STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WARREN BUILDING COMPANY, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-2369BID
	)	
DEPARTMENT OF MILITARY AFFAIRS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice this cause came on for formal hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted in Tallahassee, Florida, on June 10, 2008. The appearances were as follows:

APPEARANCES

For Petitioner: Thayer M. Marts, Esquire
1105 Hays Street
Post Office Box 1814
Tallahassee, Florida 32302

For Respondent: Kim F. Heller, II, Esquire
Elizabeth C. Masters, Esquire
Florida National Guard
Post Office Box 1008
St. Augustine, Florida 32085-1008

STATEMENT OF THE ISSUE:

The issue to be resolved in this proceeding concerns whether the agency action in recommending award of the contract

for a renovation of a National Guard Armory to Concrete Services, Inc. (CSI) was "clearly erroneous, contrary to competition, arbitrary or capricious." More specifically, it must be determined whether a specification requiring that all general and subcontractors visit the project site and examine the existing site conditions prior to bid submittal, and certifying to that fact, was a waivable or minor irregularity, not affecting the price of the proposal by giving an unfair competitive advantage to any bidder or proposed vendor.

PRELIMINARY STATEMENT

The cause arose upon the issuance of an invitation to bid (advertisement number 207005) by the Florida Department of Military Affairs (DMA) seeking bids for certain renovation work to be performed at the National Guard Armory in Tallahassee.

The time during which bids were allowed to be submitted elapsed without any protest of bid specifications. After the time for submission of bids elapsed, the DMA deliberated on the bids submitted and posted its decision on April 11, 2008. In its decision it announced its determination to award the contract advertised in the advertisement number 207005 to CSI, determining CSI to be the lowest responsive and responsible bidder.

Warren Building, Inc. (Petitioner) was the second lowest responsive and responsible bidder as determined by the DMA.

Upon announcement of the award of the contract, on to CSI, the Petitioner filed a formal written protest. It contested DMA's intended award based upon its position that CSI had committed an irregularity in its bid specification compliance and submittal by failing to submit, on CSI's letterhead, at the time of the bid, a certification that the general and subcontractors had thoroughly examined the property as required by the specifications. Warren, the Petitioner, thus asserts that this failure or irregularity results in CSI's bid being non-responsive and that the award should therefore be made to the Petitioner, Warren Building, Inc.

The Petition was transmitted to the Division of Administrative Hearings for conduct of a formal proceeding. The cause thus came before the undersigned Administrative Law Judge and was immediately set for hearing in Tallahassee, Florida, scheduled for June 10, 2008.

The cause came on for hearing as noticed on the above date on the issues referenced herein. The Petitioner called as a witness Mr. Steven C. Warren, President of Warren Building, Inc. The Department called Mr. Kenneth Hersey, who was project manager for the renovation project at issue, as well as Lt. Col. Robert Keating, who was the contract manager and the final decision- maker for the Agency and who made the decision to recommend

award of the project to CSI. The Respondent's Exhibits one through eight were stipulated into evidence.

Upon conclusion of the proceeding the parties ordered a transcript thereof and elected to submit proposed recommended orders. The Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Department of Military Affairs (Department) issued an invitation to bid for certain renovation work at the National Guard Armory in Tallahassee. The invitation to bid was issued on March 2, 2008. It was accompanied by an advertisement number 207005 and addenda No. 1-3. These were the documents that defined the scope of the work proposed to be constructed by the Department and the various specifications, conditions, and criteria which were to guide and be relied upon by prospective vendors or bidders. The invitation to bid stated that the contract would be awarded to the lowest responsive and responsible bidder.

2. The invitation to bid notified prospective bidders that the Department reserved the right to waive minor irregularities in a bid where they did not affect the price of the proposal. Thus, the Department stated in the Invitation to Bid "the Department reserves the right to accept or reject any or all

proposals received and reserves the right to make an award with or without further discussion of the proposals submitted or accept minor informalities or irregularities in the best interest of the State of Florida, which are considered a matter of form and not substance and the correction or waiver of which is not prejudicial to other proposals."

3. The reasons stated in the Invitation to Bid and Addenda for disqualification of a bidder did not include the failure of the contractor or subcontractors to visit the project site. Rather, the invitation to bid and advertisement list placed on the discriminatory business list, the submission of an electronic bid and employment of unauthorized aliens as irregularities that would result in disqualification of a bidder. The invitation to bid defines minor irregularities as "those that will not have an adverse effect on the DMA's interest and will not affect the price of the proposal by giving a proposer an advantage or benefit not enjoyed by all other proposers."

4. The Department thus did not make failure of a contractor or subcontractor to visit the site of the project an event that would result in disqualification. The Department's intent rather was to place contractors on notice that failure to visit the site would be at the sole risk of the general contractor/bidder if failure to visit the site resulted in an

unforeseen problem, cost, or risk. The Department stated at Addendum 1, D-9 the following:

> D-9 site examination by contractor: The general contractor and all subcontractors as listed on Exhibit Five, shall visit the project site and examine the existing conditions affected by this work prior to submitting a bid. Any bid submitted without prior examination of on-site existing conditions will be at the sole risk of the general contractor. The contractor shall submit on its letterhead the following at time of bid, certifying that he and his subs thoroughly examined the project site: 'I (name of general contractor), do hereby certify that all associated general and subcontractor entities have visited the project site and thoroughly examined the on-site existing conditions prior to the submittal of the bid.'

5. Lt. Col. Keating is the contract officer and manager. His duties include reviewing the bids and making final determination on bid proposals submitted to the Department for projects such as this renovation project. He reviewed the entire package of bid submissions after the bid opening in Tallahassee. These are his duties concerning every bid opening of the Department.

6. Lt. Col. Keating reviewed the failure of CSI to submit the Addendum D-9 letter and determined that the absence of the letter did not give CSI an unfair competitive advantage. He

determined that this was a minor irregularity which was waivable.

7. Mr. Hersey was the construction consultant for the Department for this project. Mr. Hersey reviewed the CSI file after the bids were submitted, noting that CSI's bid did not include all the verbiage required by Addendum One, D-9. He determined, however, that the proposed included the "Exhibit 4" document which stated that CSI had "visited the site of the proposed project and familiarized himself with the local conditions, nature, and extent of the work." Mr. Hersey brought this omission to Lt. Col. Keating's attention.

8. Lt. Col. Keating considered the failure of CSI to submit the Addendum 1, D-9 letter language and determined that the omission did not give CSI an unfair competitive advantage over other bidders and therefore that it was a minor irregularity. He determined that the fact that there was language in the bid submittal of CSI to the effect that the contractor had visited the site and familiarized himself with conditions, nature, and scope of the work made the bid actually responsive. The failure to include the language required in Addendum 1, D-9 did not render the bid unqualified or non-responsive, but, instead, the failure to include that language would have the consequence of making CSI responsible for any loss caused by the failure to visit the project site or have the

subcontractors visit the project site before bidding. If that omission caused any additional cost or unforeseen circumstances which had a cost attributable to them, CSI would have to bear the risk of paying for any such expense itself under the terms of the specifications.

9. It was thus determined that the failure to visit the site had the consequence of making the contractor assume resulting risks but was considered by the Department to be a quality assurance measure in the specifications, instead of a determining or qualifying factor for award of the project. Lt. Col. Keating determined that the failure to submit the required language in the letter did not give CSI an unfair competitive advantage. CSI's bid was $1,866,212.00. The bid of the Petitioner, Warren Building Company, Inc., was $1,944,000.00. Thus, CSI's bid was $77,788.00 lower than the bid submitted by the Petitioner Warren.

10. In preparing his bid submittal, the Petitioner had not been charged by his subcontractors for their visiting the Tallahassee project site. His entire cost of submitting the response to the invitation to bid on behalf of Warren, was $10,000.00 or less. Thus, the failure by CSI to have subcontractors visit the site and evaluate the work was clearly not shown to have saved CSI costs, in an amount anywhere approaching the total difference in the amounts of the two bids.

Only if the avoidance of such costs represented by the visits of the contractor and subcontractors to the job site was greater than or at least approximately equal to the $77,788.00 difference between the two bids, would the failure of CSI to entirely comply with this specification result in a change in the relative competitive positions of the two bidders. Put another way, there was no evidence to show that had CSI completely complied with the disputed specification, that it would not still have much the lowest-priced responsible and responsive bid.

11. It was thus determined by Lt. Col. Keating that the $1,866,212.00 bid submitted by CSI was the lowest responsible and responsive bid. He therefore determined that the award of the contract should be give to CSI and an Agency decision to that effect was posted on April 11, 2008. The subject protest and proceeding ensued.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction of the subject matter hereof and the parties to this proceeding. §§ 120.569 and 120.57(1)(3), Fla. Stat. (2007).

13. Section 120.57(3)(f), Florida Statutes (2007), provides pertinently as follows:

> . . . Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specification. The standard of proof for such proceeding shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary or capricious . . .

Thus, a Petitioner protestant must sustain its burden of proof by preponderant evidence. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1998). The Petitioner must thus demonstrate that the Agency's proposed action is contrary to governing statutes, the Agency's rules or policies, or the bid or proposal specifications. Put another way, it must be determined whether the Agency was in error in applying a governing principle, as for instance, its interpretation or application of bid specifications.

14. Whether an act is contrary to competition is determined by considering whether it offends the purpose of the competitive bidding statutes. "The purpose of the competitive bidding process is to secure fair competition on equal terms to all bidders by affording an opportunity for an exact comparison

of bids." Harry Pepper and Associates, Inc., v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2nd DCA 1977). See also Wester v. Belote, 138 So. 2d 721 (Fla. 1931).

15. Section 287.057(2), Florida Statutes (2007), requires an agency to award a contract to the "responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into the consideration the price and other criteria set forth in the request for proposals."

16. In the case at hand the Department listed a number of items in the specifications that would result in a bid being rejected. The failure to comply with Addendum D-9, was not one of them, however. In fact, the plain language of Addendum 1, D-9 states that the penalty for failure to comply with submitting the site examination would be that the general contractor assumed any additional risk caused by its failure to examine the site or to submit the relevant document assuring of the site examination. There was no penalty of rejection of the proposer's bid for such a failure.

17. The Department also placed all bidders on notice in the invitation to bid documents that it reserved the right to accept minor informalities or irregularities in bids, in the best interest of the state, which it considered to be non-substantial or matters of form, and the correction or waiver of which would not be prejudicial to other bid proposals. The

Department's determination that the CSI submission was responsive and responsible and that the omission in question was a minor irregularity and waivable was shown by the preponderant weight of the evidence to be properly within its discretion. The evidence did not demonstrate that the Department thus acted arbitrarily, capriciously, or contrary to competition. This is because the Agency was shown to have considered all relevant factors and made good faith consideration of the factors and employed a reasonable basis for making its final decision rather than caprice or whim. See Adam Smith Enterprises, Inc., v. State, Department of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

18. The purpose of competitive bidding is to secure the lowest responsible offer. Minor irregularities in bids, vis a vis, specifications can be waived, effectuating that purpose. See Air Support Services International, Inc., v. Metropolitan Dade County, 614 So. 2d 583, 584 (Fla. 3rd DCA 1983); Tropabest Foods, Inc. v. State of Florida, Department of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986). Although a bid containing a material variance from the specifications is not acceptable, not every deviation from an invitation to bid specification is material. Glatstein v. City of Miami, 399 So. 2d 1005 (Fla. 3rd DCA 1981), rev. denied 407 So. 2d 1102 (Fla. 1981).

19. The opinion in Robinson Electrical, Inc. v. Dade County, 417 So. 2d 1032 (Fla. 3rd DCA 1982), is instructive where the court stated:

> In determining whether a specific non-compliance constitutes a substantial and hence a non-waivable irregularity, the courts have applied two criteria-first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it 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.
>
> In application of the general principles above discussed, sometimes it is said that a bid may be rejected or disregarded if there is a material variance between the bid and the advertisement. A minor variance, however, will not invalidate the bid. In this context a variance is material if it gives the bidder a substantial advantage over the other bidders, and thereby restricts or stifles competition.

20. Assuming arguendo that CSI was less than fully responsive to the specification concerning site examination and evaluation by the contractor and subcontractors, the preponderant direct and circumstantial evidence, culminating in the above-found facts does not show any deviation to be material. The courts do not favor the disqualification of a low

bidder for non-responsiveness where a bid irregularity does not impart an unfair competitive advantage to the low bidder. In the case of Intercontinental Properties v. DHRS, 606 So. 2d 380 (Fla. 3rd DCA 1992), the court, in reversing a hearing officer's finding of unresponsiveness on the part of a bidder, discussed at length the well-known case of Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So. 2d 505 (Fla. 1982), concerning principles applicable to competitive bidding. The Intercontinental court enunciated the principle from the Baxter's opinion that:

> A minor irregularity is a variation from the bid invitation or proposal terms and conditions which does not affect the price of the bid, or give the bidder an advantage or benefit not enjoyed by other bidders, or does not adversely impact the interest of the Department . . .
>
> There is a very strong public interest in favor of saving tax dollars in awarding public contracts. There is no public interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, where the low bidder did not derive any unfair competitive advantage by reason of the technical omission. . . .
>
> In either event, there is a strong public policy in favor of awarding contracts to the low bidder, and an equal strong public policy against disqualifying the low bidder for technical deficiencies which do not confer an economic advantage on one bidder over another. Id. at 387. (Emphasis supplied).

See also ESP Security and Satellite Engineering, Inc. v. University of Florida, Physical Plant Division, Architecture/Engineering Department (Case No. 94-2035BID, DOAH Recommended Order entered April 12, 1995).

21. In the case at hand, CSI was shown to be the low bidder by a substantial amount, as reflected in the figures referenced in the above Findings of Fact. The evidence adduced by the Petitioner also shows that the Petitioner spent approximately $10,000.00 for all bid proposal-related work or preparations before submission of its bid proposal. Even though CSI may not have made the site examination or may not have had its subcontractors make the relevant site examination provided for in the above-referenced specification, if it had done so, and spent a resultant similar amount on bid preparation, it would still have a substantially lower bid price than would the Petitioner.

22. Moreover, the specifications are clear in providing that this was not a specification which carried with it a penalty of disqualification for any bidder who failed to comply. In fact, the bid specifications, as found above, provided that any contractor who did not comply with this specification concerning site evaluation and inspection would bear the risk of failure to comply with that specification. Thus, failure to comply would not affect the price ultimately paid or the other

circumstances and conditions of performance to be provided by the contractor, if the contractor had omitted compliance or complete compliance with that specification.

23. There was simply no preponderant evidence to show that failure to completely comply with the relevant specification at issue resulted in CSI being awarded the bid. In fact, as shown by the significant disparity in the price proposed by CSI versus that proposed by Warren, the Petitioner, CSI would have been the low bidder by a substantial amount in either circumstance.

24. In summary, therefore, it has been demonstrated by the preponderant, persuasive evidence of record, culminating in the above findings of fact, that the determination by the Department that CSI's bid proposal was responsive, responsible and the lowest bid was a reasonable decision. So too, was the determination that the minor irregularity at issue was an omission which did not confer an unfair competitive advantage on CSI. These determinations are supported by the preponderant, credible, persuasive evidence of record and do not offend the above-discussed and concluded purpose of the competitive bidding statute involved. These decisions are not contrary to competition and, because the Agency has been shown to have given good faith, reasonable consideration to all relevant factors, the decisions would not be arbitrary or capricious, and are shown to comport with Agency statutes, rules, and policies. The

decision was shown to comport with the specifications of the bid solicitation.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Military Affairs, awarding the contract for renovation work at the National Guard Armory in Tallahassee, Florida (No. 207005) to Concrete Services, Incorporated.

DONE AND ENTERED this 20th day of August, 2008, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
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 20th day of August, 2008.

COPIES FURNISHED:

Thayer M. Marts, Esquire
1105 Hays Street
Post Office Box 1814
Tallahassee, Florida 32302

Kim F. Heller, II, Esquire
Elizabeth C. Masters, Esquire
Florida National Guard
Post Office Box 1008
St. Augustine, Florida 32085-1008

Elizabeth C. Masters, Lt. Colonel
Florida Army National Guard
82 Marine Street
St. Augustine, Florida 32084

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.