STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TEXAS AQUATIC HARVESTING, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-4217BID
	)	
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
A & L AQUATIC WEED CONTROL,	)	
	)	
Intervenor.	)	
	)	

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on January 16 through 18, 2007, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether the Department of Environmental Protection's (the Department) intended award of a contract based on RFP 2006011C to A & L Weed Control (A&L), is contrary to the agency's governing statutes, rules, or policies, or the bid or proposal specifications, or was otherwise unlawful.

PRELIMINARY STATEMENT

The Department issued a request for proposal (RFP) on October 25, 2005. This document solicited proposals for addressing the problem of floating mats of herbaceous or woody plants, called tussocks, or masses of floating sediments and vegetation, called floating islands, which drift about in Florida's lakes and rivers. It called for a "cookie cutter" or similar barge-mounted device with rotating blades that could shred the aforementioned plants and vegetable matter. The document required that the machinery be capable of operating

beneath obstructions and in shallow, shoreline waters, among other things.

The RFP sought a primary and secondary provider. Four companies responded to the RFP. Intervenor A&L was selected as the primary provider. Petitioner Texas Aquatic Harvesting, Inc. (Texas), was selected as the secondary provider.

On December 30, 2005, Texas timely protested the award to A&L as the primary provider. Discussions between Texas, A&L, and the Department, with regard to this situation, continued through October 2006. On November 1, 2006, subsequent to impasse, the Department filed with the Division of Administrative Hearings, a Request for Assignment of an Administrative Law Judge. Pursuant to the request, an Administrative Law Judge was assigned. On November 6, 2006, A&L filed its Petition to Intervene, and its Petition was granted on November 8, 2006.

Texas' protest of the award to A&L alleged the following:

1. Texas was the lowest responsible bidder for the contract, but the Department awarded the contract to A&L.

2. The Department's decision to award the contract to A&L was arbitrary and capricious; was based upon ignorance through lack of inquiry; was contrary to the Department's solicitation as well as Florida's competitive bidding law, and the Sunshine

Act, and had the appearance of favoritism, if not actual favoritism.

On January 8, 2007, Texas filed a Motion for Attorney's Fees Pursuant to Section 57.105. This Motion was based on Texas' assertion that the Department failed to comply with Subsection 287.057(2)(a), Florida Statutes, in that there was no writing supporting the basis upon which the decision to use an RFP was made. For reasons addressed in detail herein, the Motion is denied.

The matter was set for hearing on December 20 and 21, 2006. Pursuant to Texas' Motion for Continuance, the hearing was rescheduled for January 16 and 17, 2007, in Tallahassee, Florida. The hearing proceeded as scheduled on January 16 and 17, and continued through January 18, 2007.

At the hearing, Petitioner presented the testimony of James Vaughan; Ruth Ann Heggen; Kenneth Dean Jones; Carl Joseph Hinkle; David Ray Douglas; Terry Keith Sullivan; Matthew V. Phillips; Chester Catterton; Evelyn Kathleen Etheridge; Shelly Kelley; and Jeffrey David Schardt. A&L presented the testimony of Chester Catterton. The Department presented the deposition testimony of Brian Nelson and Mark Edwards.

The parties stipulated to the admission of documents that were admitted as J1 through J29. Texas offered nine exhibits that were admitted, and A&L offered eight exhibits that were

admitted. A&L's Exhibit 4 had been previously admitted as J2. The Department offered three exhibits, which were admitted.

The Transcript was filed on January 25, 2007. Texas, A&L, and the Department all filed Proposed Recommended Orders on February 5, 2007.

Also on February 5, 2007, Texas filed a Motion to Supplement Trial Record with Newly Discovered Material Evidence. The Department responded. The alleged newly discovered evidence alleges matters arising more than a year after the scoring of the RFP proposals. It is too remote in time to affect the outcome of this hearing. Even if it were to be considered as part of the record, the matters addressed in the Motion are irrelevant. Accordingly, Texas' Motion to Supplement Trial Record with Newly Discovered Material Evidence is denied.

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

FINDINGS OF FACT

Floating islands and tussocks

1. Lakes and rivers in Florida, as a result of the drought of the late 1990's, experienced an encroachment of vegetation in rivers and lake bottoms that were historically covered by water. Subsequently, when rain increased and the lakes and rivers regained their usual banks, organic sediments, and vegetation

popped up from the bottoms and became tussocks and floating islands.

2. Tussocks are floating masses of aquatic plants. Floating islands are comprised of mud or peat ranging in thickness from a few inches to several feet. Woody herbaceous plants grow on the floating islands, including trees up to ten inches in diameter and up to 25 feet in altitude.

3. In addition to derogating the general ecology of lakes and rivers, tussocks and floating islands can jam against bridges and flood control structures, which may cause flooding or structural damage. Accordingly, the Department's Bureau of Invasive Plant Management, as well as water management districts and counties, have determined that tussocks and floating islands must be attacked.

4. One of the methods of reducing tussocks and floating islands is to shred them with mechanical shredders mounted on barge-like vessels. When DEP Contract SL825 was issued in 1999, addressing the shredding of tussocks and floating islands, only two shredders were available. At that time the problem of floating islands and tussocks was not as large as it subsequently became.

5. By June 2005, six different shredders were operating under several different agency contracts in Florida's public waters.

Issuance of the request for proposals

6. Jeffrey David Schardt was an Environmental Administrator with the Department at the time the decision was made to promulgate an RFP. He was a section administrator for the Aquatic Plant Management Program under the cognizance of the Bureau of Invasive Plant Management. When DEP Contract SL825 came to an end in 2004, he determined that floating islands and tussocks continued to present a problem that must be addressed. He determined that shredding could solve or reduce the problem. Among the shredding machines that he contemplated using to accomplish this was the Cookie Cutter or Swamp Devil.

7. Mr. Schardt did not think that an invitation to bid (ITB) would be practicable in seeking a contractor to address the problem. An ITB is used when the state is seeking a commodity or service that can be specifically defined and when the dominant decision factor, and competitive factor, is price. The precise definition of an ITB is found at Subsection 287.012(16).

8. An RFP is used when it is not practicable for the agency to specifically define the scope of work for which the commodity or service is required and when the agency is requesting that a responsible vendor propose a commodity or contractual service to meet the specifications of the solicitation document. In the case of an RFP, price may not be

the dominant feature. An RFP contemplates the formation of a contract with the prevailing proposer. The precise definition of an RFP is found at Subsection 287.012(22).

9. Because there were so many variables between the floating islands and tussocks, and because he was aware of the various machines that could reduce the floating islands and tussocks, Mr. Schardt suggested to the Department's procurement section, that an RFP was the appropriate vehicle to seek contractors to propose methods to resolve the problem.

10. At some point in the process, a point that cannot be ascertained with exactitude, Mr. Schardt prepared an undated writing that set forth the problem to be addressed and which assumed, without specific analysis, that an ITB was not practicable and that an RFP was the procurement method that should be used. It is obvious from reading the two documents, that much of what Mr. Schardt set forth in this writing was included in the "scope of services" portion of the RFP that was eventually prepared. However, there is no evidence that the writing was circulated or that it was ever extracted from his computer and printed until the December preceding the January 2007 hearing.

11. Mr. Schardt discussed his conclusions with Shelly Kelley of the Department's procurement section, who acquiesced in Mr. Schardt's suggestion that an RFP should be used.

12. Ms. Kelley, as part of her job in the Department's procurement section, helped develop the RFP document, put the document together, advertised it, received proposals, sent proposals and other materials to the appointed evaluators, and posted the decision. The contract contemplated by the RFP would be let for a period of five years, with a renewal period of three years.

13. As part of the Department's procurement process, Kat Ethridge, of the Bureau of Invasive Plant Management, who was designated contract manager for the procurement, prepared a Contract Initiation Form. This form provided pertinent information, including the effective period. It identified the funding source and provided a scope of services. The Contract Initiation Form was dated July 20, 2005, and was provided to Ms. Kelley.

14. The Contract Initiation Form had a box printed on it. The material printed in the box was entitled Proposed Method of Contracting. Among the choices in the box, which invited the user to check a choice, were Invitation to Bid, Request for Proposals, and Invitation to Negotiate. None of the choices were selected. This was due to an oversight on the part of Kat Ethridge or persons in the procurement section.

15. During the period August 4, 2005, through August 29, 2005, a series of emails between Kat Ethridge and Ms. Kelley

discussed the RFP. However, these emails did not contain a discussion of the practicability of an ITB vis-à-vis an RFP.

16. The writings evidencing support for the decision, as well as the testimony of record, taken as a whole, demonstrate that the decision to issue an RFP rather than an ITB was a conscious one that was made with a consideration of the alternatives and of the practicality of an ITB. The evidence indicates that no particular individual made the decision to use an RFP. The evidence suggests, rather, that it was a collective, organic decision that was made after rational contemplation.

17. However, the writings are insufficient to proved compliance with Subsection 287.057(2)(a), which states, "If an agency determines in writing that the use of an invitation to bid is not practicable, commodities or contractual services shall be procured by competitive sealed proposals." There was no agency determination in writing that the use of an ITB was not practicable.

Responses to the RFP

18. The RFP was dated October 25, 2005, and was released on that date. No party filed a challenge to the decision to issue the procurement as an RFP within 72 hours after the posting of the solicitation, as they were entitled, pursuant to Subsection 120.57(3)(b).

19. Four proposers responded. All proposals were filed with the Department, according to their date stamps, on November 22, 2006.

20. Both A&L and Texas were determined by the Department to be "responsible vendors," as that term is described in Subsection 287.012(24). Both were "responsive vendors," as that term is described in Subsection 287.012(26). On December 20, 2005, the Department posted its "Notice of Intended Award for DEP Solicitation 2006011C," announcing that A&L was selected as the primary contractor and Texas was selected as the secondary contractor. It further noted that the 72-hour protest period commenced at 2:30 p.m. on December 20 and would end on December 23, 2005.

21. When Texas timely protested the award it was required to submit a bond in the amount of $125,000. Texas was informed of this amount by Ms. Kelley in an email dated December 23, 2005. Texas complied with this requirement by providing a certified check in the amount of $125,000.

22. The $125,000 supposedly represented ten percent of the value of the contract, which the Department estimated to be worth $12,500,000 over a period of five years. However, this was an "as needed" contract, so the contractor might be asked to do $12,500,000 worth of work, or no work at all. The $12,500,000 figure was, at best, an educated guess based on

previous year's expenditures. The ultimate total cost figure will be weather-dependent, work-dependent, and appropriation-dependent. The total cost of the contract cannot now be determined.

23. In discussing the evaluations below, matters involving two proposers, Lomonico Contracting, Inc., and Weedbusters, Inc., will not be discussed because they did not contest the actions of the Department with regard to the RFP.

Evaluation of the responses

24. Mr. Schardt selected five evaluators to score the responses. The evaluators were chosen because of their experience in addressing the problem of floating islands and tussocks.

25. When the proposals were received they were provided to the evaluators for scoring. In addition to the proposals they were given a copy of the RFP and a memorandum written by Ms. Kelley dated December 12, 2005. The memorandum was entitled, "RFP Review Process" and had attached to it a "Conflict of Interest Certification." It also included an Evaluation Criteria Scoresheet and the evaluators were instructed to complete it down to the "past performance" section.

26. The memorandum provided to the evaluators, instructed them, among other things, to sign the Conflict of Interest

Certification and to independently evaluate each proposal, using the evaluation criteria contained in the RFP. No additional instructions were given to the evaluators, either written or oral.

27. The evaluation of the proposals did not consider the total cost for each year because, for the reasons set forth in Finding of Fact 22, annual cost could not be determined.

Evaluation by Jones

28. Kenneth Dean Jones was a designated evaluator. He received the instructions, the RFP, and the responses. He read the scope of services part of the RFP so that he would know what the Department was seeking. He understood the scope of services. He completed the Evaluation Criteria Scoresheet.

29. Mr. Jones, at the time of the hearing, was employed by Precision Land Investments, but prior to that employment he worked for Polk County Natural Resources for 15 years. While working for Polk County, he was involved with aquatic weed control for ten years. He has seen shredding accomplished by the use of cookie cutters. He is not familiar with any other type of aquatic shredding machine.

30. Mr. Jones had observed both A&L and Texas using their machines on Florida water bodies on numerous occasions. Both were using cookie cutter machines at the time he observed them. A&L proposed using its Adja-tater machine in its response to the

RFP, but Mr. Jones had never seen that machine in use. He had observed Texas' cookie cutter and Tiger Cutter, a smaller version of the cookie cutter, working in the field.

31. In completing the Evaluation Criteria Scoresheet, Mr. Jones gave A&L five points in the equipment category and gave Texas four. He gave A&L more points in the equipment category because A&L proposed to use three machines and two of them were larger. He made that judgment based on what was contained in the proposal. His observations of the two providers in the field, gave him insight into his evaluation. However, his personal observations played no role in his scores.

32. Mr. Jones did a rough cost-benefit analysis of the proposals. This resulted in his conclusion that although A&L proposed to charge more per hour, A&L's Adja-tater was two to ten times more efficient that Texas's cookie cutter. He did not do an analysis between the Adja-tater and the Tiger Cutter, but he was aware that the Tiger Cutter is smaller than either a cookie cutter or an Adja-tater.

33. Mr. Jones was aware that the machines sought should be capable of operating beneath bridges and obstructions, and in shallow water. He had seen the machines, except the Adja-tater, in operation. Based on his observations and the response provided by A&L in the case of the Adja-tater, he concluded that all of the machines in the proposals could satisfy the

requirement to operate under obstructions and in shallow water. He did not factor in these matters when arriving at a score under Part IIC of the Evaluation Criteria Scoresheet.

34. Mr. Jones fairly evaluated the four proposers and applied all criteria fairly and uniformly to them. He gave A&L a total score of 164 and gave Texas a total score of 146.

Evaluation by Hinkle

35. Carl Joseph Hinkle was also an evaluator. At the time of his evaluation he was employed by the Department's Bureau of Invasive Plants. He has worked for the Department for more than 32 years. He was provided the instructions, the RFP, and the responses.

36. Mr. Hinkle gave A&L a score of five in the historical background category and gave Texas a score of four. He did this based on the information provided in the responses and on his observations of A&L working in the field. He gave A&L a score of five in the experience category and gave Texas a score of four. He did this based on the number of years each company had been in the business. He noted that Texas had six years' experience and A&L had 20 years.

37. He gave A&L a score of four in the personnel category and gave Texas a score of five, based on the number of personnel to be provided. He gave A&L a score of five in the equipment

category and gave Texas a score of four, because A&L had more cutters.

38. He had observed both Texas' cookie cutters and A&L's Adja-tater working and noted that the Adja-tater did more work in less time. The difference between the efficiency of the Adja-tater and the cookie cutters was the "difference between night and day," in his opinion. The Adja-taters did more in the same amount of time as a cookie cutter. He is certain that an Adja-tater shreds much faster than a Tiger Cutter.

39. Mr. Hinkle did not consider height under obstructions and draft in his evaluation because he had observed the different machines and was of the opinion that they were all equal in those categories.

40. In accomplishing his evaluation Mr. Hinkle properly considered Footnote 2 of the Evaluation Criteria Scoresheet. This footnote advised, "Rather than awarding the maximum points to the lowest cost, the evaluation process will consider the value received by the DEP relative to the cost." He pointed out that he was evaluating the proposals, not the vendors. He considered getting the job done efficiently to be an important criterion.

41. Chester Catterton, the principal of A&L, purchased lunch for Mr. Hinkle a few times and perhaps as many as five

times. These were working lunches at fish camps and were inexpensive. These lunches did not affect Mr. Hinkle's scoring.

42. Mr. Hinkle fairly evaluated the four proposers and applied all criteria fairly and uniformly to them. He gave A&L a total score of 135 and gave Texas a total score of 119.

Evaluation by Douglas

43. David Ray Douglas was employed by the Florida Fish and Wildlife Conservation Commission at the time he evaluated the proposals. At the time of the hearing he had been with that agency about 19 years. Like the other evaluators, he was provided the instructions, the RFP, and the responses. He has about five years' experience in aquatic plant control.

44. Sometime in 2005, prior to making the evaluations, he had observed both A&L and Texas engaging in the work of tussock shredding on Lake Jumper. He did a rough "productivity analysis" based on the amount of acreage shredded by the two responders in a given time, multiplied by the dollar amount being charged by them. He considered this analysis when completing the Evaluation Criteria Scoresheet's Section 2E, Cost. It also affected his score for IIC, Equipment. He awarded A&L a five in equipment and a four in cost. He awarded Texas a four in equipment and a four in cost. He also considered the material provided in the proposals in arriving at his scores.

45. He gave A&L a total score of 134 and Texas a total score of 126. He asserted that his job was to conduct a fair and honest evaluation based on the responses to the solicitation and to use his past experience and knowledge to aid him in accomplishing that. The evidence indicates that is exactly what Mr. Douglas did. Moreover, he arrived at his findings independently of the other evaluators.

Evaluation by Sullivan

46. Terry Keith Sullivan was employed as an Environmental Specialist III with the Department at the time that he evaluated the proposals. He is assigned to monitor the environment of Lake Russo, Lake Tsala Apopka, and the Rainbow River. He has been with the Department for 20 years.

47. Like the other evaluators, he was provided the instructions, the RFP, and the responses. He has seen both A&L and Texas operating in the field on numerous occasions and, while conducting his evaluation could not discount the field observations he made of the two responders.

48. Mr. Sullivan was unsure if the two responders were working for the Department at the time he observed them. Sometimes shredders may be working under a county contract and sometimes under a Department contract. Often the funds a county expends for aquatic weed control are provided by the Department.

49. He knows a few of the equipment operators for both companies. He did not believe he could determine cost effectiveness because of the wide variations of compositions of floating islands and tussocks. However, his scores reflect not just the dollar amount, but the value of the work to be done.

50. Mr. Sullivan's scores were the result of the best rational analysis that he could make and were arrived at independently of any other evaluator. He gave A&L a total score of 126 and Texas a total score of 117.

51. Mr. Sullivan also did some past performance reference checks, but he eventually learned that in doing so he was operating outside the scope of his assigned duty and upon learning that information, he stopped making inquiries. However, based on information the past clients provided, he gave A&L maximum scores and Texas, less than the maximum. The Department used these scores.

52. Because the reference checks were accomplished by asking standard questions of other clients, it was the responders to those questions who provided the scores, not the person who asked the question. There is no evidence of record that Mr. Sullivan skewed the result or engaged in any nefarious plot to harm Texas. What he did was make a mistake which, upon reading the instructions provided by the Department in that regard, is understandable. They lacked clarity.

Evaluation by Phillips

53. Matthew V. Phillips, like the other evaluators, was provided the instructions, the RFP, and the responses. Mr. Phillips is a regional biologist for the Department. He has seen both A&L and Texas using their machines to shred in the field and has inspected their work.

54. Mr. Phillips claimed that he did not recall the basis for his scores. He noted that if he had been asked at the time he did the evaluation he would have been able to explain how he arrived at his scores. He was serious about this duty, and he arrived at his scores independently and fairly.

55. Mr. Phillips gave A&L a total score of 128 and Texas a total score of 103.

Events subsequent to individual evaluations

56. In addition to the scores based on the proposals and the knowledge of the business of shredding floating islands and tussocks, references were called on each responder for the purposes of determining past performance. Kat Ethridge, an Operations and Management Consultant at the Bureau of Invasive Plant Management, was in charge of calling entities that had previously employed the responders. She asked them for references. Specifically, she called Brian Nelson, who was with the Southwest Florida Water Management District and had observed both A&L and Texas operating their machines.

57. Past performance scores were entered into the Evaluation Criteria Scoresheet at Paragraph IIA. The parties did not view this particular part of the evaluation process as relevant to the dispute among them, but it is noted that this was a routine part of the process that did affect the ultimate scores. Past performance inquiries were not made by the evaluators, except in the case of Mr. Sullivan, who began the process by mistake, as discussed above.

58. The rough figures were entered into a matrix entitled "Tabulation Results." The rankings appear in spreadsheet form and were computed mechanically. A&L scored highest and Texas came in second. These computations were not at all subjective.

59. On December 19, 2005, Ms. Kelley reported to Eva Armstrong, Director of the Division of State Lands, that the Procurement Section had calculated the rankings for each proposal based on the evaluation team's completed Evaluation Criteria Scoresheet and past performance, and that A&L was number one, and Texas was number two.

60. The scores assigned by the evaluators were made on their assessment of the RFP, the responses to the RFP, and their experience in the field. The evaluators themselves were conscientious, fair, and experienced. They independently arrived at the same basic conclusions. There is nothing in the record to indicate that their scores were arbitrary, capricious,

or contrary to the requirements of the RFP. These scores represented the evaluators' honest judgment, which was unimpeded by extraneous input.

Specific objections by Texas

61. Texas complained that the evaluators were biased in favor of A&L. Over the course of years, Mr. Catterton, the principal of A&L, bought lunches from time to time for Mr. Hinkle, as Mr. Hinkle related. He also bought lunches for Messrs. Jones, Sullivan, Phillips, and Schardt, and it is possible that he bought lunch on one or more occasions for Ms. Ethridge.

62. The provision of these lunches usually occurred in the course of accomplishing the business of shredding tussocks and floating islands. They often were eaten at fish camps and other out-of-the-way places. They were not extravagant and the value did not exceed any statutory threshold. Upon consideration of all of the facts and circumstances, it is found that these meals did not cause the recipients to be biased in favor of Mr. Catterton's company.

63. Texas complained that it submitted the lowest price. Texas proposed $145 per hour for a cookie cutter that was essentially identical to A&L's cookie cutter and for the operation of a smaller machine called a Tiger Cutter. A&L submitted a price of $250 for their cookie cutter and $350 per

hour for their Adja-tater, plus additional rates for airboats and go devil boats if they were to be used for purposes not in connection with actually shredding vegetation.

64. Although when judged on price alone, Texas had the lower rates, the evaluators properly considered efficiency in addition to price and concluded that the Adja-tater, and thus A&L, was much more efficient. This determination was in keeping with the terms of the RFP and the Evaluation Criteria Scoresheet.

65. The attempt by Texas to prove that A&L's machines were too tall or that they could not operate in the shallow water, which is commonly encountered in the shredding business, were not considered important to the evaluators. The evaluators considered that with regard to draft and height of superstructure, the machines were equal.

66. The fact that A&L did not address the height or draft issue in their proposal did not affect the proceedings. There was no evidence that the failure to consider these matters, or to consider one machine to have a draft or height advantage over the other, affected the outcome of the proceedings.

67. Texas complained that the Department did not provide the evaluators with any formal training other than the memorandum of instruction. The memorandum was clear, with the

exception of the portion addressing past performance, and the evidence indicated that the evaluators understood their role.

68. Texas asserted that the evaluators ignored the efficiency of the operators when addressing the "cost effectiveness" criterion. Texas claimed that an interrogatory answer by the Department stated that, "Cost effectiveness is a function of . . . performance of the operator." This assertion represents an attempt to mislead. What the response said was, "Cost-effectiveness is a function of machine capability, performance of the operator, and hourly rate." The response to the interrogatory assigned no particular weight to any part of its cost-effectiveness response.

69. The responses of both A&L and Texas listed the names of the personnel who were to operate the machinery and provided their education and years of experience. The evaluators knew some of the operators by name and had observed many they knew, and many whose names they did not know. It is apparent that these experienced evaluators did not give over-riding consideration to the question of operator capability, nor were they required to do so.

70. With regard to cost effectiveness, Texas further asserted that the evaluators did not understand the term and did not use that criterion in scoring any category. In accomplishing his evaluation Mr. Jones did a rough cost-benefit

analysis. Mr. Hinkle considered footnote 2 of the Evaluation Criteria Scoresheet. Mr. Douglas did a "productivity analysis" based on the amount of acreage shredded by the two responders in a given time multiplied by the dollar amount being charged by them. Mr. Sullivan's scores reflected not just the dollar amount, but the value of the work to be done. Because Mr. Phillips' lack of recollection of what occurred, his testimony failed to illuminate what he may have done.

71. Contrary to Texas's allegations, it is apparent that the evaluators carefully and conscientiously considered productivity and cost in determining the cost effectiveness of the machines. That was all that was required by the RFP. The RFP did not require a machine versus machine competition. It only required a consideration of the proposals in light of the evaluators' own experience to arrive at a determination.

72. The memorandum of December 12, 2005, addressed to the evaluation team, required the evaluators to "use the evaluation criteria contained in the RFP." It is clear that the evaluators were to evaluate the "proposals." It is equally clear that every evaluator, either substantially, or to some lesser extent, considered their own experiences in arriving at their scores.

73. The evaluators were chosen by Mr. Schardt based on their experience in floating island and tussock shredding. If the experience of the evaluators was not important, then an

evaluation panel of accountants, or lawyers, or schoolteachers may have been chosen. However, it is clear that experience counts when conducting evaluations.

74. Moreover, Subsection 287.057(17)(a) requires that for a contract in excess of the threshold amount of Category Four ($150,000), which this contract has the potential to exceed, at least three persons appointed to evaluate proposals must have experience and knowledge in the program areas and service requirements for which the contractual services are sought. Clearly the law seeks a knowledgeable and experienced selection team which will produce evaluations in which the merits of competing proposals are fairly and competently considered.

75. Texas asserts that A&L's proposal was not responsive and that the failure to provide responses to many requirements is fatal to A&L's proposal. This assertion is incorrect. The failure to comply with certain requirements may cause the Department to refuse to consider a submission. For instance, the RPF states that submission of the response in a timely manner is a requirement and that if the submission is not timely, it will not be considered.

76. However, the RFP demands many responses to particular requirements, such as proposals related to the State Project Plan, yet does not make the failure to respond to them fatal. Despite the fact that the RFP seems to indicate that a response

to a particular requirement is mandatory, failing to respond to a mandatory requirement does not necessarily make the response not responsive, unless the RFP specifically says it is a fatal error. Moreover, Section 15 of Attachment A of the RFP provides that the Department may ". . . waive any minor irregularity, technicality, or omission if the Buyer determines that doing so will serve the State's best interest."

CONCLUSIONS OF LAW

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

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

79. The underlying findings of fact in this case are based on a preponderance of the evidence. See § 120.57(1)(l), Fla. Stat.

80. The standard of proof is whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. See § 120.57(3)(f), Fla. Stat.

Compliance with Section 287.057(2)(a)

81. An issue in this case is whether the Department complied with Subsection 287.057(2)(a), which clearly requires that an agency must determine in writing that the use of an invitation to bid is not practicable. In this case, the

Department did not determine in writing that the use of an invitation to bid was not practicable. Texas maintains this means the Department had no authority to issue an RFP leaving the matter in a posture requiring termination of the proceedings, and starting anew with an RFP issued in strict accordance with Subsection 287.057(2)(a).

82. The statutory scheme with regard to procurement, set forth in part in Section 287.057, recognizes that the different procurement processes require an ascending level of analysis and management involvement. The procurement of greater than CATEGORY TWO goods or services (where an amount of over of $25,000 or greater may be expended), must be done by process that provides vendors the opportunity to submit sealed bids. One of the methods of seeking sealed bids or responses is an ITB. No special analysis or writing is required for an ITB.

83. If an agency believes that an RFP is appropriate in procuring CATEGORY TWO, or higher, goods or services, then it must determine in writing that an invitation to bid is not practicable. If an agency decides it wants to issue an invitation to negotiate (ITN), it must do so in writing, must specify reasons, and must be approved in writing by the agency head or his or her designee prior to the advertisement. No remedy is provided in Chapter 287 if the agency fails to comply with that section.

84. Subsection 120.57(3)(b) provides in part that:

> 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.

85. While the above-quoted section does not specifically address the case where the agency fails to comply with the writing requirements set forth in Subsection 287.057(1)-(3), it is clear that the policy expressed by Subsection 120.57(3)(b) is that vendors must complain early if they are unhappy with the procurement method the agency chooses, or their right to complain will be waived.

86. As explained by Administrative Law Judge Cave, in Correctional Services Corporation v. Department of Juvenile Justice, Case Nos. 02-2966BID and 02-2967BID (DOAH October 29, 2002), adopted in toto in Case No. 02-0008 (Fla. Dept. of Juvenile Justice, November 16, 2002):

> The policy underlying this requirement and the waiver provision is obvious: If a would-be offeror takes issue with the State's proposed method of procurement, it should challenge that method at the

> inception, so that any legal or other element of the state's request can be remedied in a timely fashion, rather than at the end of the process. A late challenge to the method of procurement in which an offeror has participated without objection cannot affect the validity of the procurement process nor the ultimate award.

87. With regard to the decision to use the RFP in this case, the Department, as noted above, and as contemplated by Chapter 287, analyzed the Department's needs and made a rational, thoughtful decision to use the RFP method of procurement. It is now too late for Texas to complain.

Evaluation of the action taken by the agency

88. The de novo proceeding in this case was conducted to examine the Department's proposed action in order to determine whether that action is contrary to the agency's governing statutes, the agency's rules or policies, or the RFP document. 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).

89. The de novo proceeding conducted pursuant to Subsection 120.57(3)(f), 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.

90. A de novo proceeding in procurement cases means a proceeding in which evidence is received, factual disputes are settled, legal conclusions are made and prior agency action is reviewed for correctness. The Administrative Law Judge does not sit as a substitute for the Department in determining whether the right party prevailed in the proceeding. "Instead, the hearing officer sits in a review capacity and must determine whether the bid review criteria set . . . have been satisfied." Intercontinental Properties, Inc. v. State Department of Health and Rehab. Serv., 606 So. 2d 380, 386 (Fla. 1st DCA 1992).

91. The standard of proof used to make such a determination is, ". . . whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious." § 120.57(3)(f), Fla. Stat.

92. The definition of standard of proof for purposes of procurement actions is considered to be akin to a standard of review. R. N. Expertise, Inc. v. Miami-Dade County School Board, Case No. 01-2663BID (DOAH February 4, 2002), para. 76, adopted in toto in Miami-Dade County School Board Final Order filed March 14, 2002.

93. Petitioner, in order to prevail, must identify and prove, by the greater weight of the evidence, a specific instance or instances where the agency's conduct in taking its proposed action was either:

(a) contrary to the Department's statutes;

(b) contrary to the Department's rules or policies; or

(c) contrary to the proposal specifications.

It is not sufficient for Petitioner to prove merely that the agency violated the general standard of conduct. By virtue of the applicable standards of review, Petitioner must also establish that the Department's misstep was:

(a) clearly erroneous;

(b) contrary to competition; or

(c) arbitrary or capricious.

R. N. Expertise, para. 78.

94. A clearly erroneous standard is that generally applied in reviewing a lower tribunal's findings of fact. It means that though there may be some evidence to support the finding, the reviewer is nevertheless left with a firm conviction that a mistake has been made. R. N. Expertise, at para. 80.

95. Actions contrary to competition are those which create the appearance of and opportunity for favoritism; erode public confidence that contracts are awarded equitably and economically; cause the procurement process to be genuinely unfair or unreasonably exclusive; or, are unethical, dishonest, illegal, or fraudulent. R. N. Expertise, at paras. 101 and 102, and Section 287.001.

96. Actions that are arbitrary and capricious are limited to actions which are within the Department's discretion. It is now frequently observed that an arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). Thus, under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." Adam Smith Enterprises, Inc. v. State Department of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989)

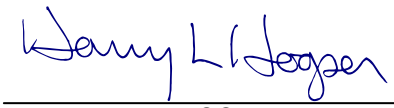
97. Applying the standard of proof used in procurement law, it is found that the actions of the Department were not contrary to the Department's statutes, or the Department's rules or policies, or to the proposal specifications.

RECOMMENDATION

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

RECOMMENDED that Texas Aquatic Harvesting, Inc.'s Petition be dismissed.

DONE AND ENTERED this 27th day of February, 2007, 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.