum, the following classes of drugs: Alcohol, Marijuana, Cocaine, Opiates, Amphetamines, Barbiturates, Benodiazepines, Methaqualone, and Phencyclidines, as listed in Attachment E.

9. There was a dispute between the parties as to whether Mercy demonstrated it had the requisite certification. That dispute is resolved by finding that Mercy demonstrated that it had the requisite certification to perform all testing other than the OTETA testing.³ Mr. Rey testified, credibly, that Mercy intended to subcontract out the OTETA testing to a laboratory certified to perform such testing. Mercy did not identify the entity that would conduct the OTETA testing, however, there is nothing in the ITB to prohibit such subcontracting and there is nothing in the ITB that would require a bidder to have such a subcontract in place at the time it submitted its response to the ITB. Further, there is no requirement in the ITB that the bidder identify the entity that would serve as the subcontractor for the OTETA testing.⁴

10. There was also a dispute as to whether the certifications provided by Mercy would suffice as certification

for the contemplated collection sites. The greater weight of the credible evidence resolved that dispute in the affirmative. Mr. Rey testified, credibly, that the collection sites could be operated by Mercy pursuant to its existing certifications.

MEDICAL REVIEW OFFICER

11. Attachment B contained the following in paragraph 17 under the heading of "Compliance":

17. Reporting and Review of Results.
(The service of a Medical Review Officer (MRO) is required to review ALL [sic] test results. The MRO may NOT [sic] be an employee of the laboratory.

12. Mercy did not identify the person or organization that would serve as the MRO in the event it was awarded the contract. That omission did not make Mercy's response to the ITB non-responsive because Paragraph 17 is merely a statement of industry practice. The ITB did not require bidders to identify the person or organization that would serve as the MRO for the winning bidder.

THIRD PARTY ADMINISTRATOR

13. A laboratory performing the type screening contemplated by the ITB must have a third party administrator (TPA) to administer the drug testing program. As with the MRO, a TPA must be independent of the laboratory to avoid conflicts of interest. Mercy's response did not identify the person or organization that would serve as the TPA in the event it was

awarded the contract. That omission did not make Mercy's response to the ITB non-responsive because the ITB did not require bidders to identify the person or organization that would serve as the TPA for the winning bidder.

IDENTIFICATION OF COLLECTION SITES

14. Under the heading of Collection and Screening Site Parameters in Attachment B, Technical Requirements, the ITB provides, in part, as follows:

Collection and screening sites shall be accessible Monday through Friday from 8:00 a.m. to 4:30 p.m., at a minimum, and shall meet the following parameters:

1. The following locations [sic] parameters are examples of locations, which shall comprise the areas for collection and drug screening to insure convenience for applicants and employees:

Area 1. East of 27th Ave. from Flagler St. North to 215th St.

Area 2. West of 27th Ave. from Flagler St. North to 215th St.

Area 3. East of State Road 836, south to intersection of US 1, then south to 392nd St.

Area 4. West of State Road 836, south to intersection of US 1, then south to 394th St.

* * *

4. At least one site in the North end of Miami-Dade County and one site in the South end of Miami-Dade County must be available to perform reasonable suspicion testing of employees. The hours of operation of these facilities must be from 8:00 a.m. to 12:00 midnight.

15. Mercy's response to the foregoing was to provide specific addresses to two locations that were presently

available as collection sites, to advise that it had a mobile collection site, and to provide three approximate locations where it would establish collection sites if awarded the bid.

16. There was a dispute between the parties as to whether Mercy was responsive to the foregoing item pertaining to collection sites. The greater weight of the credible evidence resolved that dispute in the affirmative. The ITB did not require bidders to provide specific addresses for collection sites, nor did it require bidders to specify the hours of operation of each proposed collection site. The testimony of Ms. Fahmy and Ms. Jones established that Mercy adequately responded to this item of the ITB.

BREATH ALCOHOL TESTING

17. Mercy's response to the ITB did not separately address breath alcohol testing or certification for such testing. Mercy's response did include bid prices on specified breath alcohol testing procedures as required by the ITB. There was no requirement that Mercy provide a separate certification for breath alcohol testing.

18. Petitioner is a TPA, not a laboratory, and is the existing provider for the drug screening services contemplated by the ITB. Petitioner intended to subcontract all laboratory work required by the ITB. Petitioner's response to the ITB was responsive.

19. Mercy's response to the ITB was also responsive. Mercy committed to comply with all requirements of the ITB and it established by its responses that it had the wherewithal to meet that commitment.

20. Mercy was the low, responsive, responsible bidder on the ITB.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).⁵

22. Petitioner has standing to bring this bid protest.

23. Pursuant to Section 120.57(3)(f), Florida Statutes, the burden of proof rests with the party opposing the proposed agency action, here Petitioner. See State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1998). Petitioner must sustain its burden of proof by a preponderance of the evidence. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

24. Section 120.57(3)(f), Florida Statutes, spells out the rules of decision applicable in bid protests. In pertinent part, the statute provides:

In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

25. The foregoing requires the party protesting the intended award to identify and prove, by the greater weight of evidence, a specific instance or instances where the agency's conduct in taking its proposed action was either:

- (a) contrary to the agency's governing statutes;
- (b) contrary to the agency's rules or policies; or
- (c) contrary to the bid or proposal specifications.

Further, the protester must establish that the agency's misstep was:

- (a) clearly erroneous;
- (b) contrary to competition; or
- (c) an abuse of discretion.

26. Petitioner has failed to meet its burden in this proceeding because it failed to prove the factual predicates upon which its bid protest was based. The greater weight of the credible evidence established that Mercy was the low, responsive, responsible bidder.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that Respondent enter a final order dismissing Petitioner's bid protest and awarding the ITB to Mercy.

RESERVATION OF JURISDICTION

Jurisdiction is reserved to rule on Petitioner's Motion for Attorney's Fees and Costs following Respondent's entry of a Final Order in this matter.

DONE AND ORDERED this 18th day of December, 2006, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of December, 2006.

ENDNOTES

^{1/} The ITB had several attachments. Respondent's Drug-Free Workplace Technical Guide was attached as Attachment E.

^{2/} Petitioner's bid was approximately \$14,000 more than Mercy's during each year of the bid term.

^{3/} The Centers of Medicare and Medicaid Services, which is an agency within the DHHS, certified Mercy pursuant to the Clinical Laboratory Improvement Amendments. A copy of that certification was admitted into evidence as Joint Exhibit 9. The State of Florida, Agency for Health Care Administration (AHCA), certified Mercy as a Forensic Toxicology Laboratory. AHCA also certified Mercy as a Clinical Laboratory. Copies of the certifications issued by AHCA are included in Joint Exhibit 6. The certification required for OTETA testing is issued by the Substance Abuse and Mental Health Services Administration (SAMHSA), which is another agency within DHHS. Mercy has not been certified by SAMHSA. Mr. Rey testified that Mercy intends to apply for certification from SAMHSA if it is awarded the bid.

^{4/} As the existing provider, Petitioner was able to provide greater detail in its response to the ITB as to collection sites and subcontractors when compared to Mercy's response because Petitioner had those collection sites and subcontracts in place at the time it submitted its response. Mr Rey testified, credibly, that Mercy will enter into contracts for collection sites and a subcontract for OTETA testing in compliance with the requirements if it is awarded the bid. The greater detail in Petitioner's response had no bearing on whether Mercy was a responsive or non-responsive bidder.

^{5/} All statutory references are to Florida Statutes (2006).

COPIES FURNISHED:

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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.