

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EXPERTECH NETWORK INSTALLATION,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 07-4365BID
)
CITY OF CAPE CORAL,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on October 10, 2007, in Cape Coral, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: William S. Isenberg, Esquire
William S. Isenberg and Associates, P.A.
2005 South Federal Highway, Suite 100
Fort Lauderdale, Florida 33316

For Respondent: Mark Edward Lupe, Esquire
Marilyn W. Miller, Esquire
City of Cape Coral
Post Office Box 150027
Cape Coral, Florida 33915

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent's decision to reject the galvanized pipe replacement bid of Petitioner as non-

responsive was erroneous, an abuse of discretion, arbitrary or capricious.

PRELIMINARY STATEMENT

Respondent, the City of Cape Coral (the "City"), issued an Invitation to Bid concerning replacement of galvanized pipe. Petitioner was one of the companies responding to the Invitation to Bid. The City rejected Petitioner's bid as unresponsive and awarded the contract to Guymann Construction of Florida, Inc. (Guymann). Guymann did not file any pleadings or other materials in this case and did not make an appearance at final hearing. Upon entry of the Notice of Intent to Award by the City, Petitioner filed a Protest of Intended Bid Award. The matter was forwarded to the DOAH pursuant to the City's Administrative Law Judge Services Contract.

Pursuant to City Ordinance 68-07, a final hearing was scheduled by stipulation of the parties on October 10, 2007 (even though that date was more than 15 days after receipt of the protest at DOAH). At final hearing both parties were represented by counsel. Petitioner called four witnesses at the final hearing: John Wood, director of U.S. Operations for Petitioner; Michael Heitzler, senior project manager for Petitioner; David Marinelli, vice president of U.S. Operations for Petitioner; and Justin Fredericksen, project manager for TetraTech. Petitioner's Exhibits A through K were admitted into

evidence. Respondent called three witnesses: Justin Fredericksen; David Vallandingham, assistant superintendent for Public Works with the City; and George Reilly, utilities manager for the City. Respondent's Exhibits 1 through 13 were admitted into evidence by stipulation.

A Transcript of the final hearing was filed with DOAH on October 23, 2007. The parties were given until October 26, 2007, to file proposed findings of fact, conclusions of law, and written closing statements. Petitioner asked and was granted three additional days to submit its proposed recommended order. Each party timely filed a Proposed Recommended Order, and each was duly-considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Expertech Network Installation, Inc., is a division of Bell Canada. Petitioner is a construction and engineering division of the parent company. It was set up to expand the parent's operations into the United States about nine years ago. Petitioner has steadily replaced its Canadian employees with U.S. employees over those years.

2. The City is a governmental entity established under the laws of the State of Florida. By contract with the DOAH, the City has agreed to utilize Administrative Law Judges to hear, inter alia, bid protests involving the City.

3. On May 7, 2007, the City issued Invitation to Bid No. ITB-PW060607-88. The Invitation to Bid sought bids for replacement of approximately 38,000 linear feet of two-inch galvanized pipe and associated appurtenances with 38,000 feet of four and six-inch DR18 PVC piping and associated appurtenances. The replacement would include approximately 385 service connections with Sch-80 PVC piping, all within the area known as Section 4 of the City. In addition, the scope of work included relocation of approximately 460 linear feet of eight-inch PVC water main pipe and associated appurtenances with 600 linear feet of eight-inch DR18 PVC piping and appurtenances along State Road 78.

4. A total specification package and complete set of drawings for the aforementioned work was prepared by the City's consulting engineer, TetraTech-HAI (hereinafter "Ttech"). The specifications and drawings by Ttech were made a part of the Invitation to Bid.

5. A pre-bid conference was held on May 16, 2007. At that conference, several issues were discussed, resulting in issuance of an Addendum to the Invitation to Bid. The Addendum was issued the same day as the conference and included the following paragraph:

Will the City allow directional drilling on the galvanized pipe replacement project?
No. All references to directional drilling on the galvanized pipe replacement project

are to be modified to jack & bore. All water main piping proposed to cross driveways shall be installed via jack & bore or open cut methods. Water main piping proposed to cross roadways, including long side services, shall be installed by jack & bore methods. Directional drilling is acceptable for the roadway crossings on the SR 78 Water Main Replacement portions only. Please see the enclosed revised Measurement and Payment section of the specifications (01025) and revised bid schedule. (Emphasis in original document.)

6. The Addendum also extended the due dates for bids by one week, to June 13, 2007. No protest was filed with the City with respect to the terms, conditions or specifications contained in the Invitation to Bid and the Addendum. On Wednesday, June 13, 2007, the City opened the bids.

7. Petitioner's bid was the low bid for the project. Its bid included a price of \$1,816,224, as compared to the second lowest bidder, Guymann (whose bid came in at \$1,987,561).¹ The bids were then reviewed by Ttech for conformity to the Invitation to Bid.

8. On July 31, 2007, Ttech notified the City that it was recommending approval of the Guymann bid despite Petitioner being the low bidder. The justification for that recommendation was as follows:

The lowest apparent bidder on the project was Expertech Network Installation, Inc. (Expertech) with a total bid of \$1,816,224.00. [Ttech] reviewed Expertech's bid package and found that the required list of at least five completed projects of the

type as the Galvanized Water Main Replacement project was not included in the package. [Ttech] contacted Expertech concerning the incomplete bid package and requested that Expertech provided the required list of at least five projects completed by Expertech of similar type as the Galvanized Water Main Replacement project. The list provided by Expertech did not include any completed projects of the type as the Galvanized Water Main Replacement.

9. On August 7, 2007, the City issued its Notice of Intent to Award, stating that the procurement division of the City would recommend award of the bid to Guymann as the most responsive, responsible bidder meeting the terms, conditions, and specifications set forth in the Invitation to Bid.

10. Petitioner timely filed a Notice of Intent to Protest; its Formal Written Protest was timely filed on August 24, 2007, along with the required bond.

11. There are three methods of drilling utilized for laying pipe in the ground: directional drilling, open cut drilling, and jack & bore drilling. A brief discussion of each is necessary in order to understand the dispute in this matter. Directional drilling is done utilizing a machine that is guided underground using steel rods. A person above ground with a sounding device directs the steel rods from one point to another. Directional boring is used when trenching or excavating is not practical. Directional boring minimizes environmental disruption. Jack & bore drilling (or auger

drilling) is similar to directional drilling in that it has an entrance pit, and then the pipe is manually jacked along the desired path while simultaneously excavating the soil. It is often used in projects that have to go under existing roads or driveways. Open cut drilling is the old, traditional method of digging a trench in the ground and laying the pipe in the open cut.

12. The Invitation to Bid, at page 10 of 53, included a request for each bidder to provide evidence of its experience with similar projects. Paragraph 5 asked for a list "of the last five projects of this type your organization has completed."² Paragraph 6 asked for a list "of projects of this type that your organization is currently engaged in." The lists of projects were to be completed as set forth in a table attached to the Invitation to Bid. The table is recreated below:

PROJECT TITLE & LOCATION	YOUR CONTRACT AMOUNT	CONTRACTOR OR SUB	REQUIRED COMPLETION DATE	ACTUAL COMPLETION DATE	NAME, ADDRESS & PHONE #

13. In its Bid, Petitioner provided a document entitled "Bidders Qualifications" in response to paragraph 5. The document was not on the table provided and was not entirely responsive to the information requested (i.e., it did not indicate whether Petitioner was contractor or subcontractor; there were no completion dates, and there were no contact persons). Nonetheless, the list contained eight completed projects. Those projects included two water main projects; the other six completed projects were telecommunication projects. While both types of projects would include drilling, there are distinct differences between the two. For example, water and wastewater projects require pressure testing, bacterial testing, and permitting that telecommunication projects do not. Petitioner's list also included projects that involved directional drilling. Since directional drilling was specifically prohibited in the galvanized pipe replacement project, those projects would not be deemed substantially similar in type.³

14. During the initial review of the bids, Ttech had specifically asked Petitioner to provide the required list of five completed projects of a similar type. In response, Petitioner submitted a list of four projects, which were listed as "Currently in Progress." Again, the projects were submitted on a form other than the table provided in the Invitation to

Bid. When Ttech followed up with the project contacts, it found that there had been no open cut drilling on two of them; the other two had not yet begun. However, by the date of final hearing the projects were substantially complete.

15. After Petitioner had submitted its list of projects, a meeting was called at the City. Petitioner was represented at the meeting along with City personnel and a representative from Ttech. Notes from that meeting, though inconclusive, seem to indicate that the requirement for five completed jobs of a similar nature was discussed. It is unclear whether Petitioner's representative was still at the meeting when this was discussed. However, it does not appear that anyone from the City or Ttech sent Petitioner a written request to provide evidence of additional work performed. Nor is there any evidence that the City or Ttech had an obligation to do so. At any rate, Petitioner did not submit any evidence of similar projects other than those discussed above.

16. There were notes made by attendees of the meeting. None of the notes submitted into evidence was conclusive as to all issues that were discussed at that time. However, in notes relating to a telephone conversation five days later, Ttech's representative noted discussing with Petitioner the need to provide evidence of five similar projects, which means that at

the time of the June 9, 2007, meeting, Ttech was still attempting to get the required list of projects from Petitioner.

17. The projects submitted by Petitioner include directional drill excavation projects, which involved at least some open cuts (i.e., to make tie-ins at each end of the directional drill section). None of those projects was substantially similar in type to the proposed project, but did include some open cut work.

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over this matter pursuant to a contract with the City and in accordance with City Ordinance No. 68-07.

19. Cape Coral City Ordinance No. 68-07 sets forth the procedures for bidding on projects involving the City. Included in the rules for the bid selection process is a mandate that the City evaluate "[T]he professional qualifications, related experience and adequacy of the personnel assigned to the project" and also "[T]he prior experience and references of the proposer." § 2-144(i)(4)(b), Ordinance 68-07. The failure of Petitioner to submit a list of five completed projects related to galvanized pipe replacement made it impossible for the City to properly evaluate Petitioner's experience and professional qualifications.

20. The burden of proof in this case would be on Petitioner, as it attempts to prove that its bid satisfied all the requirements of the invitation to bid. Petitioner must establish by competent substantial evidence that it complied with the requirements in the Invitation to Bid, i.e., that Petitioner's bid included the required lists of pending and approved projects of the same kind. See, e.g., Asphalt Pavers, Inc. v State of Florida, Department of Transportation, 602 So. 2d 558 (Fla. 1st DCA 1992).

21. A bid challenge proceeding is de novo in nature, but de novo in the form of an intra-agency review to evaluate the action taken by the [municipality] at the time it took the action. State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998). The Administrative Law Judge in such cases does not sit as a substitute for the municipality in determining whether the right party prevailed in the proceeding. "Instead, the [ALJ] sits in a review capacity, and must determine whether the bid review criteria . . . have been satisfied." Intercontinental Properties, Inc. v. State Department of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 3rd DCA 1992).

22. In order for Petitioner herein to prevail, it must prove by a preponderance of the evidence that the City's

decision to reject Petitioner's bid was clearly erroneous, contrary to competition or arbitrary and capricious. See Miami-Dade County School Board v. Ruiz School Bus Service, Inc., 874 So. 2d 59 (Fla. 3rd DCA 2004), wherein the court discussed material deviations from bid specifications. An omission or deviation would be considered minor if it does not give the owner of the project "any reason to doubt the bidder's ability to fulfill their contracts." Id. at 60. Inasmuch as the City's rejection of Petitioner's bid was based on the fact that Petitioner failed to provide substantive information concerning its experience, the omission of five similar projects could not be deemed minor. Petitioner has not met its burden to prove that Respondent's actions were erroneous, contrary to competition, arbitrary or capricious.

23. The City's action concerning Petitioner's bid was based on logic and reason. If it could not ascertain Petitioner's experience, the City could not comfortably award a contract to that entity.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the City of Cape Coral upholding its rejection of Petitioner's bid for the galvanized pipe replacement project.

DONE AND ENTERED this 9th day of November, 2007, in
Tallahassee, Leon County, Florida.

S

R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of November, 2007.

ENDNOTES

^{1/} There were eight other bids submitted, but none of the other bidders protested the award; thus, their bids are not relevant to this discussion.

^{2/} "Type" is defined in The American Heritage Dictionary of the English Language as "A group of persons or things sharing common traits or characteristics that distinguish them as an identifiable group or class; a kind of category." As no other definition of "type" was presented at final hearing, this definition will be used for purposes of this case. No substantive distinction exists between "same type" as opposed to "'similar type'" or any other type.

^{3/} The addendum to the Invitation to Bid did allow for some minor directional drilling, but the vast majority of the project involved the other methods of drilling.

^{4/} Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2007 version.

COPIES FURNISHED:

William S. Isenberg, Esquire
William S. Isenberg and Associates, P.A.
2005 South Federal Highway, Suite 100
Fort Lauderdale, Florida 33316

Mark Edward Lupe, Esquire
Marilyn W. Miller, Esquire
City of Cape Coral
Post Office Box 150027
Cape Coral, Florida 33915

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.