

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE VOLUNTEER WAY INC.,)
)
 Petitioner,)
)
 vs.) Case No. 07-1242BID
)
 DEPARTMENT OF AGRICULTURE AND)
 CONSUMER SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On April 9, 2007, a hearing was held via video teleconference with sites in Tallahassee and Tampa, Florida, pursuant to the authority provided in Section 120.569 and Subsection 120.57(1), Florida Statutes (2006).¹ The case was considered by R. Bruce McKibben, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Lester Cypher, pro se
The Volunteer Way, Inc.
7820 Congress Street
New Port Richey, Florida 34653

For Respondent: Stephen M. Donelan, Esquire
Department of Agriculture
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STATEMENT OF THE ISSUE

Whether the Department of Agriculture and Consumer Services' (the Department) decision to award the contract contemplated in RFP No. DM-06/07-30 is contrary to the Department's governing statutes, the Department's rules and policies or the proposal specifications.

PRELIMINARY STATEMENT

On February 5, 2007, the Department issued its notice of intent to award RFP No. DM-06/07-30 to Suncoast Harvest Food Bank, Inc. (Suncoast). On March 1, 2007, Petitioner filed a letter with the Department indicating its intent to challenge the award. On that same date, a Petition was filed with the Department formally challenging the award to Suncoast.

On March 15, 2007, the Department forwarded the Petition to the DOAH. At the final hearing, Joint Exhibits numbered 1 and 2 were admitted. Petitioner presented the testimony of one witness, Lester Cypher, it's chief executive officer. The Department presented one witness, Gloria Van Treese, chief of the Department's Bureau of Purchasing. Petitioner's Exhibits 1 and 2 were admitted into evidence.

A one-volume hearing Transcript was filed with the DOAH on April 20, 2007. Each party timely filed proposed findings of fact and conclusions of law. Both parties' Proposed Recommended

Orders have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The first ten findings of fact below were stipulated to by the parties.

1. RFP No. DM-06/07-30 was initially posted on October 30, 2006.

2. No notice of protest or formal written protest was filed with Respondent relative to the terms, conditions or specifications contained in the RFP within the time limits set forth in Subsection 120.57(3)(b), Florida Statutes.

3. Response awards were posted by the Department on February 5, 2007.

4. Two responses were received for the distribution of food in Pasco County under The Emergency Food Assistance Program (TEFAP); one from Petitioner and one from Suncoast.

5. Respondents to the RFP were awarded five points for providing proof of insurance for the value of TEFAP food in their food storage facilities at the time of their respective response submissions.

6. Petitioner's response was initially ranked higher than Suncoast's response.

7. Suncoast timely filed its Formal Written Protest on February 15, 2007, alleging that Petitioner was erroneously

awarded five (5) points for having proof of insurance for the value of TEFAP food in Petitioner's storage facility at the time of Petitioner's response submission.

8. Petitioner did not have insurance on the value of TEFAP food in Petitioner's storage facility at the time of its response submission.

9. Respondent deducted the previously awarded five points causing Petitioner's score to drop below that of Suncoast.

10. Petitioner has timely filed its Protest and bond or other security.

11. The RFP addressed a proposal under TEFAP for the receipt, storage, delivery, and distribution of USDA donated commodities for the program. The geographic area of the RFP relevant to this proceeding is Pasco County.

12. The Agency employed six evaluators to review various parts of the bids submitted.

13. At page 53 of its RFP response, Petitioner indicated that it does carry insurance for the value of TEFAP foods in its own storage facility. This statement was a mistake; Petitioner did not have TEFAP foods in a storage facility at the time of the bid. Rather, Petitioner meant to indicate that it would insure the foods during the term of the contract.

Terms of the RFP

14. The RFP is a 72-page document which includes 13 Attachments. The RFP contains terms and conditions, as well as definitions to be considered by all bidders.

15. At page 7, paragraph 34 of the RFP, the following language appears:

During the Contract term, the Contractor at its sole expense shall provide commercial insurance of such a type and with such terms and limits as may be reasonably associated with the Contract. Providing and maintaining adequate insurance is a material obligation of the Contractor. Upon request, the Contractor shall provide certificate of insurance. The limits of coverage under each policy maintained by the Contractor shall not be interpreted as limiting the Contractor's ability and obligations under the Contract. All insurance policies shall be through insurers authorized or eligible to write policies in Florida.

16. The "Contract term" is apparently not defined in the RFP, per se, but the following definition appears in the Special Terms, Conditions and Specifications at page 12:

Contract Period The anticipated contract period will be from October 1, 2007 through September 20, 2008.

17. Paragraph 13 at page 14 of the RFP states:

[Bidder must] [p]rovide insurance on the content of the organization's warehouse or storage facility. Insurance must be in sufficient amount equal to the maximum value of USDA commodities in storage at any one time at the organizations['] owned or contracted storage facility.

18. Paragraph 5 on page 17 addresses food storage. The relevant portions of that paragraph state:

b. Any locally negotiated warehouse contracts for storage must provide adequate insurance coverage equal to the maximum value of TEFAP food which would be stored at any one time by the commercial warehouse. Proof of insurance must be submitted to the Bureau annually with the TEFAP contract renewal.

* * *

d. Contractor must submit a copy of any locally negotiated warehouse contract to the Bureau within 60 days of the effective date of the contract.

19. Insurance coverage for commodities is addressed once again in the Special Provisions section beginning at page 22 of the RFP, which provides in pertinent part:

A. Responsibilities - The Contractor accepts full responsibility inclusive of its sub-distributing sites for compliance with all provisions of this contract, including liability for any TEFAP food lost through negligence, underutilization, etc. or for any reimbursement received for any fraudulently or inadequately documented costs. Contractor will insure the contents of the warehouse storing USDA commodities as well as the physical structure itself and provide proof of insurance to the Bureau annually with the contract renewal. Contractor shall comply with all applicable State and local fire safety, food storage/handling requirements and health codes.

* * *

J. Insurance - Storage facility: The contractor shall maintain insurance coverage

in an amount equal to the maximum value of TEFAP commodities which would be stored in its own warehouse or storage facility at any one time.

Insurance Coverage

20. In its response to the RFP, Petitioner understood the above provisions concerning insurance to contemplate coverage during the term of the contract. Its submitted responses were intended to show that it would obtain all necessary insurance coverage for the TEFAB foods during the term of the contract.

21. Section 5 of the RFP, beginning at page 52, addresses the applicant's storage and distribution capabilities. In its response, Petitioner identified a warehouse that it currently owns. At page 53, the RFP then asks whether the applicant carries insurance for the value of TEFAP foods in its storage facility. The question also asks the amount of coverage in existence and asks for proof of insurance.

22. In response to that question, Petitioner asserted the existence of coverage at the time of the response when in fact it had none. Petitioner did not intentionally falsify the response; rather, it believed at that time that insurance coverage was in place at its storage facility. Petitioner had previously managed TEFAP foods and had always maintained insurance as required. It believed the prior insurance policy was still in place. As it turned out, its insurance agency had

recently gone out of business, and Petitioner did not have the coverage it believed to exist. Nonetheless, its response to the RFP was in error.

23. Nothing in the RFP required a respondent to have insurance in place. A respondent was given additional credit if it had insurance, but no points were removed for not having existing insurance. The additional credit was based on the Department's belief that having insurance coverage in place was an indication of fiscal responsibility.

24. When the Department ascertained that Petitioner did not actually have current insurance coverage, it undertook a re-evaluation of the bids. Petitioner's initial scores were reduced five points by each reviewer. In the initial review Petitioner had outscored Suncoast 107.5 to 107.1 in the average score category. Upon re-evaluation, Suncoast's score remained unchanged but Petitioner's score dropped to 102.5, thus finishing second to Suncoast.

25. Petitioner had responded to the question at page 53 only in part. While it stated that insurance was in place, Petitioner did not fill in the amount of coverage. Rather, Petitioner attached a copy of the Declarations Page from its last known policy. It is difficult to ascertain how that was responsive to the question concerning insurance coverage.

CONCLUSIONS OF LAW

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

27. Petitioner has the burden to establish that the decision to award the contract to Suncoast must be invalidated. A de novo hearing was conducted to evaluate the action taken by the Department. See § 120.57(3)(f), Fla. Stat. "In this context, the phrase 'de novo hearing' is used to describe a form of intra-agency review." State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). The Administrative Law Judge may receive evidence, as with any hearing held pursuant to Subsection 120.57(1), Florida Statutes, but the purpose of the proceeding is to evaluate the action taken by the agency based on the information available to the agency at the time it took the action. Id.

28. Agencies enjoy wide discretion when it comes to soliciting and accepting proposals, and, an agency's decision, when based upon an honest exercise of such discretion, will not be set aside even where it may appear erroneous or if reasonable persons may disagree. Baxter's Asphalt and Concrete, Inc. v. Department of Transportation, 475 So. 2d 1284, 1287 (Fla. 1st

DCA 1985); Capeletti Brothers, Inc. v. State, Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983).

Subsection 120.57(3)(f), Florida Statutes, establishes the standard of proof as to whether the proposed action was clearly erroneous, contrary to competition, arbitrary or capricious.

29. A decision is considered to be clearly erroneous when although there is evidence to support it, after review of the entire record, the tribunal is left with the definite and firm conviction that a mistake has been committed. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). An agency action is capricious if the agency takes the action without thought or reason or irrationally. Agency action is arbitrary if it is not supported by facts or logic. See Agrico Chemical Co. v. State Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

30. To the extent that Petitioner is challenging the policies of Respondent, and the procedures for evaluating the proposals, Petitioner's argument must fail. In order to challenge the adequacy of the selection procedures, Petitioner must have filed a challenge to the RFP specifications. Having failed to do so, it cannot challenge the adequacy of those procedures in this proceeding. Capeletti Brothers, Inc. v. Department of Transportation, 499 So. 2d 855 (Fla. 1st DCA 1986).

31. Much of Petitioner's challenge is not, in reality, a challenge to the actions of the agency in evaluating the proposals. It is a challenge to the construction of the RFP itself, and whether the insurance requirement contemplates purchasing insurance prior to the term of the contract.

32. Petitioner takes issue with the Department's awarding of points for some bidders who already own or lease storage facilities while denying points to bidders who choose to acquire the facilities only upon approval. There is no requirement in the RFP that insurance has to already exist. Rather, the plain language of the RFP is that insurance is required during the term of the contract. However, Respondent elucidated a valid rationale for awarding points to applicants with insurance already in place: Those applicants indicate a level of fiscal responsibility deemed preferable to Respondent.

33. Respondent's reduction of Petitioner's score due to lack of insurance is reasonable and consistent with the RFP. The Department's decision is not contrary to its governing statutes, rules or policies.

RECOMMENDATION

Upon consideration of the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered dismissing Petitioner's Formal Written Protest.

DONE AND ENTERED this 8th day of May, 2007, in Tallahassee,
Leon County, Florida.

S

R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of May, 2007.

ENDNOTE

1/ All references to Florida Statutes are to Florida Statutes
(2006), unless otherwise indicated.

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.