

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MORALES MOVING AND STORAGE)
COMPANY, INC.,)
)
Petitioner,)
)
vs.) Case No. 08-4442BID
)
MIAMI-DADE COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 22 and 23, 2009, in Miami, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Philip S. Vova, Esquire
The Law Office of Philip S. Vova, P.A.
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For Respondent: Stephen L. Shochet, Esquire
Miami-Dade County School Board
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STATEMENT OF THE ISSUE

The issue for determination is whether the intended action by Respondent to disqualify Petitioner from eligibility for

award of the Invitation to Bid No. 062-HH10 – Relocation of Furniture, Fixtures and Equipment – was improper.

PRELIMINARY STATEMENT

By registered letter dated August 14, 2008, Miami-Dade County School Board (Respondent) notified Morales Moving and Storage Company, Inc. (Petitioner), that, even though Petitioner was in the group of low bidders for the Invitation to Bid (ITB) No. 062-HH10 – Relocation of Furniture, Fixtures and Equipment (FF&E), Petitioner was not being considered for the award of the contract because Petitioner was non-responsive. Further, Respondent indicated that Petitioner was non-responsive on the basis of "Special Condition #5 - Reference/Qualifications," which provides in pertinent part: "Bidders who, in the past three years, have billed the School Board for work not actually performed, or who have charged amounts materially in excess of the contract unit prices, may be determined to be ineligible for award under this Bid." Petitioner timely filed a Petition of Protest, protesting the intended action by the Respondent to disqualify Petitioner from the award of the contract for ITB No. 062-HH10, Relocation of FF&E. On September 12, 2008, this matter was referred to the Division of Administrative Hearings.

The parties waived the 30-day requirements. Prior to hearing, the parties filed a Joint Pre-hearing Stipulation, which included limited admitted facts.

At hearing, Petitioner presented the testimony of four witnesses. Respondent did not present the testimony of any witnesses. The parties entered seven joint exhibits (Joint Exhibits numbered 1-7) into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for 20 days following the filing of the transcript. The Transcript, consisting of one volume, was filed on March 4, 2009. The parties' post-hearing submissions were due on or before March 24, 2009. Subsequently, Petitioner requested additional time in which to file post-hearing submissions, to which Respondent did not object. Petitioner's request was granted. The parties timely filed post-hearing submissions, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. No dispute exists that, at all times material hereto, Respondent was a duly-constituted School Board, with the duty to operate, control and supervise all free public schools within the school district of Miami-Dade County, Florida, pursuant to Article IX, Section 4(b) of the Florida Constitution.

2. Respondent issued ITB No. 062-HH10, Relocation of FF&E. The purpose of ITB No. 062-HH10, Relocation of FF&E is, among other things, to obtain multiple providers for moving,

relocation, and installation services of Respondent's FF&E.

Bids were accepted until 2:00 p.m. on August 5, 2008.

3. ITB No. 062-HH10, Relocation of FF&E contains a section titled "Instruction to Bidders," which provides in pertinent part:

II. Submitting of Bids

* * *

D. Public Entity Crimes. Section 287.133(2)(a), Florida Statute [sic]. A person who has been placed on the convicted vendor list following a conviction for a public entity crime may not submit a bid on a contract to provide goods or services to a public entity . . . may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with any public entity, and may not transact business with any public entity in excess of the threshold amount provided in Section 287.017, for CATEGORY TWO for a period of 36 months from the date of being placed on the convicted vendor list. (emphasis in original)

4. ITB No. 062-HH10, Relocation of FF&E contains a "Special Conditions" section. Paragraph numbered 2 of the Special Conditions, titled "Award," provides in pertinent part:

The School Board of Miami-Dade County, Florida [Respondent], will award the contract to a maximum of five (5) lowest responsive, responsible bidders who offer the total low bid for all items. . . M-DCPS [Respondent] reserves the right, before awarding this contract, to require bidders to submit their qualifications. Bidders must meet all specifications and

requirements of this bid to be considered for award.

Successful vendors will be considered pre-qualified Contractor(s) and will be invited to participate in the quoting process for each relocation project. The Contractor offering the lowest quote for each relocation project, complying in full with all requirements, shall be awarded the project. . . .

5. Paragraph numbered 5 of the Special Conditions, titled "References/Qualifications," provides in pertinent part:

Bidders who, in the past three years, have billed the School Board [Respondent] for work not actually performed, or who have charged amounts materially in excess of the contract unit prices, may be determined to be ineligible for award under this Bid.

6. Respondent's "Buyer" indicated on ITB No. 062-HH10, Relocation of FF&E is Barbara D. Jones, Executive Director of the Procurement Management Services (PMS).

7. Since approximately 1998, Petitioner had been a provider of FF&E relocation services to Respondent.

8. For the past five years, Respondent had awarded bids regularly to Petitioner.

9. Petitioner's owner is Rene Morales. Petitioner, through Mr. Morales, is very familiar with Respondent's bidding process and documents.

10. Prior to ITB No. 062-HH10, Relocation of FF&E, Petitioner had submitted a bid for ITB No. 062-EE10, Relocation

of FF&E, as a provider of FF&E relocation services. Bids were accepted until 2:00 p.m. on July 14, 2005. Respondent awarded Petitioner the contract. The term of the contract was for two (2) years from the date of the award. Ms. Jones was also indicated as Respondent's buyer.

11. No dispute exists that, during the performance period of ITB No. 062-EE10, Relocation of FF&E, Petitioner performed some legitimate moves and properly billed Respondent for those moves.

12. However, in or around February or March 2007, Respondent's employees in its FF&E Department, who were charged with administering the FF&E relocation program, devised a scheme to obtain payment for work that was not performed. At the request of the FF&E employees, certain of Respondent's vendors, who were performing relocation of FF&E services, would submit lump-sum relocation service quotations for moves, which did not actually occur, at a certain cost, i.e., \$6,400.00; and those particular employees in the FF&E Department would designate certain persons to whom the participating vendor would pay a certain amount, i.e., \$5,200.00. The designated person would be included on the quotation documents, but, in actuality was not an employee of the participating vendor. Respondent would pay the lump-sum cost quoted; the participating vendor would pay the

designated person; and the participating vendor would retain the balance, i.e., \$1,200.00, for itself.

13. The FF&E Department submitted the required paperwork to Respondent's PMS for payment of the relocation services quotations. Ms. Jones, testified that PMS relied upon the FF&E Department for the correctness of the paperwork submitted, and that, therefore, PMS accepted the paperwork, including purchase orders, submitted by the FF&E Department without questioning the validity of the paperwork. Her testimony is found to be credible. Ms. Jones signed the purchase orders, authorizing payment. PMS issued payment for the purchase orders based upon the paperwork submitted by the FF&E Department.

14. No dispute exists that Respondent's employees in the FF&E Department participated in the scheme and committed illegal acts.

15. Beginning in March 2007, the employees at the FF&E Department requested Petitioner to submit a number of lump sum bid quotations, i.e., \$6,400.00, for FF&E relocation services, with a designated person named. However, no FF&E relocation services were involved. Petitioner complied with the requests on at least five (5) separate occasions in 2007.

16. Petitioner's lump-sum bid quotations were accepted by the employees at the FF&E Department. An Award Letter/Work Order (AL/WO) for each quotation was issued to Petitioner by the

employees at the FF&E Department—AL/WO N1943E; AL/WO N1855E; AL/WO N1940E; AL/WO N2066E; and AL/WO N2065E.

17. The employees at the FF&E submitted the paperwork to PMS for payment of the lump-sum quotations. Ms. Jones signed the purchase orders submitted by the employees of the FF&E Department, authorizing payment. PMS issued payment to Petitioner for the lump-sum purchase orders of \$6,400.00 each, based upon the paperwork submitted by the FF&E Department. Petitioner paid the designated person on each bid quote \$5,200.00 and retained the remainder.

18. Mr. Morales, testified at hearing. He testified that, in 2007, Petitioner was not receiving payment for services that had been performed under ITB No. 062-EE10, Relocation of FF&E because the director of the FF&E Department, Will Lopez, was absent due to illness; that Petitioner was owed approximately \$100,000.00 under ITB No. 062-EE10, Relocation of FF&E, but was not receiving payment; and that he (Mr. Morales) was being informed by the FF&E Department that FF&E payment documents required the approval of Mr. Lopez. Furthermore, Mr. Morales testified that, at the time of the first request for the lump sum quotation, he (Mr. Morales) was informed that the designated person would perform the paperwork that was needed for Petitioner to receive the payments. Mr. Morales' testimony is found to be credible. An inference is drawn and a finding of

fact is made that Mr. Morales agreed to submit the lump sum requests in order to obtain monies for Petitioner, which, at that time, Petitioner was not receiving from Respondent even though Respondent had performed services under ITB No. 062-EE10, Relocation of FF&E.

19. Additionally, Mr. Morales testified that, when he submitted the requested lump-sum bid quotations in 2007, that was the first time that he had observed the requests containing a designated person; and that, when he questioned the designation, the employee at the FF&E Department informed him that the FF&E Department needed assistance with the paperwork required to process payments and that was the person who would provide such assistance. His testimony is found to be credible.

20. Mr. Morales further testified that, in all the other jobs, he was required to place the name of his crew chief, or an alternate person on the documents he submitted to the FF&E Department in order not to delay payment; and that the crew chief or alternate person would report to the school site at which the school coordinator would inform the crew chief as to what was to be done. However, Mr. Morales testified that, for the 2007 lump sum quotations, time sheets were signed by the crew chief, not the designated person; that no crew chief was used for any of the relocation jobs; that he (Mr. Morales) would pay the designated person, as an employee, based upon the hours

worked by the designated person at the rate of \$32.00 per hour; and that the balance of the money received from Respondent was to be retained by him (Mr. Morales) for administration costs. Mr. Morales also testified that for one of the designated persons, Petitioner did not pay any monies to the designated person, but to someone else. Mr. Morales' testimony is found to be credible, except as to paying monies for hours worked; as to the designate person being employed by Petitioner for relocation services; and as to administration costs representing the balance of the monies retained by Petitioner.

21. No furniture relocation services were performed by Petitioner regarding AL/WO N1943E; AL/WO N1855E; AL/WO N1940E; AL/WO N2066E; and AL/WO N2065E.

22. A finding of fact is made that Petitioner knowingly participated in the scheme with Respondent's employees at the FF&E Department.

23. Ms. Jones filed a complaint with the Miami-Dade Schools Police Department (M-DCPD), which performed an investigation of the scheme. The investigation took many months. Mr. Morales cooperated with the M-DCPD.

24. Ms. Jones included Special Condition, paragraph numbered 5 in ITB No. 062-HH10, Relocation of FF&E because of the scheme.

25. Special Conditions, paragraph numbered 5, was applied to all vendors which had participated in the scheme.

26. Petitioner was in the group of low bidders for ITB No. 062-HH10, Relocation of FF&E. However, Petitioner was not considered for the award of the contract due to being non-responsive as a result of being ineligible because of Special Condition, paragraph numbered 5.

27. All of the bidders for ITB No. 062-HH10, Relocation of FF&E, who participated in the scheme, were found to be non-responsive as a result of Special Condition, paragraph numbered 5.

28. Petitioner was not convicted of a criminal offense involving the scheme.

29. At all times material hereto, Petitioner was not placed on the convicted vendor list.

30. By registered letter dated August 14, 2008, Respondent notified Petitioner that, even though Petitioner was in the group of low bidders for ITB No. 062-HH10, Relocation of FF&E, Petitioner was not being considered for the award of the contract because Petitioner was non-responsive. Further, Respondent indicated that Petitioner was non-responsive on the basis of Special Condition, paragraph numbered 5.

31. Petitioner timely filed a Petition of Protest, protesting the intended action by the Respondent to disqualify

Petitioner from the award of the contract for ITB No. 062-HH10, Relocation of FF&E.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Section 120.569 and Subsections 120.57(1) and (3), Florida Statutes (2008).

33. Subsection 120.57(3), Florida Statutes (2008), provides in pertinent part:

(f) In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. . . . 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'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. . . .

34. Petitioner, as the protestor, has the burden of proof.

35. Petitioner must sustain its burden of proof by a preponderance of the evidence. Department of Transportation v.

J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981);
§ 120.57(1)(j), Florida Statutes (2008).

36. The hearing conducted by the undersigned was a de novo hearing. § 120.57(3)(f), Florida Statutes (2008). The definition of a de novo hearing in the context of the instant case is found in State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998):

In this context, the phrase "de novo hearing" is used to describe a form of intra-agency review. The [administrative law] 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.
(citations omitted)

37. Not only must Petitioner show that Respondent's proposed action is contrary to Respondent's governing statutes, rules or policies, or the bid or proposal specifications, but Petitioner must also show, pursuant to the standard of proof, that Respondent's proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious.

38. Petitioner failed to timely challenge the specifications and, therefore, could not challenge the specifications at hearing. Hence, any challenge presented at this juncture is limited to substantive application of the specifications.¹

39. A decision is considered to be clearly erroneous when, although evidence supports the decision, after review of the entire record, the tribunal is left with the definite and firm conviction that a mistake has been committed. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766 (1948). An agency's decision is arbitrary if it is not supported by facts or logic. See Agrico Chemical Company v. State Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). An agency's action is capricious if the agency takes the action without thought or reason or with irrationality. Id. An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding. See Webster v. Belote, 103 Fla. 976, 138 So. 721, 723-34 (1931).

40. An agency has wide discretion when it comes to soliciting and accepting bids for public contracts, and an agency's decision, when based upon an honest exercise of such discretion, will not be set aside even where it may appear erroneous or if reasonable persons may disagree. Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982); Baxter's Asphalt and Concrete, Inc. v. Department of Transportation, 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985); Capeletti Brothers, Inc. v. Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983).

41. The evidence demonstrates that Petitioner was one of the five lowest bidders, which had submitted bids on August 5, 2008, for ITB No. 062-HH10, Relocation of FF&E.

42. The evidence demonstrates that Respondent's employees in its FF&E Department participated in the scheme.

43. The evidence demonstrates that Petitioner knowingly participated in the scheme on at least five separate occasions during the time period that Petitioner was rendering services to Respondent under ITB No. 061-EE10, Relocation of FF&E. Furthermore, the evidence demonstrates that Petitioner, within the past three years prior to submitting its bid for ITB No. 062-HH10, Relocation of FF&E, had billed Respondent for work not actually performed.

44. The evidence demonstrates that Petitioner falls within the requirements of Special Condition, paragraph numbered 5, of ITB No. 062-HH10, Relocation of FF&E.

45. The evidence demonstrates that Respondent applied Special Condition, paragraph numbered 5, of ITB No. 062-HH10, Relocation of FF&E to Petitioner and all bidders that participated in the scheme. Furthermore, the evidence demonstrates that Respondent considered Petitioner and all bidders that participated in the scheme as ineligible and disqualified.

46. The evidence demonstrates that Petitioner failed to meet all specifications and requirements of ITB No. 062-HH10, Relocation of FF&E to be considered by Respondent for the award of the bid.

47. Based on the totality of the evidence presented, Petitioner failed to meet its burden. The evidence fails to demonstrate that Respondent's intended action to find Petitioner ineligible and disqualify Petitioner, under Special Condition, paragraph numbered 5, for award of the contract for ITB No. 062-HH10, Relocation of FF&E is in contradiction to any of Respondent's statutory or rule provisions, or policies, or specifications. Furthermore, the evidence fails to demonstrate that Respondent's intended action to find Petitioner ineligible and disqualify Petitioner, under Special Condition, paragraph numbered 5, for award of the contract for ITB No. 062-HH10, Relocation of FF&E is clearly erroneous, contrary to competition, arbitrary, or capricious.

RECOMMENDATION

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

RECOMMENDED that the Miami-Dade County School Board enter a final order dismissing Morales Moving and Storage Company, Inc.'s Petition of Protest.

DONE AND ENTERED this 1st day of May 2009, in Tallahassee,
Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of May, 2009.

ENDNOTE

^{1/} A ruling to this effect was made, prior to hearing, by this
Administrative Law Judge by Order Regarding Striking and/or
Limiting Portions of Petition of Protest issued on November 13,
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.