

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

FILED
08 MAY -1 PM 1:31
DIVISION OF
ADMINISTRATIVE
HEARINGS

EROSION STOPPERS, INC.,

Petitioner,

vs.

DOAH CASE NO.: 07-4823BID

DOT CASE NO.: 07-090

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

**DeANGELO BROTHERS, INC., d/b/a
DBI SERVICE CORPORATION,**

Intervenor.

FINAL ORDER

On September 4, 2007, the Department of Transportation (Department) posted notice that it intended to award contract E2K97-RO, to provide Asset Maintenance for the roadways and facilities for certain roads in Duval County, to DeAngelo Brothers, Inc., d/b/a DBI Services, Inc. (DBI). Petitioner, Erosion Stoppers, Inc. (Erosion Stoppers), filed a notice of protest on September 7, 2007, and a Formal Written Bid Protest on September 17, 2007.

The matter was referred to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge and a formal hearing on October 22, 2007. DBI filed a Petition to Intervene that was granted on November 7, 2007. Erosion Stoppers' Motion for

Leave to Amend Bid Protest, filed on November 30, 2007, was granted on February 12, 2008.

An administrative hearing was held in Tallahassee, Florida, on February 22, 2008, before Don W. Davis, a duly appointed administrative law judge. Appearances on behalf of the parties were as follows:

For Petitioner: Brant Hargrove, Esquire
 Law Offices of Brant Hargrove
 2104 Delta Way, Suite 9
 Tallahassee, Florida 323030

and

 J. Reuben Hamlin, Esquire
 P. O. Box 1620
 Newberry, Florida 32669

For Respondent: C. Denise Johnson, Esquire
 Assistant General Counsel
 Department of Transportation
 605 Suwannee Street, M.S. 58
 Tallahassee, Florida 32399-0458

For Intervenor: Brian Newman, Esquire
 Cynthia Tunnickliff, Esquire
 Pennington, Moore, Wilkinson,
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 215 South Monroe Street, Second Floor
 Tallahassee, Florida 32301

No testimony was presented at the final hearing. The parties offered Joint Exhibits 1 through 7 into evidence, which were received without objection. The transcript of the hearing was filed on March 6, 2008. The parties timely filed proposed recommended orders. Judge Davis issued his Recommended Order on March 31, 2008. Erosion Stoppers served its exceptions to the Recommended Order on April 15, 2008. DBI's response to Erosion Stoppers' exceptions to the recommended order was served April 18, 2008, and the Department's response to Erosion

Stoppers' exceptions was filed on April 23, 2008.

STATEMENT OF THE ISSUE

The issue in this matter as stated by the Administrative Law Judge is:

Whether the Department's intended award of contract E2K97-RO for Asset Maintenance of Duval County Roadways is contrary to the agency's governing statutes, the agency rules or policies or the bid or proposal specifications.

EXCEPTIONS TO THE RECOMMENDED ORDER

Erosion Stoppers has filed eight exceptions grounded upon its belief that the Administrative Law Judge failed to address evidentiary matters in its proposed factual findings as well as other evidentiary matters which it views as not having been refuted or controverted. Erosion Stoppers' exceptions are rejected in their entirety for three reasons, any one of which afford a sufficient basis for rejection, to-wit: 1) the exceptions were not timely filed; 2) the exceptions lack the requisite specificity; and 3) the exceptions, if viewed on the merits, are not well-taken.

First, the Recommended Order was entered in this case on March 31, 2008, and provided that the parties had ten days from that date to submit written exceptions. See § 120.57(3)(e), Fla. Stat. (2007). Erosion Stoppers' exceptions were submitted on April 15, 2008, were untimely, and are, therefore, rejected.

Second, Erosion Stoppers' exceptions do not identify the disputed portions of the recommended order by page number and paragraph, they do not contain an identifiable legal basis other than a failure to "address" or a failure to "articulate," and they contain no citations to the record. Consequently, Erosion Stoppers' exceptions are impermissibly broad and lacking in specificity contrary to the provisions of Section 120.57(1)(k), Florida Statutes, and Florida

Administrative Code Rule 28-106.217(1), and are rejected on that basis as well.

In addition to rejection for their untimeliness and lack of specificity, Erosion Stoppers' exceptions should also be rejected on the merits. Erosion Stoppers' first exception asserts that the Recommended Order fails to address proposed findings of fact concerning the number of proposal evaluators required by Department procedures. The Recommended Order states that the parties proposed recommended orders were duly considered by the Administrative Law Judge before the Recommended Order was entered. Moreover, any evidence concerning the number of evaluators required by a Department procedure vis a vis the number of evaluators the request for proposal (RFP) stated would review the proposals is not relevant in light of the Administrative Law Judge's having found that Erosion Stoppers' claim concerning the number of evaluators was time-barred by virtue of Erosion Stoppers not having filed a protest to the RFP specifications. Erosion Stoppers' first exception is rejected.

Erosion Stoppers' Exceptions 2 through 7 take issue with the Recommended Order's failure to address a number of evidentiary matters Erosion Stoppers contends were not refuted or controverted. Inasmuch as no evidence, other than the parties joint exhibits, was admitted at the hearing, Erosion Stoppers is evidently referring to the written proffer it submitted with its proposed recommended order as a source for these evidentiary matters. While the proffer may have indicated what a given witness would have testified to if the Administrative Law Judge had not found Erosion Stoppers' claims concerning the evaluation methodology to be time-barred, it does not establish the existence of unrefuted or uncontroverted evidence. Furthermore, this "evidence" was not relevant given the Administrative Law Judge's ruling that Erosion Stoppers' evaluation methodology claims were time-barred. Exceptions 2 through 7 are rejected.

Finally, Erosion Stoppers' eighth exception, at best, is essentially a blanket challenge to the Administrative Law Judge's Conclusions of Law in their entirety. Regarding an agency's treatment of conclusions of law, Section 120.57(1)(l), Florida Statutes provides:

The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

After consideration of Erosion Stoppers' exception, the Department finds that Conclusions of Law 19 through 25 comport with the Department's interpretation and application of controlling statutes and rules over which it has substantive jurisdiction and are otherwise fully supported in law. Exception 8 is rejected.

FINDINGS OF FACT

The Administrative Law Judge's Findings of Fact in paragraphs 1 through 18 were agreed to by the parties and are adopted and incorporated as if fully set forth herein.

CONCLUSIONS OF LAW

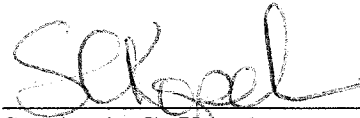
1. The Department has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapters 120 and 337, Florida Statutes.
2. The Conclusions of Law in paragraphs 19 through 25 of the Recommended Order are fully supported in law and are adopted and incorporated as if fully set forth herein.

ORDER

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

ORDERED that the amended formal protest filed by Erosion Stoppers, Inc., challenging the award of contract E2K97-RO for Asset Maintenance of Duval County roadways, is hereby dismissed.

DONE AND ORDERED this 28th day of April, 2008.



Stephanie C. Kopelousos
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
2008 APR 28 PM 3:05

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EROSION STOPPERS, INC.,)
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 Petitioner,)
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 vs.) Case No. 07-4823BID
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 STATE OF FLORIDA, DEPARTMENT OF)
 TRANSPORTATION,)
)
 Respondent,)
)
 vs.)
)
 DeANGELO BROTHERS, INC., d/b/a)
 DBI SERVICES CORPORATION,)
)
 Intervenor.)
)
 _____)

RECOMMENDED ORDER

Administrative Law Judge Don W. Davis conducted a final hearing in this matter on February 22, 2008, in Tallahassee, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: Brant Hargrove, Esquire
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For Intervenor: Cynthia S. Tunnicliff, Esquire
Brian A. Newman, Esquire
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Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether the Department's intended award of contract E2K97 for Asset Maintenance of the Duval County Roadways is contrary to the agency's governing statutes, the agency rules or policies or the bid or proposal specifications.

PRELIMINARY STATEMENT

This is a procurement protest proceeding initiated by Petitioner, Erosion Stoppers, Inc. ("ESI") to protest the Florida Department of Transportation's ("FDOT") intended contract award to Intervenor, DeAngelo Brothers, Inc., d/b/a DBI Services Corporation ("DBI"). The Request for Proposal for contract number E-2K97 was posted on June 18, 2007. ESI did not file a notice of protest of the RFP terms, conditions, or specifications within 72 hours of the posting.

FDOT posted its notice of intent to award the contract to DBI on September 4, 2007. ESI timely filed its Notice of Intent to protest the intended award to DBI. That Formal Written Protest was filed on October 22, 2007. An order granting DBI intervention status was entered on November 7, 2007.

On November 30, 2007, ESI filed a motion requesting leave to file an Amended Formal Written Bid Protest. FDOT and DBI objected to the motion. After hearing argument of counsel at a duly noticed hearing, ESI was granted leave to file its amended petition on February 12, 2008.

The amended petition alleges that FDOT's scoring of ESI's proposal was arbitrary or capricious. It also alleges that the RFP's method for ranking proposals conflicts with FDOT procedure in two respects. First, ESI claims that FDOT procedure number 375-000-005a requires that the technical proposals be evaluated by at least five people. The parties agree that the RFP requires only three evaluators. Second, ESI asserts that FDOT procedure number 375-000-005a requires the scoring of the technical proposals be weighted as follows: Management Plan (50%) and Technical Plan (50%). The parties agree that the RFP provides that the scoring of the technical proposals is to be weighted as follows: Administration Plan (20%), Management and Technical Plan (30%), Operation Plan (30%), and Plan for Compliance with Standards (20%). ESI asserts in its amended petition that these conflicts between the RFP's method of ranking proposals and the FDOT procedure require rejection of all bids.

At the formal hearing held on February 22, 2008, ESI raised a third objection with the RFP's method of ranking proposals, i.e., that the evaluators did not establish the RFP's criteria for ranking proposals as required by FDOT procedure number 375-000-005a. This allegation was not pled by ESI in its petition or its amended petition. As a consequence, prior to the presentation of evidence, the undersigned ruled that ESI's objections to the RFP's method of ranking proposals were time-barred because it failed to protest the RFP terms, conditions, or specifications within 72 hours of the solicitation posting. ESI was told that the presentation of evidence would be limited to evidence supporting its contention that FDOT's scoring of the RFP was arbitrary or capricious, and that it could proffer all evidence supporting its challenge to the RFP's method of ranking proposals with its post-hearing submission. After this ruling was announced, counsel for ESI withdrew its challenge to the scoring of its proposal and announced his client's intention to appeal the ruling that the remaining allegations of its protest are time-barred.

Joint Exhibits 1-7 were admitted without objection. No witnesses were called to testify. The transcript of the hearing was filed on March 6, 2008. The parties submitted proposed

recommended orders, which were duly considered by the undersigned before entering this Recommended Order.

FINDINGS OF FACT

The following facts were agreed between the parties in their Joint Pre-Hearing statement:

1. On June 18, 2007, FDOT posted the solicitation for asset maintenance of the Duval County Roadways through procurement E-2K97.
2. The RFP requested technical proposals and bids for a five-year contract for maintenance of identified roads in Duval County.
3. The RFP provides that the scoring of the technical proposals is to be weighted as follows: Administration Plan (20%), Management and Technical Plan (30%), Operation Plan (30%), and Plan for Compliance with Standards (20%).
4. ESI did not file a protest of the RFP's terms, conditions, specifications, or provisions governing the method of ranking proposals within 72 hours of the posting of the solicitation.
5. A mandatory pre-bid meeting was held on July 10, 2007.
6. The technical and price proposals for this project were due by August 9, 2007.

7. Four firms submitted timely proposals in response to the RFP. They were ESI, DBI, Infrastructure Corporation of America (ICA) and VMS.

8. The proposals were evaluated by three registered civil engineers who are employed by FDOT: Jerry Ausher, Julius Rinoso, and Mark Kuhn.

9. All four firms were determined to be responsive and received scores on their technical proposal and price proposal.

10. DBI's average score on its technical proposal was 88, the highest of the four firms.

11. ESI's average score on its technical proposal was 75.33, the lowest of the four firms.

12. ESI's price proposal bid was \$44,759,500.00, the lowest of the four firms.

13. DBI's price proposal bid was \$48,748,886.00, the second lowest of the four firms.

14. After combining the technical scores and price proposal scores, the total proposal scores for the four firms were as follows: DBI = 89.14, VMS = 85.19, ESI = 82.73, and ICA = 82.68.

15. On September 4, 2007, FDOT posted its notice of intended award to DBI as the winning bidder.

16. ESI filed a notice of intent to protest on September 7, 2007, followed by a formal written protest on September 17, 2007.

17. DBI filed a Petition to Intervene which was granted on November 7, 2007.

18. As the intended awardee, DBI has a substantial interest in the outcome of this proceeding and thus, has standing to intervene.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.57(3), Florida Statutes (2007).

20. ESI has the burden of proof in this proceeding. § 120.57(3)(f), Fla. Stat. (2007).

21. 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.; see also State Contracting & Engineering Corp. v. Dept. of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998) (purpose of a bid protest proceeding is to "evaluate the action taken by the agency" in relation to the standards in Section 120.57(3)(f), Florida Statutes).

22. As the protestor, ESI must show not only that the proposed award is contrary to the RFP, but must also show that the proposed award is clearly erroneous, contrary to competition, or an abuse of discretion. Syslogic Technology Services, Inc. v. South Florida Water Management Dist., 2002 Fla. Div. Adm. Hear. WL 76312 (DOAH Jan. 18, 2002).

23. Section 120.57(3)(b), Florida Statutes, provides in pertinent 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 . . . the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation.

The RFP was posted on June 18, 2007. ESI did not file a notice of protest within 72 hours of the posting as required by section 120.57(3)(b). In fact, it did not raise any formal objection to the RFP terms, conditions or specifications until after FDOT posted its notice of intent to award the contract to DBI. ESI's protest of the RFP's method of ranking proposals is, therefore,

time-barred. Consultech of Jacksonville, Inc. v. Dep't. of Health, 876 So. 2d 731 (Fla. 1st DCA 2004) (affirming the agency's final order rejecting untimely protest of RFP's specifications); Optiplan Inc. v. School Bd. of Broward County, 710 So. 2d 569 (Fla. 4th DCA 1998) (bidder waived right to challenge school board's evaluation criteria because it failed to bring protest within 72 hours of publication of bid solicitation); Capeletti Brothers, Inc. v. Dep't. of Transportation, 499 So. 2d 855 (Fla. 1st DCA 1986) (holding bidder waived right to protest bid solicitation specifications when it failed to bring challenge within 72 hours of receipt of project plans).

24. At the formal hearing, ESI voluntarily withdrew its claim that the scoring of its proposal was arbitrary or capricious and elected not to offer any evidence to support this assertion. Consequently, ESI has failed to meet its burden to demonstrate that FDOT's scoring of its proposal was arbitrary or capricious.

25. ESI failed to establish that FDOT's proposed award of the contract to DBI is clearly erroneous, contrary to competition, or an abuse of discretion and thus, failed to meet its burden of proof under Section 120.57(3)(f), Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that Petitioner's Amended Formal Written Bid Protest be dismissed.

DONE AND ENTERED this 31st day of March, 2008, in Tallahassee, Leon County, Florida.

Don W. Davis

DON W. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
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this 31st day of March, 2008.

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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.