STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SPINELLA ENTERPRISES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-3380BID
	)	
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on August 7, 2008, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Cas Spinella
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For Respondent: Suzanne B. Brantley, Esquire
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STATEMENT OF THE ISSUE

The issue in this bid protest is whether Respondent acted arbitrarily when it decided to reject all of the bids it had received in response to a solicitation seeking bids on a contract for roof repairs.

PRELIMINARY STATEMENT

On January 10, 2008, the Florida Department of Environmental Protection issued an Invitation to Bid, which sought competitive bids from roofing contractors interested in performing roof repairs on several buildings located in a state park. After opening the bids on February 12, 2008, the Department determined that Petitioner Spinella Enterprises, Inc., had quoted the lowest price for the work. A notice of intent to award a contract to Spinella Enterprises was posted on February 19, 2008.

Thereafter, a disappointed bidder initiated a protest. On May 16, 2008, while this first protest was pending, the Department gave notice of its intent to reject all bids and start over. Spinella Enterprises timely protested the decision to abort the instant procurement.

The Department referred the matter to the Division of Administrative Hearings ("DOAH") on July 10, 2008. The final hearing took place as scheduled on August 7, 2008. At the hearing, Spinella Enterprises presented the testimony of its president, Cas Spinella, and offered Petitioner's Exhibits 1 and 2, which were received in evidence. During its case, the Department called Michael Renard, the project administrator, as a witness. The Department also offered Respondent's Exhibits 1-3, 5-8, and 10, which were admitted.

The final hearing transcript was filed on September 4, 2008. The Department timely filed a Proposed Recommended Order ahead of

the established deadline, which was September 15, 2008. Spinella Enterprises did not submit a Proposed Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2008 Florida Statutes.

FINDINGS OF FACT

1. On January 10, 2008, the Florida Department of Environmental Protection (the "Department" or "DEP") issued an Invitation to Bid (the "ITB"), the purpose of which was to solicit competitive bids from qualified contractors on a project whose scope of work envisioned repairs to the wind-damaged roofs of several buildings located on the grounds of the Hugh Taylor Birch State Park in Fort Lauderdale, Florida.

2. Some of the buildings to be repaired were single-family residences. Work on these structures accordingly needed to conform to the requirements prescribed in the 2007 Manual of Hurricane Mitigation Retrofits for Existing Site-Built Single Family Residential Structures (the "Manual"), which the Florida Building Commission (the "Commission"), following an explicit legislative directive, see Section 553.844(3), Florida Statutes,[1] recently had adopted, by incorporative reference, as a rule. See Fla. Admin. Code R. 9B-3.0475 (2007).[2] The Rule had taken effect on November 14, 2007, giving the Manual's contents the same status and force as the Florida Building Code. Id.

3. Just before the Department issued the ITB, the Commission had approved, at a meeting on January 8, 2008, a

modified version of the Manual, which it called the 2007 Manual of Hurricane Mitigation Retrofits for Existing Site-Built Single Family Residential Structures, Version 2 (the "Revised Manual").

4. In consequence of the Commission's approval of the Revised Manual, the Florida Department of Community Affairs ("DCA") caused a Notice of Proposed Rule Development to be published on January 25, 2008, in the Florida Administrative Weekly. This official advertisement announced that the Commission intended to amend Rule 9B-3.0475, so that its incorporative reference would mention the Revision Manual instead of the Manual. See 34 Fla. Admin. W. 461-62 (Jan. 25, 2008).[3]

5. DCA caused a Notice of Proposed Rule respecting the intended revision of Rule 9B-3.0475 to be published on February 1, 2008, in the Florida Administrative Weekly. See 34 Fla. Admin. W. 605 (Feb. 1, 2008).[4]

6. On February 5, 2008, the Department issued Addendum No. 4 to the ITB (the "Addendum"). The Addendum provided in pertinent part as follows:

> Bidders shall bid the project as specified despite the recent change in Rule 9B-3.0475 relating to hurricane mitigation retrofits. Any additional water barrier will be accomplished by Change Order after award of the contract.

(The foregoing provisions of the Addendum will be referred to hereinafter as the "Directive").

7. On February 12, 2008, the Department opened the bids it had received in response to the ITB. Ten (out of 12) of the bids

submitted were deemed responsive. The bid of Petitioner Spinella Enterprises, Inc. ("Spinella") was one of the acceptable bids.

8. On February 19, 2008, DEP posted notice of its intent to award a contract to the lowest bidder, namely Spinella, which had offered to perform the work for $94,150.

9. The second lowest bidder was The Bookhardt Group ("Bookhardt"). Bookhardt timely protested the intended award, raising several objections, only one of which is relevant here. In its formal written protest, dated March 3, 2008, Bookhardt alleged that "[t]he new State of Florida law F.S. 553.844 was not part of the solicitation."

10. On April 4, 2008, Rule 9B-3.0475, as amended to incorporate by reference the Revised Manual, took effect. See Fla. Admin. Code R. 9B-3.0475 (2008).

11. On May 16, 2008, DEP posted notice of its intent to reject all bids received in response to the ITB. (Bookhardt's protest, which remained pending, had never been referred to DOAH for a formal hearing.) Spinella timely protested the Department's decision to reject all bids.

12. In an email sent to Spinella on July 22, 2008, DEP's counsel explained the rationale behind the decision:

> The reason the Department rejected all bids follows. When the Department posted the notice of intent to award the contract to Spinella Enterprises, Inc., the second low bidder (Bookhardt Roofing) protested the intent to award. The second low bidder's basis for protesting the intended award was that Addendum 4 directed bidders to ignore

> certain rules of the Construction Industry Licensing Board [sic], which had become effective after the bid opening, which was not in accordance with the law. As a result, this may have caused confusion and the Department had no assurance that bidders were bidding the project correctly. In addition, the statement in Addendum 4 that the Department would add the required moisture barrier afterward by change order set up a situation where bidders had no idea how much the Department would be willing to pay for the change order. Further, the moisture barrier was not the only thing required by the new rules. Potential bidders may not have bid due to these uncertainties. The Department agreed with Bookhardt's assertions and rejected all bids . . . .

13. Notwithstanding Spinella's protest, the Department issued a second invitation to bid on the project in question. As of the final hearing, the bids received in response to this second solicitation were scheduled to be opened on August 12, 2008.

Ultimate Factual Determinations

14. The Department's decision to reject all bids is premised, ultimately, on the notion that the Directive told prospective bidders to ignore an applicable rule in preparing their respective bids.[5] If this were true, then the Directive could have been a source of potential confusion, as the Department argues, because a prudent bidder might reasonably hesitate to quote a price based on (possibly) legally deficient specifications.

15. The Directive, however, did not instruct bidders to ignore an applicable, existing rule. Rather, under any

reasonable interpretation, it instructed bidders to ignore a proposed rule and follow existing law. Such an instruction was neither confusing nor inappropriate.

16. To be sure, the first sentence of the Directive——at least when read literally——misstated a fact. It did so by expressing an underlying assumption, i.e. that Rule 9B-3.0475 recently had been changed, which was incorrect. In fact, as of February 5, 2008, the Rule was exactly the same as it had *always* been. (It would remain that way for the next two months, until April 6, 2008).[6] DEP's misstatement about the Rule might, conceivably, have confused a potential bidder, at least momentarily. But DEP did not factor the potential for such confusion into its decision to reject all bids, and no evidence of any confusion in this regard was offered at hearing.[7]

17. More important is that the unambiguous thrust of the Directive was to tell bidders to rely upon the "not recently changed" Rule 9B-3.0475, which could only have meant Florida Administrative Code Rule 9B-3.0475 (2007) as originally adopted, because that was the one and only version of the Rule which, to that point, had ever existed. Thus, even if the Department were operating under the mistaken belief, when it issued the Addendum, that Rule 9B-3.0475 recently had been amended; and even if, as a result, DEP thought it was telling prospective bidders to ignore an *applicable*, existing rule, DEP nevertheless made clear its intention that prospective bidders follow the *original* Rule 9B-

3.0475, which was in fact the *operative* Rule at the time, whether or not DEP knew it.

18. Indeed, as any reasonable potential bidder knew or should have known at the time of the Addendum, (a) the Commission recently had approved the Revised Manual, but the contents thereof would not have the force and effect of law *unless and until* the Revised Manual were adopted as a rule, which had not yet happened; (b) the Commission had initiated rulemaking to amend Rule 9B-3.0475 so as to adopt the Revised Manual as a rule, *but the process was pending, not complete*; (c) Rule 9B-3.0475 had *not* been amended, ever; and, therefore, (d) the Manual still had the force and effect of law. See endnote 6. The Directive obviously could not alter or affect these objective facts.

19. At bottom, then, a reasonable bidder, reviewing the Directive, would (or should) have concluded *either* (a) that the "recent change" which DEP had in mind was the Commission's approval of the Revised Manual (or the subsequent announcement of the proposed amendment to Rule 9B-3.0475) *or* (b) that DEP mistakenly believed the Rule had been changed, even though it had not been. Either way, a reasonable bidder would (or should) have known that the Department wanted bidders to prepare their respective bids based not on the Revised Manual, but the Manual. In other words, regardless of what DEP subjectively thought was the existing law, DEP clearly intended (and unambiguously expressed its intent) that bidders follow what was, in fact,

existing law. This could not have confused a reasonable bidder because, absent an instruction to *exceed* the minimum required legal standards (which the Directive was not), a reasonable bidder would have followed existing law in preparing its bid, just as the Directive required.

20. Once it is determined that the Directive did not, in fact, instruct bidders to *ignore* an applicable, existing law, but rather told them to *rely upon* the applicable, existing law (notwithstanding that such law might change in the foreseeable future), the logic underlying the Department's decision to reject all bids unravels. Simply put, there is no *genuine* basis in logic or fact for concluding that the Addendum caused confusion.

21. The other grounds that DEP has put forward do not hold water either. Contrary to the Department's contention, the possibility that a Change Order would be necessary if an "additional water barrier" were required could not possibly have confused potential bidders or caused them to be uncertain about how much money the Department would be willing to pay for such extra work. This is because Article 27 of the Construction Contract prescribes the procedure for entering into a Change Order, and it specifies the method for determining the price of any extra work. See ITB at 102-05.

22. The fact that the proposed amendment to Rule 9B-3.0475, if it were to be adopted and become applicable to the instant project, might require other additional work, besides a water

barrier, likewise could not reasonably have caused potential bidders to refrain from bidding, for the same reason: The Construction Contract contains explicit provisions which deal with the contingency of extra work or changes in the work. Id.

23. In sum, DEP's intended decision to reject all bids cannot be justified by any analysis that a reasonable person would use to reach a decision of similar importance. It is, therefore, arbitrary.

CONCLUSIONS OF LAW

24. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes, and the parties have standing.

25. Section 120.57(3)(f), Florida Statutes, provides that in a proceeding brought to protest the intended rejection of all competitive proposals, the standard of review shall be whether the proposed agency action is "illegal, arbitrary, dishonest or fraudulent." This standard derives from Department of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 914 (Fla. 1988), a case in which the Florida Supreme Court held that the administrative law judge's "sole responsibility [in reviewing a decision to reject all bids] is to ascertain whether the agency acted fraudulently, arbitrarily, illegally or dishonestly." (The parties here stipulated that the Department had not acted fraudulently, illegally, or dishonestly, leaving only the

question of whether the Department's intended decision is arbitrary.)

26. The burden of proof rests with the party opposing the proposed agency action. See State Contracting and Engineering Corp. v. Department of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). As the protesting party, Spinella must sustain its burden of proof by a preponderance of the evidence. Department of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

27. In Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991), the First District Court of Appeal described the deference to be accorded an agency in connection with a competitive procurement:

> The Hearing Officer need not, in effect, second guess the members of the evaluation committee to determine whether he and/or other reasonable and well-informed persons might have reached a contrary result. Rather, a "public body has wide discretion" in the bidding process and "its discretion, when based on an honest exercise" of the discretion, should not be overturned "even if it may appear erroneous and even if reasonable persons may disagree."

(Citations omitted; emphasis in original).

28. In Gulf Real Props., Inc. v. Department of Health and Rehabilitative Servs., 687 So. 2d 1336, 1338 (Fla. 1st DCA 1997), the court upheld an agency's intended rejection of all bids, stating that "an agency's rejection of all bids must stand,

absent a showing that the 'purpose or effect of the rejection is to defeat the object and integrity of competitive bidding.'"

29. An arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). Under the arbitrary and capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." Adam Smith Enterprises, Inc. v. State Dep't of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Still,

> the reviewing court must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of each of these factors to its final decision.

Id.

30. The second district has supplied the following test for determining whether a decision was arbitrary: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious." Dravo Basic Materials Co., Inc. v. State Dep't of Transportation, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

As the court observed, this "is usually a fact-intensive determination." Id. at 634.

31. To summarize, in reviewing an agency's intended decision to reject all bids, the administrative law judge must give substantial deference to the agency's determination, owing to its wide discretion in procurement matters. There is an appreciable difference, however, between according the respect that deference entails and affixing the rubber stamp.

32. As set forth in the preceding Findings of Fact, the undersigned has determined as matter of ultimate fact that the Department's intended decision is arbitrary. The rationale behind this fact-intensive determination was given above. To the extent any of the findings of fact herein are deemed to be legal conclusions, such findings are hereby incorporated by reference as if set forth in this Conclusions of Law section of the Recommended Order and adopted as legal conclusions.

33. The facts of this case call to mind Caber Systems, Inc. v. Department of General Services, 530 So. 2d 325 (Fla. 1st DCA 1988). In Caber, as here, the agency decided to reject all bids after a disappointed bidder had protested the intended award. Unlike this case, however, in Caber the administrative law judge found, as a matter of fact, that the invitation to bid was "seriously flawed in several respects." Id. at 331. Indeed, the bid specifications were so ambiguous, a finding of fact was made that the invitation to bid had failed clearly to reflect either

the agency's or anyone else's intent. Id. The court held that, in view of the hopelessly ambiguous specifications, the agency's rejection of all bids was neither arbitrary nor capricious, even though the decision to pull the plug on the procurement had been made while the first protest remained pending. Id. at 336.

34. In the instant case, the Addendum was not confusing, ambiguous, or fatally flawed. Rather, although the Directive, as written, incorrectly suggested that there had been a recent change in Rule 9B-3.0475 (when in fact there recently had been published only a *proposed* amendment to the Rule), it nevertheless clearly and plainly stated DEP's intent that bidders follow the applicable, existing law. Caber, therefore, is distinguishable on this basis and hence inapposite.[8]

35. One final issue remains to be discussed. At hearing, DEP admitted that, notwithstanding Spinella's timely bid protest, it *already* effectively had implemented its intended decision to reject all bids by issuing another invitation to bid on the very project at stake in this case; indeed, as of the final hearing, bids submitted in response to the second solicitation were expected to be opened within a matter of days. No evidence was presented to establish that, before taking this action, the agency head had set forth in writing particular facts and circumstances demonstrating that the failure to proceed at once with this procurement would present an immediate and serious danger to the public. By pressing ahead with its efforts to let

the contract in question, DEP violated Section 120.57(3)(c), Florida Statutes.[9]

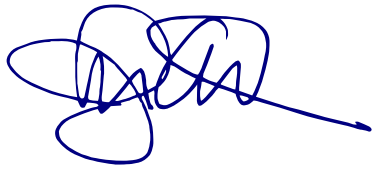
36. As Spinella argued at hearing, the Department's actions threaten to make unavailable the *administrative* relief to which Spinella otherwise would be entitled if his protest were successful, namely final agency action awarding Spinella the subject contract. The unavailability of administrative relief would not make this case moot, however, because there are *judicial* remedies available, such as injunctive or other equitable relief, reliance damages, and the recovery of protest costs, to rectify the losses caused by DEP's wrongful denial of Spinella's bid. See Miami-Dade County Sch. Bd. v. J. Ruiz School Bus Serv., Inc., 874 So. 2d 59 (Fla. 3d DCA 2004).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order finding that its decision to reject all bids was arbitrary. Because the Department elected not to comply with the statutory directive to abate this procurement pending the outcome of Spinella's protest, with the result that the contract at issue possibly has been awarded already to another bidder; and because the choice of remedies for invalid procurement actions is ultimately within the agency's discretion, the undersigned declines to make a recommendation regarding the means by which DEP should rectify the harm to Spinella, but he urges that other

appropriate relief be granted if Spinella cannot be awarded the contact.

DONE AND ENTERED this 2nd day of October, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of October, 2008.

ENDNOTES

[1]/ In pertinent part, the statute provides as follows:

> [T]he Florida Building Commission shall develop and adopt . . . measures [to incorporate recognized mitigation techniques for lessening the destructive effects of hurricanes on site-built, single-family residential structures constructed before the implementation of the Florida Building Code] by October 1, 2007, by rule separate from the Florida Building Code, which take immediate effect and shall incorporate such requirements into the next edition of the Florida Building Code.

§ 553.844(3), Fla. Stat.

[2]/ Florida Administrative Code Rule 9B-3.0475 (2007) provided as follows:

> The 2007 Manual of Hurricane Mitigation Retrofits for Existing Site-Built Single Family Residential Structures is hereby adopted by reference. The manual provides requirements for construction in addition to those contained in the Florida Building Code as adopted by Rule 9B-3.047, F.A.C., that shall be enforced as provided in the manual and as required by Section 553.844, F.S. A copy of the manual may be obtained from the Florida Building Commission's website, www.floridabuilding.org. If any person encounters any difficulty utilizing the website, assistance is available by calling the Codes and Standards Unit at (850)487-1824.

[3]/ The undersigned has taken official recognition of the public announcement which appeared in the Florida Administrative Weekly.

[4]/ The undersigned has taken official recognition of the public notice which appeared in the Florida Administrative Weekly.

[5]/ In her email of July 22, 2008, DEP's counsel asserted that the Directive had instructed "bidders to ignore certain rules . . . which had become effective after the bid opening, which was not in accordance with the law." This statement implies that the "certain rules" which were to be ignored were *applicable* rules because, logically, there would be nothing problematic about instructing bidders to ignore *inapplicable* rules. Yet, while the statement acknowledges that the "certain rules" in question took effect *after the bid opening*, it avoids mentioning that the subject rules were, for that reason, not in effect (and thus not applicable) at the time the Addendum was issued. The statement thus seems designed to leave the impression that the Directive referred to an applicable rule, even as it hints that such was not the case.

Regardless, the Department's position makes sense only if the Directive is understood as an instruction to ignore an applicable, existing law. This is because, first, the Directive actually told bidders (in so many words) to ignore the "recent change in Rule 9B-3.0475"——language which suggested that the "recent change" was already in effect. Second, if the Department had meant merely to instruct bidders, through the Directive, to ignore the recently proposed (but currently ineffective)

amendment to Rule 9B-3.0475, such an instruction would have been fully in accord with the law, and should not have been confusing to any reasonable bidder, even if the Department believed that the proposed amendment likely would become effective after the bid opening. (It is, of course, easy to imagine scenarios in which compliance with a proposed amendment to the building code would be impermissible. Suppose, for example, the Revised Manual promised to *relax* certain standards found in the Manual. In that event, builders would continue to be required to meet the more stringent standards contained in the Manual until such time as the Revised Manual were adopted as a rule.) Therefore, the Department needs for the Directive to be understood as an instruction to ignore *applicable*, existing law if its rationale for rejecting all bids is to be deemed coherent.

[6]/ The law in this regard is clear and unambiguous. Section 120.54(1)(i)1., Fla. Stat. (2008), states:

> A rule may incorporate material by reference but only as the material exists on the date the rule is adopted. For purposes of the rule, changes in the material are not effective unless the rule is amended to incorporate the changes.

(Emphasis added.)

[7]/ It is debatable, moreover, whether such confusion would have been reasonable. Article 16 of the Construction Contract required a bidder to represent that it was "fully informed with regard to all applicable local, state, and federal laws, ordinances, rules, regulations, and codes (the 'Laws') governing the Work . . . ." See ITB at 90. Any bidder who made this representation in good faith would have known that Rule 9B-3.0475 had not been "recently changed" as of February 5, 2008.

[8]/ Because Caber is inapposite, the undersigned need not decide here whether Caber should be revisited in light of subsequent statutory changes. Of particular interest, however, is that, some two years after Caber was decided, it became necessary to bring a specifications protest within 72 hours after receipt of the invitation to bid——or be deemed to have waived the right to do so. Legislation enacted in 1990 inserted the following sentence into § 120.53(5)(b), Florida Statutes: "With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for

proposals, and the formal written protest shall be filed within 10 days after the date the notice of protest is filed." Ch. 90-302, Laws of Fla. This particular provision, which despite undergoing some revisions over the years retains the same basic meaning, is currently found in § 120.57(3)(b), Fla. Stat.

Given the requirement that specifications be protested immediately——which was not the law at the time of Caber——there is now reason to view with some suspicion an agency's decision to reject all bids on the basis of alleged problems with the specifications when, as happened here, the purported deficiencies have been brought to the agency's attention by the protest of a disappointed bidder. The concern, of course, is that the agency may have favored a preferred bidder by granting it relief on grounds which the bidder, having failed to bring a timely specifications protest, clearly had waived, and by doing so effectively have circumvented the deadline that § 120.57(3)(b) imposes.

[9]/ Section 120.57(3)(c), Fla. Stat., states:

> Upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.

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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.