

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

INFRASTRUCTURE CORPORATION OF)
AMERICA,)
)
Petitioner,)
)
vs.) Case No. 07-4410BID
)
DEPARTMENT OF TRANSPORTATION,)
)
Respondent,)
)
and)
)
DEANGELO BROTHERS, INC., d/b/a)
DBI SERVICES CORPORATION,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on October 30, 2007, in Tallahassee, Florida.

APPEARANCES

For Petitioner: W. Robert Vezina, III, Esquire
Eduardo S. Lombard, Esquire
Vezina, Lawrence & Piscitelli, P.A.
413 East Park Avenue
Tallahassee, Florida 32301

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

For Intervenor: Cynthia S. Tunnickliff, Esquire
Brian A. Newman, Esquire
Pennington, Moore, Wilkinson, Bell &
Dunbar, P.A.
215 South Monroe Street, Second Floor
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether the proposed award of Contract No. E1G23 to DeAngelo Brothers, Inc. d/b/a DBI Services Corporation (DBI) is contrary to the Department of Transportation's governing statutes, rules, policies, or the specifications in the Request for Proposals (RFP).

PRELIMINARY STATEMENT

On September 4, 2007, Infrastructure Corporation of America, Inc. (ICA), timely filed a Formal Protest Petition with the Department of Transportation (Department) challenging the Department's proposed award of Contract No. E1G23 to DBI. On September 24, 2007, the Department referred the petition to the Division of Administrative Hearings (DOAH) for a formal hearing pursuant to Section 120.57(3), Florida Statutes.¹ DBI was granted leave to intervene through an Order entered on September 27, 2007.

At the final hearing, ICA presented the testimony of David Rader and the deposition testimony of Jennifer Perry and Amy Burlarley-Hyland; DBI presented the testimony of Ms. Perry and Ms. Burlarley-Hyland; and the Department did not present any

witnesses. The following exhibits were received into evidence at the hearing: Joint Exhibits (Jt. Ex.) 1a, 2 through 21, 24, 25, and 33 through 38²; Petitioner's Exhibits 1 and 2; and Intervenor's Exhibits 1 and 2.

The two-volume Transcript of the final hearing was filed on November 13, 2007. The parties requested and were given 21 days from that date to file proposed recommended orders (PROs), and thereby waived the deadline for this Recommended Order. See Fla. Admin. Code R. 28-106.216(2). The PROs were timely filed and have been given due consideration.

FINDINGS OF FACT

1. On June 18, 2007, the Department issued RFP No. E1G23, which solicited proposals for "ultra asset maintenance" for Interstate 75 (I-75) and interchanges in Broward, Collier, Lee, Charlotte, Manatee, Desoto, and Sarasota Counties.

2. The Department issued three addenda to the RFP. The addenda did not make any material changes that are pertinent to the issues in this proceeding.

3. The Scope of Services for the RFP stated that for all roadways and facilities covered by the contract, the contractor will be responsible for performing all of the maintenance activities that would otherwise have been performed by the Department, including but not limited to, mowing the right-of-way, maintaining guardrails, fixing potholes, maintaining

stormwater management facilities, cleaning and maintaining rest areas, tree trimming, and incident response and management.

4. In the asset management industry, this type of contract is known as a comprehensive asset management contract because the contractor is responsible for all maintenance activities within the right-of-way "from fence to fence, including the fence."

5. The RFP states that the contract will be awarded to the responsive and responsible vendor whose proposal receives the highest total score, which is composed of a price score and a technical score. The price score is weighted 30 percent, and the technical score is weighted 70 percent.

6. The vendor proposing the lowest price received the full 30 points for the price score. The other vendors' price scores were calculated through a mathematical formula based upon the percentage that the vendor's price exceeded the lowest price.

7. The technical score was based upon a subjective evaluation of the proposals in four broad categories: administration plan (weighted 20 points); management and technical plan (weighted 30 points); operation plan (weighted 30 points); and compliance plan (weighted 20 points). There are sub-categories in each of those categories, with a specific number of points assigned to each sub-category.

8. Five evaluators independently reviewed the proposals. The evaluators -- Jennifer Perry, Howard Summers, David Holden, Lance Grace, and Robert Mannix -- were Department employees selected based upon their familiarity with the areas and services covered by the contract.

9. All of the evaluators attended the pre-bid conference, which was mandatory for prospective bidders. No questions or concerns were raised at the pre-bid conference or at any point prior to submittal of the proposals regarding the evaluators having experience with the prior I-75 contract or having been involved in the preparation of the RFP.

10. Three companies -- ICA, DBI, and VMS, Inc. (VMS) -- submitted responses to the RFP.

11. ICA is a Tennessee corporation. DBI is a Pennsylvania corporation. Both companies provide asset management services in Florida and around the country, but ICA has more experience than DBI in providing comprehensive asset management services.

12. The price offered by ICA -- \$89,200,300.01 -- was the lowest of the three vendors that responded to the RFP; the price offered by DBI -- \$92,630,739 -- was approximately 3.8 percent higher. As a result, ICA received a price score of 30 and DBI received a price score of 28.89.

13. Three of the five evaluators -- Ms. Perry, Mr. Summers, and Mr. Golden -- scored DBI's proposal the highest.

Two of the evaluators -- Mr. Grace and Mr. Mannix -- scored ICA's proposal higher than DBI's proposal, but they scored VMS's proposal the highest. None of the evaluators scored ICA's proposal the highest.

14. DBI's proposal received an average score of 85.40 from the evaluators, and ICA's proposal received an average score of 82.96. As result, DBI received a technical score of 59.78, and ICA received a technical score of 58.07.

15. When the price scores and the technical scores were combined, DBI received the highest total score of 88.67. ICA was the second-ranked vendor with a total score of 88.07. VMS was the third-ranked vendor with a total score of 86.12.³

16. On August 21, 2007, the Department posted notice of its intent to award the contract to DBI.

17. The initial posting erroneously identified the winning vendor as "DeAngelo Brothers, Inc. T/A Aguagenix, Inc." rather than DBI. The contract administrator, Cheryl Sanchious, explained that this was a clerical error caused by the Department's computer system and that it has been corrected in the system.

18. ICA timely filed a notice of protest and a formal written protest challenging the award to DBI. ICA posted a cashier's check in the statutorily required amount in lieu of a protest bond.

19. After the protest was filed, the Department entered into temporary emergency asset management contracts for the roadways and facilities covered by contract at issue in this case. ICA was given the contract for Broward and Collier Counties because it was already providing asset management in those counties under the predecessor to the contract at issue in this case, No. BC680. DBI was given the contract for the other counties, Sarasota, Lee, Manatee, Charlotte, and Desoto.

20. It is undisputed that ICA's proposal was responsive to the RFP in all material respects.

21. The focus of ICA's protest is four-fold. First, ICA contends that DBI's proposal is not responsive because it did not affirmatively state that it would grant a first right of refusal to RESPECT of Florida (RESPECT). Second ICA contends that DBI is not a "responsible vendor" and that the Department confused the concepts of "responsiveness" and "responsibility" in its review of the proposals. Third, ICA contends that the evaluation committee failed to prepare a technical summary as required by the RFP, and that its failure to do so was material because it would have brought to light the discrepancies in Ms. Perry's scoring. Fourth, ICA contends that Ms. Perry's scoring was flawed and out of sync with the other evaluators in several respects. Each issue is discussed in turn.

(1) Responsiveness / RESPECT First Right of Refusal

22. Section 8.2 of the RFP provides that "[a] responsive proposal shall perform the scope of services called for in this Proposal Requirements [sic] and receive a Technical Proposal score of at least seventy (70) percent of the maximum attainable points established for scoring the Technical Proposal."

23. Section 17.1 of the RFP provides that "[d]uring the process of evaluation, the District Contracts Office will conduct examinations of Proposals for responsiveness to requirements of the Proposal Solicitation. Those determined to be non-responsive will be automatically rejected."

24. Section 16.5 of the RFP requires the proposal to "[u]se only statements of what the Proposer will or will not accomplish" rather than "words such as may, might, should, etc."

25. Section 8.5 of the RFP authorizes the Department to "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." That section defines "minor irregularities" 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."

26. The Scope of Services for the RFP requires the contractor to "grant 'Respect of Florida' a first right of refusal" to provide maintenance services at rest areas. This was intended by the Department to be a mandatory requirement of the RFP, and was understood as such by ICA and DBI.

27. RESPECT is a not-for-profit organization that employs disabled and disadvantaged individuals. RESPECT employees perform janitorial and grounds maintenance functions at rest areas, including one of the rest areas covered by the RFP.

28. ICA's proposal expressly states that "ICA will grant Respect of Florida first right of refusal on rest area janitorial work consistent with statewide maintenance practices."

29. DBI's proposal does not include an affirmative statement that it will grant RESPECT a first right of refusal. However, DBI stated in its proposal that it "is currently in negotiation with [RESPECT] to expand their existing maintenance responsibilities for rest areas within the project limits" and that "DBI Services believes that expanding [RESPECT's] responsibilities in the project is the right thing to do."

30. The absence of an affirmative statement in DBI's proposal that it will grant RESPECT a first right of refusal was not material to the evaluators. For example, evaluator Robert Mannix testified that he "generally looked for more of the

intent to give [RESPECT] the opportunity of making a bid rather than the specific language of right of first refusal.”⁴

Similarly Ms. Perry testified that she considered granting RESPECT a first right of refusal to be a requirement of the contract whether or not the contractor mentioned it in its proposal.

31. Amy Burlarley-Hyland, director of asset management for DBI, testified that DBI intends to provide a first right of refusal to RESPECT and that, consistent with the statement in DBI’s proposal, DBI is “committed to expanding Respect’s responsibilities on this project.” She explained that she did not include an affirmative statement to that effect in the proposal because it is “a known requirement” that will be part of the contract by virtue of it being in the RFP.

32. Mr. Rader, ICA’s executive vice president, testified that it is more costly to contract with RESPECT to provide maintenance services than to contract with another entity to provide those services. Ms. Hyland disagreed with that testimony, as did Ms. Perry.

33. No documentation was provided to support Mr. Rader’s claim that it is more expensive to contract with RESPECT, and the evidence was not persuasive that DBI received a competitive advantage by not affirmatively stating in its proposal that it will grant a first right of refusal to RESPECT.

34. The RFP does not require the vendor to expressly acknowledge and affirmatively agree to meet each and every mandatory requirement in the RFP. Indeed, if this were the test for responsiveness, ICA's proposal would be nonresponsive because it failed to expressly acknowledge and affirmatively agree to meet a number of the mandatory requirements in the RFP.

35. DBI's proposal complies with the intent of the RFP in regards to RESPECT. Its failure to specifically state that it will grant RESPECT a first right of refusal is, at most, a minor irregularity.

(2) Failure to Determine DBI's Responsibility

36. Responsiveness and responsibility are separate, but related concepts in the competitive procurement context.

37. Section 287.012(24), Florida Statutes, defines "responsible vendor" to mean "a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance."

38. Section 287.012(26), Florida Statutes, defines "responsive vendor" to mean "a vendor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation."

39. In order to bid on certain Department contracts, a vendor has to be pre-qualified under Florida Administrative Code

Rule Chapter 14-22. Pre-qualification serves as an advance determination of the vendor's responsibility.

40. Pre-qualification is generally not required in order to bid on maintenance contracts; bidders are presumed qualified to bid on such contracts. However, as noted in the Bid Solicitation Notice for the RFP, "certain maintenance contracts will contain specific requirements for maintenance contractor eligibility" if deemed necessary by the Department. This is such a maintenance contract.

41. Section 7.1 of the RFP required the Department to determine whether the proposer is "qualified to perform the services being contracted." That determination was to be made "based upon the[] Proposal Package demonstrating satisfactory experience and capability in the work area." The RFP did not specify when or by whom this determination was to be made.

42. The Department and DBI contend that the determination required by Section 7.1 is essentially a determination of whether the bidder is responsible, and that the determination is to be made by the evaluators during their scoring of the proposals. In support of that contention, the Department and DBI refer to Section 17.1 of the RFP, which provides that "[p]roposing firms must receive an average technical proposal score of at least (70) percent of the maximum attainable points established for scoring the Technical Proposal to be considered

responsive." Similar language is included in Section 8.2 of the RFP under the heading "Responsiveness of Proposals."

43. The interpretation of the RFP advocated by the Department and DBI is reasonable, and DBI's proposal received an average score from the evaluators of 85.40, which exceeds the 70 percent threshold in Section 17.1 of the RFP. Indeed, each of the evaluators gave DBI more than 70 points for its technical proposal.

44. The preponderance of the evidence presented at the final hearing supports the Department's implicit determination that DBI is "qualified to perform the services being contracted," as required by Section 7.1 of the RFP.

45. DBI has a 29-year history. It employs approximately 700 employees in 34 offices nationwide; it is the largest vegetation management company in the world; and it is ranked in the top five nationally in Pavement Maintenance Magazine.

46. Even though DBI has less experience in comprehensive asset management contracts than does ICA, DBI has extensive experience in managing comprehensive activities under large contracts. DBI has managed over \$400 million in performance-based contracts nationwide, including a \$9 million comprehensive asset management contract with the Department in District 4 (US 27/Belle Glade area), and DBI's director of asset management has extensive experience in highway and facility asset management in

the private sector with DBI and VMS and in the public sector with the New York Department of Transportation.

47. In sum, a determination that DBI is a responsible bidder was inherent in the Department's decision to award the contract to DBI, which was based in large part on the technical score of its proposal by the evaluators, and the evidence presented in this de novo proceeding supports that determination. Therefore, even if, as ICA argues, the Department and DBI are improperly construing the word "responsive" in Section 17.1 of the RFP to mean "responsible," ICA failed to prove that such error is material to the outcome of this proceeding.

(3) Failure to Prepare Technical Summary

48. Section 17.1 of the RFP describes the evaluation process as follows:

A Technical Evaluation Committee . . . will be established to review and evaluate each Proposal Package submitted in response to this Proposal Solicitation. The Committee will be comprised of at least five persons with background, experience, and/or professional credentials in relative service areas.

The District Contracts Office will distribute to each member of the Committee a copy of each technical proposal. The Committee members will independently evaluate the Proposals on the criteria in the section below entitled "Criteria for Evaluation" in order to ensure that the Proposals are uniformly rated. The

Committee will then assign points, utilizing the technical evaluation criteria identified herein and complete a technical summary. . . . (Emphasis supplied).

The District Contracts Office and/or the Project Manager/Technical Evaluation Committee will review and evaluate the price packages and prepare a summary of its price evaluation. Points will be assigned based on price evaluation criteria identified herein.

During the process of the evaluation, the District Contracts Office will conduct examinations of Proposals for responsiveness to requirements of the Proposal Solicitation. Those determined to be non-responsive will be rejected.

49. ICA contends that the evaluation committee failed to prepare a "technical summary," which would have brought to light the scoring issues discussed below concerning Ms. Perry.

50. The RFP does not define "technical summary" nor does it specify the form that the summary must take.

51. The RFP does not specify how the evaluation committee as a whole would assign points to the proposals in light of the independent scoring mandated by Section 17.1 of the RFP.

52. The evaluators did not assign points to the proposals as a committee, but rather independently scored the proposals.

53. The evaluators did not meet as a committee to prepare a "technical summary." Several of the evaluators testified that they considered the evaluation form that they completed for each proposal to be their "technical summary" for the proposal

because the form included the scores assigned in each technical review category and summary comments about the proposal.

54. The evaluators did not collectively discuss their scoring of the proposals after they completed their independent evaluations; they simply submitted their completed evaluation forms to Ms. Sanchious.

55. Ms. Sanchious' office prepared a spreadsheet summarizing the evaluators' technical scoring of the proposals. The spreadsheet -- Joint Exhibit 33, titled "Proposal Evaluation/Breakdown Sheet" -- lists the scores awarded by each evaluator in each technical review category; calculates the total points awarded by each evaluator for each proposal; and calculates an "overall score" for each proposal by averaging the five evaluators' scores for each proposal.

56. This spreadsheet is more akin to a "technical summary" than is Joint Exhibit 21, which DBI and the Department contend is the "technical summary." Indeed, Joint Exhibit 21 only includes the "overall score" and not the underlying data that was used to calculate that score.

57. It was not unreasonable for the Department to calculate an "overall score" for each proposal by simply averaging the five evaluators' scores for each proposal, and ICA failed to prove that the averaging being done by Ms. Sanchious' office (instead of the evaluation committee) was a material

deviation from the RFP. Indeed, ICA's contention that discussion amongst the evaluation committee members to prepare the "technical summary" would have changed Ms. Perry's scoring of ICA's or DBI's proposal is speculative, at best, in light of the findings below.

58. In sum, the evaluation committee's failure to prepare a "technical summary" as required by Section 17.1 of the RFP does not undermine the proposed award to DBI.

(4) Scoring by Jennifer Perry

59. Ms. Perry was one of the five evaluators who reviewed the technical proposals submitted in response to the RFP.

60. Ms. Perry is a licensed professional engineer. She has 10 years of work experience with the Department, and she currently serves as the assistant maintenance engineer for District 1. In that capacity, she is responsible for all forms of maintenance contracting in District 1, including routine maintenance and asset maintenance.

61. Ms. Perry served for a time as the project manager for the existing asset management contract for I-75, which was held by ICA. As a result, she had the occasion to work with ICA employees and become familiar with ICA's performance under that contract.

62. There is no evidence that Ms. Perry is biased against ICA in any way. Indeed, she credibly testified that she had a

good working relationship with ICA; that she had no major issues with ICA's performance under the existing contract; and that she would have had no hesitation recommending that the contract be awarded to ICA if its proposal had received the highest score.

63. Ms. Perry was heavily involved in the preparation of the RFP as a result of her position as assistant maintenance engineer for District 1. She was also involved in the selection of the evaluators.

64. There is no Department rule or policy that prohibits a person from serving as an evaluator if he or she was involved in the preparation of the RFP.

65. Likewise, the fact that Ms. Perry served as the project manager for the asset management contract held by ICA does not preclude her from serving as an evaluator. Indeed, Section 17.1 of the RFP specifically contemplates that the evaluators will have "background, experience, and/or professional credentials in relative service areas." Similar language is contained in Section 287.057(17)(a), Florida Statutes.

66. Ms. Perry spent between 10½ and 11 hours reviewing and scoring the proposals. She made detailed notes while she was scoring in order to capture her general impressions of each proposal and to serve as a reminder of issues to address with the vendor who was ultimately awarded the contract.

67. Ms. Perry gave ICA's proposal a score of 74. She gave DBI's proposal a score of 86.

68. Ms. Perry double-checked her scores before submitting her completed score sheets. She specifically went back over her scoring of ICA's proposal after she noticed that she scored ICA lower than DBI and VMS because she thought she may have added wrong or overlooked something. She decided not to make changes to give ICA additional points just because she liked working with ICA.

69. The main difference in Ms. Perry's scoring of DBI's and ICA's proposals relates to Plan for Compliance with Standards (Plan for Compliance) section. She gave ICA 10 points for that section, and she gave DBI 20 points, which is the maximum available for that section. Each of the other evaluators gave ICA and DBI very similar scores in the Plan for Compliance section.

70. The Plan for Compliance section describes the programs that the proposer intends to implement to ensure compliance with the applicable statutes, rules and Department policies. A proposer's quality assurance/quality control (QA/QC) program is an important component of its plan for compliance.

71. DBI gave the Plan for Compliance section significant emphasis because of the weight assigned to the section in the RFP. Ms. Burlarly-Hyland rewrote the section to make it more

detailed because of her perception of its importance to the Department.

72. ICA did not place as significant of an emphasis on the Plan for Compliance section in its proposal as did DBI. Indeed, ICA's position in this case is that "a plan for compliance is quite standard and one would expect to see very similar plans and therefore very similar scores among the proposals."

73. DBI references its QA/QC program several times in the Plan for Compliance section, but the detailed description of the QA/QC program is included in the Management and Technical Plan section of DBI's proposal.

74. Ms. Perry relied on the description of the QA/QC program in the Management and Technical Plan section of DBI's proposal in her scoring of the Plan for Compliance section. Similarly, in her scoring of the ICA and VMS proposals Ms. Perry did not limit her scoring of a particular section of the proposal to information presented in that section. Instead, she looked at the proposals in their entirety and "gave them credit . . . in any section that [she] felt it applied to because . . . [i]f they have a good idea, they need credit for it."

75. Ms. Perry explained that that she scored DBI higher than ICA in the Plan for Compliance section because, even though both proposals discussed their QA/QC program, DBI went into much greater detail about its program and its plan for compliance

generally. Ms. Perry viewed the level of detail provided by DBI regarding its QA/QC program and its plan for compliance generally as an indication of the importance of these matters to DBI.

76. Some of the material differences identified by Ms. Perry were DBI's commitment to do its first QA/QC within the first three months instead of waiting six months as ICA proposed; DBI's identification of a high-level person, the project manager, as being responsible for compliance; DBI's commitment to provide its QA/QC reports directly to the Department; DBI's "corporate culture concept" program that is similar to the Department's "grassroots" program; DBI's more detailed description of its training programs; and DBI's commitment to have all of its herbicide applicators licensed by the state, not just in compliance with state law.

77. Ms. Perry's rationale for her scoring differences on the Plan for Compliance section is generally consistent with another evaluator's "overall impression" that "the ICA proposal did not offer a lot of new innovation or continuous quality improvement over the level of performance that we had already experienced and . . . we were hoping to have in reletting the new contract rather than renewing the existing contract" ⁵

78. ICA also takes issue with Ms. Perry's scoring of the ICA and DBI proposals in the DBE/RESPECT/Agency Participation

section; the Proposed Facilities Capabilities section; the Routine/Periodic Maintenance Operations section; and the Rest Area Maintenance Operations section.

79. Ms. Perry gave DBI's proposal five points and ICA's proposal three points for the DBE/RESPECT/Agency Participation section. She explained that she scored DBI higher than ICA in this section because DBI provided more detail on how it would help develop disadvantaged business subcontractors, including training them on compliance with Department standards and helping them obtain work. She recognized that ICA also had a subcontractor development program, but she was more impressed with DBI's proposal because "DBI really went into a lot more detail in what they were going to do."

80. Ms. Perry gave DBI's proposal five points and gave ICA's proposal three points for the Proposed Facilities Capabilities section. She explained that she scored DBI higher than ICA in this section because of the amount and type of equipment that DBI was going to make available for the contract and because of DBI's commitment to put an office on the Alligator Alley corridor. Ms. Perry felt that the Alligator office was "very important" because that area is isolated and having an office in the area would make it easier for the contractor to respond quickly to problems. ICA's proposal did not commit to put an office on the Alligator Alley corridor.

81. Ms. Perry gave DBI's proposal ten points and gave ICA's proposal six points for the Routine/Periodic Maintenance Operations section. She explained that she scored DBI higher than ICA in this section because DBI's proposal included a week-by-week maintenance plan that detailed the specific activities that DBI would be working on each week and it also included detailed charts identifying the efforts that DBI would undertake to meet the requirements of the Department's maintenance program. The description of the maintenance plan in ICA's proposal was not nearly as detailed, and Ms. Perry was so impressed with DBI's maintenance plan that she provided copies of the plan to the other districts' operation centers as an example of the type of detailed planning that she felt the Department should move towards.

82. Ms. Perry scored ICA and DBI the same for the Rest Area Maintenance Operation section. She explained that even though the proposals focused on different aspects of their rest area maintenance plans, the plans were roughly equivalent overall. For example, DBI committed to maintain the rest areas in accordance with the Department's standard maintenance requirements and, like ICA, DBI will handle customer comment cards from rest areas through its QA/QC program.

83. Ms. Perry scored ICA higher than DBI in areas that she found ICA's proposal to be better than DBI's proposal. For

example, in the Identification of Key Personnel Section, she gave ICA four points and DBI three points; in the Contractor Experience section, she gave ICA the maximum five points and DBI two points; in the Bridge Inspection section, she gave ICA the maximum 10 points and DBI seven points; in the Incident Response Operations section, she gave ICA nine points and DBI eight points; and in the Bridge Maintenance Operations section, she gave ICA the maximum five points and DBI three points.

84. Ms. Perry's explanation of her scoring decisions was reasonable and supported by the preponderance of the evidence presented at the final hearing. The evidence fails to establish that Ms. Perry's scoring of the proposals was arbitrary, capricious, or otherwise improper.

CONCLUSIONS OF LAW

85. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.57(3), Florida Statutes.

86. ICA has standing to protest the proposed award of the contract to DBI because its proposal received the second-highest overall score. See Preston Carroll Co. v. Florida Keys Aqueduct Authority, 400 So. 2d 524, 525 (Fla. 3d DCA 1981).

87. ICA has the burden of proof in this proceeding. See § 120.57(3)(f), Fla. Stat.; State Contracting & Engineering

Corp. v. Dept. of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998)

88. The scope of this proceeding and the nature of ICA's burden of proof are as follows:

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 solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

§ 120.57(3)(f), Fla. Stat.

89. It is not enough under Section 120.57(3)(f), Florida Statutes, for the protestor to show that the proposed award is inconsistent with some provision of the RFP; the protestor must also show that agency's "misstep" and, hence, the proposed award is clearly erroneous, contrary to competition, arbitrary, or capricious. See, e.g., Granite Construction Co. of California v. Dept. of Transportation, Case No. 03-2374BID, at ¶ 103 (DOAH Aug. 25, 2003) (quoting Syslogic Technology Services, Inc. v. South Fla. Water Mgmt. Dist., Case No. 01-4385BID, 2002 Fla. Div. Adm. Hear. LEXIS 235, at ¶¶ 40-74 (DOAH Jan. 18, 2002)), adopted in pertinent part, Case No. 03-067 (DOT Sep. 23, 2003).

90. The standards in Section 120.57(3)(f), Florida Statutes, have been explained as follows:

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. An agency action is capricious if the agency takes the action without thought or reason or irrationally. Agency action is arbitrary if is not supported by facts or logic. An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding.

Lakeview Center, Inc. v. Agency for Health Care Admin., Case No. 06-3412BID, Fla. Div. Adm. Hear. LEXIS 571, at ¶ 44 (DOAH Dec. 6, 2006; AHCA Dec. 21, 2006) (citations omitted). Accord Syslogic Technology Services, supra.

91. ICA failed to meet its burden of proof; the evidence fails to establish that the proposed award to DBI is contrary to the RFP in any material respect or that the proposed award is clearly erroneous, contrary to competition, arbitrary, or capricious. Indeed, as detailed in the Findings of Fact, the preponderance of the evidence establishes that DBI's proposal was responsive to the RFP; that DBI is a responsible bidder; and that the scoring of the proposals by Ms. Perry was reasonable and consistent with the RFP as a whole.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department issue a final order dismissing the Formal Protest Petition filed by ICA, and awarding Contract No. E1G23 to DBI.

DONE AND ENTERED this 14th day of December, 2007, in Tallahassee, Leon County, Florida.

S

T. KENT WETHERELL, II
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 14th day of December, 2007.

ENDNOTES

^{1/} All statutory references are to the 2007 version of the Florida Statutes.

^{2/} The Joint Exhibits include the deposition testimony of Cheryl Sanchious (Jt. Ex. 34), Howard Summers (Jt. Ex. 35), David Holden (Jt. Ex. 36), Lance Grace (Jt. Ex. 37), and Robert Mannix (Jt. Ex. 38).

^{3/} VMS received the highest technical score, but its price score was the lowest because its price -- \$108,057,300 -- was, by far, the highest of the three proposals.

^{4/} Jt. Ex. 38, at 31. Accord Jt. Ex. 35, at 32-33 (testimony of evaluator Howard Summers).

^{5/} Jt. Ex. 38, at 19. See also Jt. Ex. 19 (Mr. Mannix's evaluation form, which states that ICA's proposal "lacks new competitive improvement ideas-appears to maintain status quo").

COPIES FURNISHED:

James C. Myers, Clerk of Agency
Proceedings
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

Alexis M. Yarbrough, General Counsel
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

Stephanie Kopelousos, Secretary
Department of Transportation
Haydon Burns Building, Mail Station 57
605 Suwannee Street
Tallahassee, Florida 32399-0450

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

Eduardo S. Lombard, Esquire
Vezina, Lawrence & Piscitelli, P.A.
413 East Park Avenue
Tallahassee, Florida 32301

Cynthia S. Tunnicliff, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 South Monroe Street, Second Floor
Post Office Box 10095
Tallahassee, Florida 32302-2095

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.