

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EROSION STOPPERS, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 07-4823BID
)
 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 Respondent: C. Denise Johnson, Esquire
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For Intervenor: Cynthia S. Tunnickliff, Esquire
Brian A. Newman, Esquire
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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.



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Filed with the Clerk of the
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this 31st day of March, 2008.

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.