STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDIAN CONSTRUCTION & DEVELOPMENT COMPANY, INC., Petitioner, vs. STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent, and GAC CONTRACTORS, INC., Intervenor.	)	Case No. 07-5636BID

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on February 12 and 13, 2008, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether the proposed disqualification of Petitioner's bid is contrary to the agency's governing statutes, rules, or policies or contrary to the bid solicitation specifications within the meaning of Subsection 120.57(3)(f), Florida Statutes (2007).[1]

PRELIMINARY STATEMENT

Respondent disqualified Petitioner's bid and issued a notice of intent to award the contract to another bidder. Petitioner protested the disqualification, and Respondent referred the protest to DOAH to conduct an administrative hearing.

At the hearing, Petitioner, Respondent, and Intervenor submitted six joint exhibits for admission into evidence. Petitioner presented the testimony of two witnesses and submitted three exhibits for admission into evidence. Respondent presented the testimony of four witnesses and submitted eight exhibits for admission into evidence. The identity of the witnesses and exhibits, and the rulings regarding each, are reported in the three-volume Transcript of

the hearing filed with DOAH on February 27, 2008.

Petitioner timely filed its Proposed Recommended Order (PRO) on March 7, 2008. Respondent and Intervenor timely filed their respective PROs on March 10, 2008.

FINDINGS OF FACT

1. Petitioner is a closely held Florida corporation licensed in the state as a general contractor. Mr. Milton "Mitt" Fulmer is the owner, sole director, and only stockholder.

2. Respondent is a state agency. Respondent regularly solicits bids for construction services to build and maintain its facilities.

3. On August 3, 2007, Respondent issued an invitation to bid identified in the record as Bid No. 03-07/08 (the ITB). The ITB solicited bids to construct a new headquarters for the Apalachicola National Estuarine Research Reserve, commonly referred to in the record as ANERR.

4. Four companies responded to the ITB. Petitioner submitted the lowest bid. Intervenor submitted the next lowest bid. Intervenor is a Florida corporation licensed in the state as a general contractor.

5. The ITB required bidders to submit a bid bond in an amount equal to five percent of the amount of the bid, plus alternates. A bid bond is not a performance bond. A bid bond is customarily provided for gratis or a nominal charge, and

variations in bid bonds do not result in a competitive advantage among bidders. A bid bond merely insures the successful bidder will enter into the contract and provide whatever payment and performance bonds (performance bond) the ITB requires.

6. The Instructions to Bidders for the ITB required all bonds to be issued by a surety company that "shall have at least the following minimum rating in the latest issue of Best's Key Rating Guide (Best's): 'A'" (the bond rating requirement). The bond rating requirement was a bid solicitation specification required for a bond to be acceptable to Respondent.

7. Petitioner submitted a bid bond issued by a surety identified in the record as International Fidelity Insurance Company (IFIC). IFIC has Best's rating of "A-."

8. Respondent proposes to reject Petitioner's bid for failure to satisfy the bond rating requirement and to award the bid to Intervenor as the second lowest bidder. The bond rating for the surety company that issued the bid bond for Intervenor is not in evidence. For reasons stated in the Conclusions of Law, Petitioner has the burden of proof.

9. The parties provided the trier of fact with a wealth of evidence during the final hearing. However, judicial decisions discussed in the Conclusions of Law confine the purpose of this proceeding to a review of the proposed disqualification of Petitioner's bid at the time Respondent exercised that agency

discretion. This proceeding is not conducted to formulate final agency action that determines which bidder should receive the contract or whether all of the bids should be rejected.

10. The review of proposed agency action is limited to a determination of whether the proposed action violates a statute, rule, or specification. If a violation occurred, the review must then determine whether the violation occurred because Respondent exercised agency discretion that was clearly erroneous, contrary to competition, or an abuse of discretion.

11. A preponderance of evidence does not show that the proposed agency action violates a statute, rule, or specification. That finding ends the statutorily authorized inquiry. In the interest of completeness and judicial economy, however, the trier of fact also finds that the exercise of agency discretion that led to the proposed agency action is not clearly erroneous, contrary to competition, or an abuse of discretion.

12. It is undisputed that the proposed agency action does not violate a statute or rule. Petitioner implicitly argues that the proposed agency action violates the bond rating requirement in the bid specifications because an "A-" rating is equivalent to an "A" rating.

13. The Best's ratings of surety companies are not equivalent. Before discussing the differences, however, it is

important to note that Respondent did not base its proposed rejection of Petitioner's bid on an independent evaluation of the data used to distinguish the two ratings.

14. The failure to conduct an independent evaluation of the differences in Best's ratings criteria was neither clearly erroneous, contrary to competition, nor an abuse of discretion. The differences in Best's ratings criteria are complex and proprietary. Respondent lacks sufficient staff and expertise to evaluate the data underlying the Best's ratings or the quality of surety companies.

15. Respondent relied on its own experience, custom and practice in the surety industry, and advice of counsel. Respondent also took into account the unusual size and complexity of the ANERR project, time constraints, and the added risk aversion to any delay in starting the project.

16. The proposed rejection of Petitioner's bid is consistent with Respondent's past practice. Respondent has consistently required compliance with bond rating requirements for bid bonds in previous projects. In the course of bidding 500 to 600 projects over approximately an eight-year period, only one of the apparent low bidders offered Respondent a bid bond from an "A-" rated surety when an "A" was required by the bid specifications. Respondent disqualified that bid, which was for a project of approximately four million dollars; the only

previous project that approaches the $5-$6 million cost of the ANERR project. All other low bidders complied with the specification as written.

17. Respondent reasonably inferred that the surety company for the bid bond would be the same for the performance bond. Respondent's experience with industry practice in the 500 to 600 previous projects suggests the surety company that writes the bid bond will also write the performance bond. It is also customary for a surety company to provide the bid bond for gratis or for a nominal charge because the surety company collects its premium upon writing the subsequent payment and performance bonds.

18. Respondent's experience also shows that contractors must qualify for their surety bonds, and not all contractors succeed in qualifying for surety bonds. Moreover, not all contractors can succeed in procuring surety bonds from an A-rated company.

19. The temporal exigencies between the award of the bid and the provision of a performance bond also supported Respondent's inference that the surety company for the bid bond would be the surety company for the performance bond. The General Conditions of the contract required Petitioner to submit evidence of its ability to provide the requisite performance

bond within two working days of being notified of a successful bid. Petitioner had ten days to actually furnish the bond.

20. Establishing a surety is not perfunctory but entails a prequalification process. Petitioner had to supply its bonding agent with information including project history, credit references, reviewed financial statements, personal financials, and details on its assets.

21. Any delay in the ANERR project, in contrast to its previous projects, for reasons of contractor default or otherwise, would expose Respondent to greater risk and greater expense. Respondent reasonably experienced a heightened risk aversion for the ANERR project than the risk aversion Respondent experienced during previous projects.

22. The $5 or $6 million price tag for the ANERR project is about 400 percent greater than all but one previous project in Respondent's experience. Unusual aspects of the project, including its design elements and its environmentally sensitive location, could be irreparably harmed in the event of default or delay. The nature of the project's funding, part of which is a federal construction grant that expires on a date certain and part of which involved taxes paid by Floridians, contributes to the unique qualities of the project that support Respondent's greater risk aversion in connection with the ANERR project.

23. At the time Respondent had to make a decision to reject or accept Petitioner's bid, Respondent believed in good faith a distinction existed between Best's "A" and "A-" ratings. The Best's ratings publication is a summary based on data, much of which is proprietary. It would be pointless for Respondent to "cross examine" a summary before rejecting Petitioner's bid if significant portions of the data underlying the summary are proprietary and unavailable to the cross-examiner.

24. If Respondent were to have sufficient staff and expertise to independently evaluate the data underlying the Best's ratings, if some of the data were not proprietary, and if such an evaluation were the basis for the proposed rejection of Petitioner's bid, the outcome would not alter the proposed rejection of Petitioner's bid. The Best's ratings are based, in relevant part, on Best's Capital Adequacy Ratio, commonly referred to in the record as BCAR. The BCAR score estimates the ability of a surety company to pay claims.

25. The minimum BCAR score for an "A" rating is 145, meaning the value of a surety company's assets exceed its estimated claims by a minimum of 45 percent. The minimum BCAR score for a surety with an "A-" rating is 130, meaning the value of its assets exceed its estimated claims by 35 percent.

26. Although a 15-percent differential may appear small, Best's states the differentials by reference to a range of

scores. The actual differential between individual sureties with an "A" rating and an "A-" rating may be as little as one percent or as great as 29 percent.

27. An independent evaluation by Respondent would have revealed a margin of error as large as 29 percent in the standard used to evaluate a surety company's ability to pay claims. If the proposed rejection of Petitioner's bid were based on an independent evaluation of the data underlying the Best's rating summaries, it would have been reasonable for Respondent to reject Petitioner's bid. It would have been reasonable for Respondent to reject a 29-percent margin of error for a surety company in a project that is 400 percent larger than the typical project and for which Respondent reasonably has a greater risk aversion due to the temporal limit on the availability of funds, the complexity of the project, and its environmental sensitivity.

28. Much of the data underlying Best's published ratings is proprietary information. However, the available evidence shows that Best's adjusts BCAR values based on qualitative factors such as: business plan, management quality, liquidity of assets, liabilities, and other operational aspects of the surety company. A qualitative analysis shows that ratings of "A" and "A-" are not the "functional equivalent" of each other.

29. Petitioner submitted evidence that Best's "bands" surety companies with ratings of "A" and "A-" together in the Best's rating guide. However, the relevant specification in the ITB did not express the bond rating requirement in terms of a band or category. Rather, Respondent requested an "A" or better rating according to Best’s Key Rating Guide.

30. An independent evaluation by Respondent would have provided a reasonable basis for an inference that the surety company for the bid bond and performance bond would be the same company. Petitioner has used IFIC for more than one year. During that time, IFIC has issued all of Petitioner’s bid bonds. IFIC issued Petitioner two payment and performance bonds. Petitioner was unable to identify any other surety company that had issued its payment and performance bonds within the time period during which Petitioner has used IFIC.

31. Petitioner did not ask its insurance broker to obtain a bid bond from a company other than IFIC. When Petitioner sent a bid bond order form to its broker, Petitioner provided information to the broker about the project and the amount of the bid and Respondent’s surety requirements. The Bid Bond Order Form does not indicate the minimum bond rating requirement specified in the ITB. Mr. Fulmer had a conversation with his broker about Respondent’s bid security requirements, but it is unclear whether the relevant specifications were faxed to the

broker or whether Mr. Fulmer saw the Bid Bond Order Form before it was provided to the broker.

32. In response to the Bid Bond Order Form, the broker generated a bid bond and sent the bond to Petitioner for signature. At the time Petitioner received the bid bond, Petitioner did not consult Best's Key Rating Guide to confirm that its surety met the minimum bond rating requirement in the ITB.

33. It is unnecessary to determine whether the bond rating requirement was a material or immaterial requirement. If it were material, Respondent had no discretion to waive it. If it were non-material, within the meaning of Florida Administrative Code Rule 60D-5.002(9)(Rule), evidence discussed in previous Findings in this Order shows that the exercise of agency discretion underlying the refusal to waive the bond rating requirement was reasonable and was not clearly erroneous, contrary to competition, arbitrary, or capricious.

34. Petitioner's bid protest is not, in substance, a challenge to the bid solicitation specification identified in this Order as the bond rating requirement. If the substance of the bid protest were deemed to be a challenge to a bid specification requirement, the challenge is untimely.

35. On October 30, 2007, Respondent opened the bids, identified Petitioner as the apparent low bidder, consulted

Best's for information on the "A-" rating, consulted with counsel, and disqualified Petitioner's bid. Petitioner filed a Notice of Intent to Protest on November 8, 2007, and a Petition to Protest on November 13, 2007. A deemed challenge to the specification for the minimum bond rating requirement was untimely within the meaning of Subsection 120.57(3)(b).

CONCLUSIONS OF LAW

36. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(3). DOAH provided the parties with adequate notice of the administrative hearing.

37. This is a de novo proceeding conducted pursuant to Subsection 120.57(3)(a 120.57(3) proceeding). However, a 120.57(3) proceeding is not synonymous with the de novo proceeding required in Subsection 120.57(1) (a 120.57(1) proceeding).

38. The distinction between the two types of de novo proceedings is articulated in Syslogic Technology Services, Inc. v. South Florida Water Management District, Case No. 01-4385BID (DOAH January 18, 2002). The undersigned cannot improve upon that discussion, but considers the distinction important and quotes from Syslogic.

> The First District Court of Appeal has construed the term "de novo proceeding," as used in Section 120.57(3)(f), Florida

Statutes, to "describe a form of intra-agency review. (citation omitted) The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency. State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). In this, the court followed its earlier Intercontinental Properties, Inc. v. State Department of Health and Rehab. Serv., 606 So. 2d 380, 386 (Fla. 1st DCA 1992), a decision which predates the present version of the bid protest statute, wherein the court had reasoned:

Although the hearing before the hearing officer was a de novo proceeding, that simply means that there was an evidentiary hearing during which each party had a full and fair opportunity to develop an evidentiary record for administrative review purposes. It does not mean, as the hearing officer apparently thought, that the hearing officer sits as a substitute for the Department and makes a determination whether to award the bid de novo. Instead, the hearing officer sits in a review capacity, and must determine whether the bid review criteria set . . . have been satisfied.

Thus, the "de novo proceeding" contemplated in Section 120.57(3), Florida Statutes, might be envisaged, oxymoronically, as an "appellate trial," a hybrid proceeding in which evidence is received, factual disputes are settled, legal conclusions made--and prior agency action is reviewed for correctness.

Syslogic, Case No. 01-4385BID at 18-19, paras. 43-44.

39. The appellate part of a Subsection 120.57(3) proceeding is a retrospective view of agency action that

previously occurred when Respondent disqualified Petitioner's bid. The retrospective review is primarily a look back at the evidence Respondent relied on, at the time, to exercise agency discretion. For illustrative purposes only, a 120.57(3) proceeding may be understood as a probable cause determination; a determination of whether Respondent had probable cause at the time it exercised agency discretion to disqualify Petitioner's bid.

40. A 120.57(1) proceeding looks forward to formulate final agency action that Respondent should take. If this were a 120.57(1) proceeding, the ALJ would sit in the place of the agency head and determine whether to award the bid de novo by looking forward to the evidence available through the date of the administrative hearing even if some of that evidence were unavailable to Respondent at the time Respondent exercised agency discretion to disqualify Petitioner's bid.

41. In a 120.57(3) proceeding, the trier of fact looks back to review the evidence available to Respondent when Respondent exercised agency discretion to disqualify the bid. The purpose is to determine whether the exercise of agency discretion was clearly erroneous, contrary to competition, arbitrary, or capricious based on the evidence considered by Respondent at the time. The trier of fact considers evidence Respondent did not consider (other evidence), which may or may

not have been available to Respondent, not for the purpose of formulating future agency action, but for the limited purpose of determining whether the failure to consider the other evidence was clearly erroneous, contrary to competition, arbitrary, or capricious.

42. Petitioner has the burden of proving a valid ground for invalidating the proposed agency action. State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Petitioner must show that by a preponderance of the evidence that the proposed agency action was contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. Id.; see also § 120.57(3)(f). That alone, however, is not sufficient for Petitioner to prevail. A preponderance of evidence must convince the reviewing ALJ that the agency's violation of a statute, rule, or specification was clearly erroneous, contrary to competition, arbitrary, or capricious. Id.

43. Petitioner did not satisfy its burden of proof. For reasons already stated in the Findings of Fact and not repeated here, the exercise of agency discretion to disqualify Petitioner's bid did not violate a statute, rule, or bid specification. Assuming arguendo a violation did occur, the violation was not clearly erroneous, contrary to competition,

arbitrary, or capricious. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); Dravo Basic Materials Co. Inc. v. Dept. of Transportation, 602 So. 2d 632, 635 n.3 (Fla. 2d DCA 1992); Agrico Chemical Co. v. Dept. of Envtl. Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978); Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

44. A good part of the ample evidence in this proceeding focused on the issue of whether the bond rating requirement was a non-material requirement within the meaning of Rule 60D-5.002. Respondent has no discretion to waive a material requirement in a bid specification. As a general rule, bids must strictly adhere to the requirements of the ITB. First Communications, Inc. v. Dept. of Corrections, Case No. 07-0630BID (DOAH April 5, 2007), para. 36, adopted in toto in Florida Department of Corrections Final Order filed April 26, 2007. It would offend the very idea of competitive bidding to afford agencies the discretion to waive material deviations in bids. Robinson Electrical Co. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982).

45. Respondent has broad discretion to waive a non-material deviation from bid requirements. Liberty County v. Baxter's Asphalt and Concrete Inc., 421 So. 2d 505, 507 (Fla. 1982). Two criteria determine whether an act of noncompliance is substantial enough to amount to a non-waivable deviation.

The ALJ must first consider whether the effect of a waiver would deprive Respondent of its assurance that the contract will be entered into or performed and guaranteed according to its specified requirements. The ALJ must also determine whether the bid requirement is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition. Robinson, 417 So. 2d at 1034.

46. The waiver of a deviation that might disqualify an otherwise winning bid gives the beneficiary of the waiver an advantage or benefit over the other bidders. Robinson, 417 So. 2d at 1034; Phil's Expert Tree Service, Inc. v. Broward County School Board, Case 06-4499BID (DOAH March 19, 2007), at para. 59, adopted in toto in Broward County School Board Final Order filed May 8, 2007. However, noncompliance with a specification designed to winnow the field, especially one that prescribes particular characteristics that the successful bidder must possess, should rarely, if ever, be waived as immaterial. This is because such a provision acts as a barrier to access into the competition, potentially discouraging some would-be participants, namely those who lack a required characteristic, from submitting a bid. City of Opa-Locka v. Trustees of the Plumbing Industry Promotion Fund, 193 So. 2d 29, 32 (Fla. 3rd

DCA 1966); Phil's Expert Tree Service at para. 60, citing Syslogic, Case No. 01-4385BID at 98.

47. While other explanations for a bidder's failure to comply with a specification may exist, prudence requires an agency to assume the worst, not hope for the best. Such caution is not only prudent, but also a matter of fairness to the other competitors who complied with the specification. Syslogic, at n. 22.

48. Savings to the taxpayer is not a sufficient ground to disturb an agency's decision not to waive a non-material bid requirement. While taxpayers may benefit from the lowest price, the public has a greater interest in ensuring the integrity of the bidding process by enforcing strict standards that discourage unfettered discretion or favoritism in the public bidding process. Phoenix Mowing and Landscaping, Inc. v. Dept. of Transportation, Case No. 01-0371BID (DOAH April 25, 2001), para. 46, adopted in toto in Florida Department of Transportation Final Order filed May 21, 2001, citing De Sapio Construction, Inc. v. Township of Clinton, 647 A.2d 878, 881 (N.J. Super. Ct. Law Div. 1994).

49. Agencies have wide discretion in soliciting and accepting bids. When an agency makes its decision based on an honest exercise of its discretion, the decision should not be overturned even if it may appear erroneous and even if

reasonable persons may disagree. Overstreet Paving Co. v. Dept. of Transportation, 608 So. 2d 851, 852-853 (Fla. 2d DCA 1992) (citing Dept. of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988) and Liberty County, 421 So. 2d at 507).

RECOMMENDATION

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

RECOMMENDED that Respondent issue a final order dismissing the protest.

DONE AND ENTERED this 21st day of March, 2008, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of March, 2008.

ENDNOTE

1/ References to subsections, sections, and chapters are to Florida Statutes, (2007) unless otherwise stated.

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.