

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE WACKENHUT CORPORATION,)
)
 Petitioner,)
)
vs.)
)
DEPARTMENT OF MILITARY AFFAIRS,)
)
 Respondent,) Case No. 08-6416BID
)
and)
)
FIRST COAST SECURITY SERVICES,)
INC.,)
)
 Intervenor.)

)

RECOMMENDED ORDER

Pursuant to written notice, the above matter was heard before the Division of Administrative Hearings by Administrative Law Judge, Diane Cleavinger, on January 30, 2009, in St. Augustine, Florida.

APPEARANCES

For Petitioner: Bradley R. Johnson, Esquire
(Wackenhut) Taylor, Day, Currie, Boyd & Johnson
Bank of America Tower
50 North Laura Street, Suite 3500
Jacksonville, Florida 32202

For Respondent: Thomas Barnhart, Esquire
(DMS) Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

and

Elizabeth C. Masters, Lieutenant Colonel
Florida National Guard
Post Office Box 1008
St. Augustine, Florida 32085-1008

For Intervenor: Andrew K. Kantor, Esquire
(First Coast) 800 West Monroe Street
Jacksonville, Florida 32202

and

Matthew T. Jackson, Esquire
800 West Monroe Street
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

The issue in this proceeding is whether the Respondent's award of a security guard services contract to Intervenor is clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On October 8, 2008, the Department of Military Affairs (DMA or Respondent) issued Request for Proposals No. DMA-RFP-112 to provide security guard services for National Guard locations around Florida. On November 21, 2008, DMA awarded Intervenor, First Coast Security Services, Inc. (First Coast), the contract. On November 26, 2008, Petitioner, Wackenhut Corporation (Wackenhut), filed a Notice of intent to protest DMA's award of the contract to First Coast. DMA and Wackenhut could not resolve the protest. Therefore, on December 24, 2008, Wackenhut filed a petition challenging the award of the contract to First

Coast. The case was forwarded to the Division of Administrative Hearings.

On January 9, 2009, First Coast filed its petition to intervene in the proceeding. First Coast's petition was granted. On January 30, 2009, the parties filed a Joint Pre-Hearing Stipulation.

At the hearing, the parties offered Joint Exhibits one through ten into evidence. Wackenhut called four witnesses to testify. Additionally, the depositions of Joseph Bielowaski, Major John Gross, Rannah Lewis and Earle Ginn were offered into evidence.

After the hearing, Wackenhut filed a Proposed Recommended Order on February 25, 2009. Likewise, Respondent and Intervenor filed Proposed Recommended Orders on February 27, 2009.

FINDINGS OF FACT

1. On October 8, 2008, Respondent, DMA, issued a Request for Proposals, RFP No. DMA-RFP-112, entitled "Security Guard Service." The purpose of the RFP was to solicit bids for providing security services at five National Guard locations around Florida. The term of the contract was for five years.

2. Part (a) of Section 1.2 of the RFP defines a valid proposal as a responsive offer where "a person or firm has submitted a bid/proposal and conforms in all material respects to the Request for Proposal." Part (b) of section 1.2 defines a

responsible or qualified offeror as a "person or firm with the capability to perform the requirements and the integrity and reliability to assure good faith performance."

3. Section 4.5 of the RFP governs "Bid Questions and Answers." In particular, Section 4.5 states in part:

Any technical questions arising from this RFP must be forwarded, in writing, to the procurement official designated in section 1.2 or 1.4 above.

4. Section 4.7.1 of the RFP states:

The Vendor must prove to the satisfaction of the Agency that their company has actively and normally been engaged in business for the services/items being procured under this solicitation for at least three (3) years of continuous operation. (This shall be demonstrated through references which have been in place at least one (1) continuous year). The Bidder shall have available under their direct supervision, the necessary organization, experience, equipment and staff to properly fulfill all the conditions, requirements, and specifications required under this solicitation.

5. Section 4.8 of the RFP specifies DMA's reservations and outlines how the proposals are evaluated in terms of responsiveness. In particular, Section 4.8.1 reserves the right of DMA to accept or reject any proposal. Section 4.8.2 defines a responsive proposal or bid as one that offers to perform the services called for by the RFP and meets the requirements of the RFP.

6. Section 6.2 of the RFP delineates the Evaluation Criteria for scoring the proposals. Section 6.2 states:

DMA will evaluate responsive replies and score them on a scale of 1 to 100 using the following criteria (weight noted parenthetically). DMA anticipates awarding one Contract to the responsive and responsible [sic] criteria which will be used to evaluate proposals:

Qualifications:	70%	70 Points
Price:	30%	30 Points
Total:	100%	100 Points

7. In order to demonstrate that a bidder was qualified in providing the services required by the RFP, DMA required references to be provided by the prospective bidders. Section 6.2.1 of the RFP states:

6.2.1 Qualifications: The Vendor's qualifications and experience in successfully serving facilities of similar size and scope to those required by this solicitation, as indicated by (Maximum 70 points - Attachment B -references (6 points) will be included in this maximum point total):

- Experience: Age of the Company, qualifications of key personal, extent of the vendor's activities, locations of the Vendor's Florida office(s) and nearest Florida account, and current and past project references. (0-24 Points)
- Preference for vendors that have considerable and quantifiable experience in providing similar services to governmental entities. (0-5 Points)
- Preference for companies with a proven ability to effectively manage multiple sites. Vendors should provide relevant experience data and references. References may be the same as those provided on

Attachment B, if so; a statement to that effect should be added. (0-5 Points)

9. Section 6.4 of the RFP states:

Reference Sheet: Vendors shall provide at least three current references. Note 6 points (2 points for each reference) of the proposal points are applied from this category. During the evaluation process all companies will receive the maximum points until references are verified, at such time the points may be reduced. (Attachment B.)

10. Attachment B to the RFP provides for the listing of three separate and verifiable references. The instructions for filling out Attachment B state, in part, the following:

The Respondent must list a minimum of three (3) separate and verifiable clients of the Respondent, other than the DMA which have been in place for at least one (1) continuous year. Any information not submitted on this attachment shall not be considered. The clients listed shall be for services similar in nature to that described in this solicitation.

11. Attachment B requires prospective bidders to list contact information for the bidder's references so that the references could be verified at the appropriate time. The requested information includes the name of the company or entity that the contract was with, description of work, the beginning dates of the contracts and, importantly, the ending dates of the contracts. Attachment B does not include the use of the word "current" or "active" in its description of the type of references that a bidder should submit.

12. Rannah Lewis is the Grant Specialist for the Department of Military Affairs. As such, she participates and manages bid solicitations for DMA. She has performed these duties for four or five years.

13. In this case, Ms. Lewis was the person responsible for assembling the RFP and the person responsible for the use of the word "current" in this RFP.

14. Her use of the word "current" referred to a recent contract that could be verified with respect to similarities between the referenced contract and the services being solicited by DMA. She distinguished a "current" contract from an "active" contract and specifically did not require the contract to be active. Indeed, Ms. Lewis's purpose for including the starting and ending dates for contracts listed in Attachment B of the RFP was to aid her in identifying the contractor to the referent when she verified the bidder's references. In the past she had sometimes encountered difficulty in verifying a bidder's references because the contractee did not remember the contractor from the information Ms. Lewis had regarding the referenced contract. She also wanted to obtain references that demonstrated experience in providing services required in the RFP that were verifiable over the course of time. Ms. Lewis testified:

We wanted them to demonstrate it had been a continuous process of at least a year so that when I called the reference, if they use them as a reference, they said - Well I've had this experience - personally, I've had this experience where I called a reference, and they go, well, they just started two weeks ago, so we really don't know. And that was the intent, to avoid situations like that.

There was no evidence presented at the hearing that demonstrated DMA's use of the word "current" as meaning recent or relevant to the RFP was inaccurate or unreasonable.

15. Eleven bids were submitted in response to the RFP. First Coast's bid price was \$17.42. Wackenhut's bid price was \$19.40. The bids were the third and fourth lowest bids, respectively.

16. None of the bidders raised any questions regarding the meaning of the word "current" in the RFP. Eight out of the eleven bidders for the RFP listed contracts on Attachment B that were not active and had ended or expired. All of Wackenhut's listed contracts were active.

17. First Coast listed three references on Attachment B. Two of the references were active and are not at issue here. However, First Coast also listed the U.S Government - Department of the Navy as a reference and reflected the service dates for the contract as June 2001 through December 2006.

18. The bids were evaluated by a three-person committee selected by the DMA. The Evaluation committee was directed by Ms. Rannah Lewis. The other members of the evaluation committee were Major John Gross and Joseph Beilawaski. Major Gross and Mr. Beilawaski were selected because of their experience with regard to force protection and security. Each evaluator evaluated the bids independently of the other evaluators.

19. Ms. Lewis awarded six points to First Coast for the three references it listed in Attachment B. She also awarded six points to Wackenhut for the three references it listed in Attachment B. She felt that a bidder's references were current if the contract had been active within the past seven years. She chose seven years because, in her experience, most businesses retain records for at least seven years and could therefore, find and supply relevant information on the referenced contract. There was no evidence that Ms. Lewis was either arbitrary or capricious in her individual evaluation of the parties' RFP proposals. Similarly, there was no evidence that Ms. Lewis' evaluation was dishonest, contrary to competition, or otherwise impaired the competitive bidding process.

20. Mr. Bielawaski awarded six points to all of the bidders for the references they listed on Attachment B. He believed that references in the recent past met the currency

requirement of the RFP since the contracts referred to recent customers that provided services similar to that which was requested in the RFP. As with Ms. Lewis, there was no evidence that Mr. Bielowaski was either arbitrary or capricious in his individual evaluation of the parties' RFP proposals. Similarly, there was no evidence that Mr. Bielowaski's evaluation was dishonest, contrary to competition, or otherwise impaired the competitive bidding process.

21. Major Gross determined that First Coast's bid "complied with all material provisions" of the RFP. Major Gross thought that a contract that had been in place within the last three or four years would be "current," even though that contract was not presently active. He awarded five points to First Coast and six points to Wackenhut based on the two companies' respective references listed in Attachment B. Major Gross determined that the references provided by First Coast were current and that one was not active. He, therefore, deducted one point from First Coast's score because of the inactive reference. However, Major Gross also testified that he was "probably in error" in deducting one point from First Coast based on the provision of Section 6.4, which required the award of two points for each reference that he "perceived as being current and appropriate to this bid proposal." Indeed, Major Gross' error worked against First Coast in winning the RFP since

the error resulted in less points being awarded to First Coast and, thereby, advantaging Wackenhut. However, even with Major Gross' error, there was no evidence that Major Gross was either arbitrary or capricious in his individual evaluation of the parties' RFP proposals. Likewise, there was no evidence that Major Gross' evaluation was dishonest, contrary to competition, or otherwise impaired the competitive bidding process.

22. At the conclusion of the evaluations, the evaluators turned in their score sheets and notes to Ms. Lewis. The total scores for the three evaluators were averaged for a final score on each bidder's proposal.

23. First Coast received a total score of 91 points.

24. Wackenhut received a total score of 90 points.

25. First Coast was determined to be the bidder with the highest score. Ms. Lewis then verified First Coast's three references. First Coast's score remained unchanged since all three references were verified. Based on the scores First Coast was awarded the RFP by DMA.

26. As indicated, the evidence did not demonstrate that the evaluators or DMA acted dishonestly, arbitrarily or capriciously. Indeed, each evaluator reviewed each proposal using consistent criteria that he or she used for all the proposals reviewed by that evaluator. In this case, the differences in the amount of time used to define the parameters

of what constituted a current reference were immaterial. Both parties' references fell well within all the evaluators' time frames. Likewise, the evidence did not demonstrate that DMA's definition of the word "current" was so unusual so as to cause the evaluation of the parties' proposals to be arbitrary, capricious, or otherwise contrary to competition. No bidder received an advantage over another bidder based on DMA's definition of the word "current." Given these facts, the award of the RFP to First Coast was valid and should be upheld.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.57(3), Fla. Stat. (2008).

28. Section 120.57(3), Florida Statutes (2008), provides in pertinent part:

(f) [i]n 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. The standard of proof for such proceedings shall be whether the proposed agency actions was clearly erroneous, contrary to competition, arbitrary, or capricious. . . .

29. "In this context, the phrase 'de novo hearing' is used to describe a form of intra-agency review. 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 Contr. & Eng'g Corp. v. DOT, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

30. Petitioner has the burden to establish by a preponderance of the evidence that the RFP award was invalid because the award decision was clearly erroneous, contrary to competition, arbitrary or capricious. See § 120.57(3)(f), Fla. Stat. (2008). "Even if the public entity makes an erroneous decision about which reasonable people may disagree, the discretion of the public entity to solicit, accept and/or reject contract bids should not be interfered with by the courts, absent a showing of dishonesty, illegality, fraud, oppression or misconduct." Sutron Corp. v. Lake County Water Auth., 870 So. 2d 930, 932-933 (Fla. 5th DCA 2004) See also Scientific Games v. Dittler Brothers, Inc. 586 So. 2d 1128 (Fla. 1st DCA 1991); City of Cape Coral v. Water Services of America, Inc.; 567 So. 2d 510 (Fla. 2nd DCA 1990); Capeletti Brothers v. State Dept. of General Services, 432 So. 2d 1359 (Fla. 1st DCA 1983).

31. Further, "a 'public body has wide discretion' in the bidding process and 'its decision, when based on an honest exercise' of that discretion, should not be overturned 'even if it may appear erroneous and even if reasonable persons may disagree.'" Scientific Games, Inc. v. Dittler Bros., Inc., 586

So. 2d 1128, 1131 (Fla. 1st DCA 1991) citing Department of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988).

32. A proposed award is clearly erroneous if the evidence demonstrates a definite and firm conviction that a mistake has been committed in the agency's award of the contract. An agency action is capricious if the action is irrational or without thought or reason. Agency action is arbitrary when it is not supported by facts or logic. An agency decision is contrary to competition if it unreasonably interferes with the objectives of the competitive bidding process. Lakeview Center, Inc. v. Agency for Health Care Administration, Case # 06-3412BID, ¶44 (DOAH 2006) (internal citations omitted).

33. In this case, the only issue presented for resolution was whether the use of the word "current" in Section 6.4 of the RFP required prospective bidders to include references with presently active contracts.

34. Webster's New Collegiate Dictionary defines the word "current" as 1) presently elapsing; 2) occurring in or belonging to the present time; and 3) most recent.

35. The evidence clearly demonstrated that DMA intended the word "current" to mean most recent or most relevant to the present time so that a reference could be verified. Moreover, the language of the RFP, when read as a whole, shows that DMA

was interested in obtaining contractor information sufficiently recent enough to allow it to determine the experience of a bidder in providing the services being procured under this RFP. See Sections 4.7.1, 6.2.1, 6.4 and Attachment B of the RFP. DMA's definition of the word "current" conforms with its standard usage and is reasonable.

36. Wackenhut relies upon testimony of the evaluators to argue that the decision of DMA to award the contract to First Coast was erroneous and capricious because the evaluators had different opinions regarding the meaning of the word "current." Those differences related to the amount of time that had passed since the proposer had provided security guard services to the referent. There was no difference between the evaluators as to the fact that the referenced contracts did not have to be presently active. Importantly, each evaluator used consistent criteria in that individual evaluator's evaluation of the proposals. It is not necessary for evaluators to mirror each other in their evaluations. Moreover, in this case, the difference in the amount of time each evaluator used in determining whether a referenced contract met the currency requirement of the RFP was immaterial. The parties' references all fell within the shortest amount of time allotted by one of the evaluators. First Coast did not receive any advantage over Wackenhut in the scoring of the proposals. Indeed, all of the

proposals received equal treatment; and therefore, the award of the RFP to First Coast should stand.

RECOMMENDATION

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

RECOMMENDED that the Department of Military Affairs enter a final order approving the award of RFP No. DMA-RFP-112 to First Coast Security.

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



DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of May, 2009.

COPIES FURNISHED:

Bradley R. Johnson, Esquire
Taylor, Day, Currie, Boyd & Johnson
Bank of America Tower
50 North Laura Street, Suite 3500
Jacksonville, Florida 32202

Thomas Barnhart, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Elizabeth C. Masters, Lieutenant Colonel
Florida National Guard
Post Office Box 1008
St. Augustine, Florida 32085-1008

Andrew K. Kantor, Esquire
800 West Monroe Street
Jacksonville, Florida 32202

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.