STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA CONSTRUCTION AND DEVELOPMENT COMPANY, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 09-0858BID
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice this cause came on for formal proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted on March 16, 2009, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: David M. Adelstein, Esquire
Kirwin Norris, P.A.
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Ft. Lauderdale, Florida 33301

For Respondent: Reagan K. Russell, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the proposed award of a contract to Ben Withers, Inc., is contrary to the Agency's governing statutes, rules, or policies or contrary to the bid solicitation specification concerning bid bond requirements, within the meaning of Subsection 120.57(3)(f), Florida Statutes (2008). It must also be determined whether those bidders who submitted a less than "A+" bid bond rating are compliant with the specification, or should be disqualified for non-responsiveness.

PRELIMINARY STATEMENT

This cause arose on the filing of a challenge to a Notice of Intent to award a contract for construction services by the Department of Environmental Protection (DEP, Department) to Ben Withers, Inc. (Withers) for DEP Project No. 60611 (DEP Bid No. 49-08/09) for construction of a new entrance roadway, removal of an existing timber bridge and construction of a new free-span bridge, including all drainage and utility improvements, at Bald Point State Park (Bald Point) in Franklin County, Florida.

The Petitioner filed its protest in accordance with Sections 120.569 and 120.57 (3), Florida Statutes (2008), and the matter was transmitted to the Division of Administrative Hearings. The case was assigned to the undersigned and, in due course, came on for hearing on the above date.

The Petitioner, Floridian Construction and Development Company, Inc. (Petitioner, Floridian) contends that the Department violated its bid specifications and its "policy" concerning the materiality of the rating of bonds, as specified in the bid specification. It argues that the Department's violation in these respects was arbitrary, capricious, and contrary to competition, and that Floridian was the only responsive bidder and should have been awarded the contract because it was the only bidder to provide a bond rating in compliance with the specifications and the Department's policy.

The Department contends that its proposed award to Withers conforms with its governing statutes and Florida Administrative Code Chapter 60D-5, as well as the specifications; and that the bid bond and payment and performance bonds may be issued by different surety companies. It contends that the Petitioner cannot show that the proposed agency action is clearly erroneous, contrary to competition, arbitrary or capricious.

Upon the convening of the hearing, Joint Exhibits A through I were admitted into evidence. The Petitioner also had admitted its Exhibits A through G. The Respondent had its Exhibits one through four admitted into evidence. The Petitioner presented the testimony of four witnesses. The Respondent, relying on its exhibits and cross-examination, called no witnesses.

Upon concluding the proceeding, the parties did not order a transcript of the record. They submitted Proposed Recommended Orders, which were timely submitted on March 26, 2009. The undersigned has considered those Proposed Recommended Orders in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is a closely held Florida corporation. It holds a State of Florida license as a General Contractor. Its licensure authorizes it to perform work of the nature and scope involved in this project. Mr. Milton Fulmer is the principal owner and president of the Petitioner. He testified in this proceeding on behalf of the Petitioner.

2. The Respondent is an Agency of the State of Florida charged with managing and administering state-owned lands in the state park system, including the planning and arranging for the construction of facilities, installations and improvements on those lands. The Respondent engages in procurement through competitive bidding on a regular basis, in order to build and maintain its improvements on those lands.

3. The Respondent issued an Invitation to Bid (ITB) for certain road and additional work to be performed at the Bald Point State Park, in Franklin County. The ITB is designated as “Bid No. 49-08/09” on the Department of Management Services’

Vendor Bid System (VBS). It is undisputed that the ITB was properly advertised and noticed.

4. The ITB project involves the construction of a new entrance roadway, the removal of an existing timber bridge and the installation of a new “free-span" bridge. The project also includes related drainage and utility work. Three addenda to the ITB were issued, which significantly increased the scope of the work, and the estimated budget for the project, from $1,000,000 to $3,000,000. The bids were timely opened on January 12, 2009.

5. Withers was the low bidder. The Petitioner was the sixth low bidder. The bid tabulation, announcing the Respondent’s intent to award to Withers was posted on January 23, 2009.

6. The Petitioner filed a timely protest, pursuant to Section 120.57(3), Florida Statutes (2008). The protest notice was filed on January 28, 2009, and the Petition was timely filed on February 6, 2009.

7. Eight vendors submitted timely bid responses. None of the bids were disqualified by the Respondent. The specifications in the ITB required bidders to submit a good faith deposit or bid guaranty, amounting to five percent of the bid. This could be provided in the form of a bid bond. All the bidders submitted bid bonds with their bids.

8. The instructions to bidders in the specifications of the ITB require that, for bids exceeding $2,000,000, “the surety that will provide the Performance Bond and Labor and Materials Payment Bond shall have at least an 'A+' rating in A.M. Best Company’s online rating guide.” The ITB also provides that the rating of a reinsurance company is not applicable and does not meet this requirement.

9. The Petitioner’s expert witness, Paul Ciambriello, acknowledged in his testimony that a Bid Bond, a Labor and Materials Payment Bond (payment bond) and a Performance Bond (payment bond) guarantee different aspects of a procurement or project. A bid bond guarantees that a vendor or contractor will execute the contract and undertake it for the bid price. A payment bond guarantees payment for all equipment, labor, materials and services, in the event the contractor fails to pay for them, as contractually required. The performance bond guarantees full performance of the contract by the surety company, if the contractor defaults on performance of the contract. The surety company would, in that event, be completing the job, or obtaining bids from other contractors for completion, while remaining liable for the difference between the contract price and the actual price of project completion.

10. The Petitioner has taken the position that the specification requiring an "A+" rating for the payment and

performance bonds should be applied by the Respondent to the bid bond requirement, as well, because there is no significant or practical difference between the issuance and underwriting efforts involved in the obtaining of the two types of bond for a given project. The Petitioner's point is that, if an "A+" rated surety is required for the payment bond and the performance bond, then, as a practical matter, that is the same thing as requiring a bid bond of that same rating, because in the vast majority of cases, the surety which underwrites the bid bond and the one issuing the payment and performance bonds is the same surety, and that inclusive would allow for only one underwriting effort. Because of this purported custom or course of dealing in the industry, as also purportedly reflected in past Department practice regarding bond requirements, the Petitioner maintains that its bid was the only responsive bid, and all the other bidders should have been disqualified.

11. The Petitioner provided its insurance and bond broker, Paul Ciambriello, of the Guignard Company with information about the project and its surety requirements. The broker then obtained a bid bond with International Fidelity Insurance Company and Everest Reinsurance Company, as co-sureties. International Fidelity Insurance Company has an "A-" rating, according to the Best's rating guide. Everest Reinsurance Company has a rating of "A+", according to that rating guide.

12. The other seven bidders submitted bids accompanied by bid bonds issued by surety companies with “A” ratings. The bid specification provided no rating requirement for the bid bond.

13. The Petitioner has argued that it is the custom or practice in the surety industry for the surety company which underwrites a bid bond to also underwrite the payment and performance bonds. In addition to the reasons referenced above, this is generally done because the surety will offer a very low premium price for a bid bond and "make its money" on the premium price for the payment and performance bonds, which it would also issue in the normal course of dealing. There is also a very short time period between issuance of the bid bond and the requirement to underwrite the payment and performance bonds, which is another reason why it is the customary practice in the surety industry for the same company to write both types of bond. The Petitioner contends that the bid bond and the payment and performance bonds really have no practical distinction because it is so common that a surety company issuing a bid bond will be the same as the surety company (with its bond rating) which issues the payment and performance bonds.

14. Although the Petitioner's expert witness, Mr. Ciambriello, testified that a bid bond, in essence, guarantees the payment and performance bond, that guarantee is not actually true as a matter of law. Rather, the bid bond does

not guarantee that the surety company issuing the bid bond will issue the payment and performance bonds, but rather that the principal, i.e. the contractor, shall provide the payment and performance bonds from a good and sufficient surety, according to the obligee's, the Respondent Agency's, requirements (bid specifications).

15. Mr. Ciambriello acknowledged in his testimony, however, that, while it is rare, in his experience representing surety companies, for a contractor to change the surety company it uses between the issuance of the bid bond and the issuance of the payment and performance bonds, a contractor certainly can do so. It can also simply initially select a different surety company, from the bid bond surety, to issue the payment and performance bonds.

16. There are several reasons a contractor might elect to change surety companies between the issuance of the bid bond and the issuance of the payment and performance bonds. The surety company might become insolvent, lose its ratings, or another surety company might offer a better rate on its premium, which might induce a contractor to change surety companies between the issuance of the two types of bonds.

17. In order for a vendor or contractor to establish a surety, a pre-qualification process is necessary. In pre-qualification, contractors must supply information including

project history, credit references, reviewed financial statements, personal financial information and details regarding assets. The surety companies assess risk based upon the characteristics of the project, including its size, nature, location, and complexity. A surety may elect not to underwrite the payment and performance bonds for a project for which it has issued the bid bond, which would also require a contractor to seek a different surety for issuance of the later payment and performance bonds. Moreover, contractors must qualify for surety bonds and not all contractors succeed in qualifying; further, not all contractors can succeed in qualifying and procuring surety bonds from an "A+" rated company.

18. The Petitioner, as found above, submitted its bid response with co-sureties proposed to underwrite the bonds. The Respondent accepts the premise that use of the rating of a co-surety is compliant with the ITB solicitation specification. The use of two surety companies listed as co-sureties on a bond is very unusual, in the Respondent's experience.

19. The Respondent had a good faith belief, at the time it posted the notice of intent to award the bid, that it could not disqualify any bidder for submitting a bid bond from a surety rated less than A+, based upon its ITB specification. Indeed it should not, because the bid bond specification contained no rating requirement for the bid bond. Moreover, the Respondent

had a good faith belief that the contractors could change surety companies between the issuance of the bid bond and the payment and performance bonds.

20. The Respondent's belief or interpretation as to this last point is correct. In another procurement involving the Respondent, on a project located at Jonathan Dickenson State Park, a bidder, H and J Contracting, Inc. (H and J), changed surety companies between the issuance of the bid bond and the issuance of the payment and performance bonds. That bidder was determined to have successfully provided compliant bonds, which met the specifications in that solicitation.

21. The Respondent had advertised the ITB for the campground renovation project at Jonathan Dickenson State Park, using the same solicitation specification for surety bonds as was used for the Bald Point project at issue in this case. The low bidder in that case, H and J Contracting, Inc., submitted a bid for $2,033,636.32. It was therefore required to comply with the specification for bonds regarding bids which exceeded two million dollars. H and J, therefore submitted a bid bond from Liberty Mutual Insurance Company, a company which carried an "A" rating according to Best's On-line Ratings Guide. H and J subsequently submitted payment and performance bonds from U.S. Specialty Insurance Company, a company rated "A+" according to that same ratings guide. H and J was deemed to have complied

with the specifications concerning bonding, because, by changing surety companies for the payment and performance bonds, it provided such bonds with the required "A+" rating, even though the bid bond submitted in that case only carried an "A" rating. The solicitation specification in that case did not require any particular rating for the bid bond.

22. In the instant situation, the Respondent did not violate its specification by accepting bid bonds of all bidders because the solicitation specification stated that the rating should apply to the surety company issuing the payment and performance bonds, not the bid bond.

23. The Petitioner contends that its interpretation of the solicitation specification, that the rating requirement should be applied to the bid bond also, is the only practical interpretation because of the pre-qualification process and the lack of adequate time between submittal of the bid bond and the requirement for submittal of the payment and performance bonds. Moreover, the Petitioner contends that any other interpretation would be contrary to competition because other bidders may have bid on the project had they known that the Respondent was not applying the rating requirement to the bid bond, as the Respondent had done in past procurements. This argument is somewhat specious, however, because, in fact, the Petitioner's

interpretation would negate the fact that the bid bond specification does not require a rating.

24. The Petitioner is the only one of the six top bidders who submitted an "A+" bond rating response concerning, according to its argument, the bid bond requirement. Thus, if its interpretation were followed as to the bid bond rating requirement, then such would be anti-competitive, in relation to the other bidders, because none of them supplied an ”A+" rating surety in response to the bid bond specification. In the face of the fact that the bid bond specification required no rating, to interpret the rating requirement of the payment and performance bonds as being applicable to the bid bond stage of the procurement, would effectively eliminate the other bidders, which were lower in price than the Petitioner, from the competition.

25. The Petitioner also argues that other unknown vendors might have bid on the project had they known that the Respondent was not applying a rating requirement to the bid bond, as the Respondent had done in the past. In fact, however, all bidders or vendors with access to the ITB solicitation knew, or should have known, of the specification of this particular ITB, which differed in its terms from some past solicitations of the Respondent by not requiring a rating for the bid bond.

26. Moreover, there is no evidence that, in the pre-submittal stage of the process, potential bidders could not have asked for clarification of the specification from the Agency had they chosen to do so. There is no showing by persuasive evidence that there is an anti-competitive effect on potential bidders caused by the Respondent's specification concerning the bid bond. In fact, logic would dictate that by removing any rating requirement for the bid bond, the potential universe of bidders might be enlarged and therefore this might have a positive competitive effect.

27. Additionally, the Petitioner's argument that the specification should be interpreted to apply a rating requirement to the bid bond, when the actual specification, in its language, does not contain such a requirement, is rejected also for the additional reason that such an interpretation is contrary to the plain meaning of the bid specification language. This amounts to, at least, an implicit collateral challenge to the specification, which is untimely and impermissible.[1/]

28. There are 19 vendors listed on the "plan holders list" for the Bald Point project. That relatively large number of potential bidders is because the project began as a paving contract, and was later amended to include vertical construction. This changed the licensure requirement as to potential vendors from a situation of no license being required,

to a situation where a general contractor or building contractor license would be required. Some of the bidders appearing on the plan holders list are just paving contractors, and therefore, under the amended project, they would no longer qualify to bid on the entire job, although they might be sub-contractors. Not all bidders who bid on the Bald Point Project are listed on the plan holders list.

29. The Petitioner's argument that the Respondent may have had more of the 19 potential bidders actually submit bids, if the other vendors had known that the Respondent would accept bid bonds from a surety rated less than "A+" is not persuasive. It is impossible to determine how many contactors actually reviewed the Bald Point Project plans and for what reasons they decided not to submit a bid. Seven of the eight bidders submitted bid bonds from surety's rated "A" rather than "A+." It certainly seems obvious that those bidders did not interpret the bid bond specification as requiring a bid bond from an "A+" rated surety company or better. Moreover, all potential vendors, whether they bid or not, who reviewed the specifications should have known when they read the specification that there was no rating requirement attendant to the bid bond (as evidenced by the fact that seven of the eight bidders competing in this situation obviously seemed to be so aware and did not submit an "A+" surety for the bid bond). Thus, in this context, the

Respondent's interpretation of this specification is not anti-competitive.

30. The Petitioner also contends that the Respondent acted contrary to its policy by accepting bid bonds from all eight bidders and not disqualifying all but the Petitioner's bid, since it alone submitted one carrying an "A+" rating. The Petitioner refers to past practices of the Respondent as being its "policy."

31. In this particular, the Petitioner and Respondent were involved in a prior bid procurement and protest involving the Apalachicola National Estuarine Research Reserve Headquarters project (ANERR). The Petitioner in that situation was the lowest bidder, but had its bid disqualified. The Petitioner uses the prior project specification as evidence of what the Respondent's policy is with regard to situations such as that in the instant case.

32. The solicitation specification regarding bonds for the ANERR project, however, was different from the solicitation specification for the Bald Point Project. The solicitation specification for the ANERR project required that all bonds have at least a minimum rating of "A" in the latest issue of the Best Rating Guide.

33. The Petitioner submitted a bid bond from a surety company rated "A-" with its bid for the ANERR Project. The bid

was therefore deemed non-responsive by the Respondent Agency and the bid was disqualified for failing to meet the solicitation specification.

34. The Petitioner's president testified that he read the specification for the Bald Point Project and he conceded that it was different from the specification for the ANERR Project. The Petitioner's argument that, apparently, the Respondent's policy or practice in the ANERR Project situation should be applied to interpretation of the bonding requirement for the Bald Point Project is not persuasive. Clearly the specification concerning the bid bond and bond rating was different between the two projects. The attempted application of the purported past policy or practice of the Department to interpret the Bald Point specification concerning the bid bond, to require an "A+" rating for the bid bond, when the specification term clearly does not provide it (merely because that was the policy or practice in the ANERR project case, involving a different specification) amounts to an untimely collateral attempt to alter the specification of the Bald Point Project. Such would amount to a material deviation from the specifications because it would disqualify seven of the eight bidders (and would likely have resulted in fewer bids had potential bidders been on notice of that policy or interpretation).

35. In like manner, the Petitioner relies on the case of Gum Creek Farms, Inc., v. Department of Environmental Protection, Case No. OGC 07-2623 (FO: June 20, 2008) as evidence of the Respondent's policy with regard to bond rating requirements. In that case, as in the ANERR situation, the solicitation specification was different from the Bald Point specification at issue. Because the two situations referenced above are different from the Bald Point Project as to the specification requirements, they cannot be said to be evidence of a policy or regular practice by the Agency which would be applicable to this case, since the specific requirements of the bid specifications in this solicitation are what drive the necessary bid responses.

36. Over a period of approximately 10 years the Department has engaged in bid procurement with regard to approximately 600 projects. The Respondent has, during that time, consistently required compliance with its surety ratings specifications in its bid solicitations. This is because an adequate surety bonding for payment and performance is an important means for the Respondent to manage its risk as the owner of a project. Thus, whatever the specifications concerning bond ratings are for a particular project, the Respondent has consistently required compliance with them. In the instant situation, the Respondent re-wrote its rating specification for the Bald Point

Project so that it was different from the other two projects referenced and discussed above. It has re-written its specifications on other occasions as well, which is within its prerogatives.

Timeliness of Payment and Performance Bond Notification

37. The general conditions of the contract require that the contractor submit evidence of its ability to provide acceptable payment and performance bonds within two working days of being notified of a successful bid. The contractor has 10 days to actually furnish the bonds.

38. The testimony of Michael Renard, of the Department, shows, however, that as a practical matter, it is not a material deviation if a contractor does not supply evidence of ability to provide compliant bonds precisely within that time period. The actual payment and performance bonds are usually submitted to the Respondent at the time the contract is actually signed or shortly thereafter. Sometimes it may be a longer period of time before the contractor submits payment and performance bonds. This might occur because authorization to sign a contract is suspended due to budgetary concerns or due to lack of funding availability. The Respondent does not require and contractors do not generally wish to expend their capital for payment of a surety premium until a contract is actually signed and in effect, and the Agency's funding is approved and released, as

persuasively shown by the testimony of Michael Renard and Ben Withers.

39. The winning bidder herein, Withers, did not provide evidence of ability to provide compliant payment and performance bonds within two days of being notified of being the lowest bidder. This was because the protest was filed during the intervening time and Withers and the Respondent were of the good faith belief that all responsive efforts to the solicitation were tolled upon notice being provided that a protest had been filed. In fact, because a protest was filed, triggering a formal proceeding to determine which entity might ultimately be the contractor, it could not be determined that there was, as yet, a winning bidder or contract, as a necessary pre-requisite to issuance of payment and performance bonds.

40. In fact, the Respondent has received evidence of Withers' ability to provide compliant payment and performance bonds. This evidence was provided after Withers was informed that a co-surety rating would be acceptable to the Respondent and in compliance with the bid specification. This treatment, of allowing a co-surety rating as being acceptable was also accorded the Petitioner, who submitted a co-surety proposal. There is no persuasive evidence that the fact that Withers may have supplied evidence of a compliant payment and performance bond beyond the above-referenced time limits had anything to do

with selection of Withers over the Petitioner or other bidders and thus provided a competitive advantage for Withers. The Petitioner filed its written evidence of ability to provide the payment and performance bonds on February 20, 2009, almost a month after the posting of the Intent to Award.

41. It did not even become incumbent upon Withers to submit such evidence regarding payment and performance bond compliance until after it was notified that it was a successful bidder. As pertinent to the issues in this proceeding, Withers was selected, in essence, because its bid submittal was compliant with the bid bonding requirement, other specifications, and was the lowest bid. The fact that Withers went beyond the time limits for furnishing evidence of compliant payment and performance bonds, occurred after the initial choice by the Agency as to the awarded bidder, here under review. Thus, Withers' excession of the time limit regarding the payment and performance bond evidence submittal, etc., is not a material deviation from specifications, as to the manner in which the award decision was made. It is of no consequence because, with the initiation of a formal proceeding, there was not even a final award and contract as yet.

42. Finally, although argument was made concerning whether the Respondent had waived the requirement of payment and performance bonds from an "A+" down to an "A" rating, the

persuasive evidence shows that the Respondent never did waive the rating requirement in order to post the award to Withers. The Respondent has established that there was no need for it to waive the "A+" rating requirement, and it had no intent to do so.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(3), Fla. Stat. (2008).

44. The de novo proceeding envisioned by Section 120.57(3), Florida Statutes, is not the same as that emanating from Section 120.57(1), Florida Statutes. A Section 120.57(1) proceeding essentially is forward-looking and employs consideration of properly admitted evidence to fashion findings of fact and conclusions of law designed to formulate final agency action, with the Administrative Law Judge sitting in place of the agency head to determine, by recommended order, what the agency's decision shall be. Hamilton County Board of County Commissioners v. Florida Department of Environmental Regulation, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991). A Section 120.57(3) proceeding requires the trier of fact to "look back," in the sense of reviewing the evidence available to the Respondent Agency when the initial Agency action was taken. State Contracting and Engineering Corp. v. Department of

Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Syslogic Technology Services, Inc. v. South Florida Water Management District, Case No. 01-4385BID (DOAH January 18, 2002). See also Floridian Construction and Development Company, Inc. v. Florida Department of Environmental Protection, 07-5636BID (DOAH March 21, 2008).

45. The Administrative Law Judge may consider evidence that the Agency did not consider, which may or may not have been available to the Agency at the time of the initial Agency action. This is considered, not for the purpose of formulating future Agency action, but for the limited purpose of considering whether the Respondent Agency's failure to consider the other evidence was clearly erroneous, contrary to competition, arbitrary or capricious. Id.

46. The Petitioner has the burden of proving a legitimate reason for invalidating the proposed Agency action concerning the bid award. State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). The Petitioner must show that the proposed agency action was contrary to the Agency's governing statutes, Agency rules or policies or the solicitation specifications themselves. Id. See also § 120.57(3)(f), Fla. Stat. (2008). The statute defines the applicable standard of proof in a bid protest proceeding involving the rejection of a competitive bid as "whether the

proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. Id.

47. An arbitrary decision has been held to be one not supported by fact or logic and a capricious action is one taken without thought or reason or which is irrational. Agrico Chemical Company v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). See also Dravo Basic Materials Company, Inc. v. Department of Transportation, 602 So. 2d 632, 634 n.3 (Fla. 2nd DCA 1992). ("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").

48. A decision is clearly erroneous when unsupported by substantial evidence or contrary to the clear weight of the evidence or is induced by an erroneous view of the law. Black's Law Dictionary, 251 (6th Edition 1990); see also U.S. v. U.S. Gypsum Company, 333 U.S. 364, 395 (1948) ("a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed"). See also Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985).

49. The purpose of competitive bidding has been described as follows:

> [T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Wester v. Belote, 138 So. 2d 721, 723-4 (Fla. 1931); Harry Pepper and Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2nd DCA 1977); Air Support Services International, Inc. v. Metropolitan Dade County, Inc., 614 So. 2d 583, 584 (Fla. 3rd DCA 1993).

50. The Respondent did not act contrarily to its solicitation specifications when it accepted bid bonds from the various bidders, underwritten by surety companies carrying less than an "A+" rating. This is because the specifications did not require any rating at all for the surety company providing the bid bond. The "A+" surety company rating requirement, by the terms of the specifications, only applied to the performance and payment bonds, which are supplied after the bid award is made. In fact, had the Respondent required the "A+" rating to be applicable to the bid bond when it considered the bid

submittals, it would be affirmatively acting contrarily to its solicitation specification. If it disqualified certain of the bidders for submitting a bid bond from a surety carrying less than an "A+" rating (as the Petitioner urges that it do) it would be violating the above-referenced legal mandates by acting contrary to competition, arbitrarily, or capriciously, and, obviously, contrary to its solicitation specifications. See State Contracting, 709 So. 2d at 609.

51. The Petitioner contends that the Respondent should have followed what it argues was the Respondent's past policy or practice relating to the rating of bonds and to related responses to solicitations regarding bond requirements. The Petitioner means, in essence, that the rating requirement for the performance and payment bonds should have been applied to the submission of bid bond responses to the solicitation as well, which it contends would be in accord with the policy and practice of the Respondent. This position loses sight of two pivotal considerations, however. First, it would be arbitrary, capricious, and clearly erroneous if the Respondent employed a policy, which, at least implicitly, grew out of the specifications of prior procurement projects. Those past procurements obviously had different specifications because the specifications have been rewritten since those employed in the past projects, upon which the Petitioner relies for its

explication of the proper "policy." Secondly, and related to this point, the employment of the Respondent's past policy or practice in the manner advanced by the Petitioner, would simply be irrelevant because the specifications have been rewritten and are different from those which relate to the same bond rating issue from past procurement projects and solicitations. Moreover, as a matter of law, the Respondent can have no generally applicable policy that is not articulated in statute, rule, or the specifications themselves and can base no agency action that determines the substantial interests of a party on what amounts to an unadopted rule. § 120.57(1)(e), Fla. Stat. (2008).

52. Obviously, if the Agency could reach back to solicitation efforts for past procurement projects, to borrow policy or practice and seek to implement such in the situation at hand, there could be no mutuality of terms, proper notice and due process for bidders, in terms of having advance notice of the specifications which would actually be followed by the Agency, and because bidders might not be treated equally in a competitive context. Thus, in light of these legal considerations and because the persuasive evidence, especially the specification concerning bid bond requirements, does not support it, this "policy or practice" argument must be rejected. The opinion of the bidder, the Petitioner, regarding what is

sufficient cannot replace the express ITB requirements, particularly in the absence of a timely challenge to the specification. See Capaletti Bros. Inc. v. Department of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1986) rev. denied, 509 So. 2d 1117 (Fla. 1987).

53. The Petitioner has also implied that Withers is not in compliance with the specification regarding submission of evidence that it can provide acceptable performance and payment bonds. This argument is inappropriate because the purpose of this proceeding is limited to determining whether the Respondent's action in not disqualifying bidders at the bid posting was contrary to law or the solicitation specifications. Syslogic, Case No. 01-4385BID at 18-19, para. 43-44. The Respondent's receipt of the evidence that the low bidder can provide compliant payment and performance bonds, the requirement as to when it is to be provided, and the provision of the payment and performance bonds themselves, is to occur (according to the specifications) after the disputed Agency action occurred (posting of the winning bidder). See Fla. Admin Code R. 60D-5.004(2)(b)1.c. and d.

54. Even if the manner by which Withers provided evidence of the payment and performance bond capability, and the provision of the bonds themselves, is relevant to this proceeding, it has not been demonstrated that compliance was

untimely. This is because the protest filed in this proceeding tolled the procurement process short of the time limit expiration for providing evidence of ability to provide the payment and performance bonds, by the initiating of this de novo proceeding. Since this de novo proceeding is designed to review whether the Agency acted in accordance with relevant law in determining the awardee, all later aspects of the procurement process were tolled after the filing of the protest. See § 120.57(3)(c), Fla. Stat. (2008).

55. It is not necessary to address the issue, raised by the Petitioner, regarding waiver of the bond rating requirement. This is because, although it may have engaged in internal discussion concerning possible waiver of the rating requirement from an "A+" to an "A" rating on the payment and performance bonds, the Respondent never actually waived the requirement in order to post the award to the low bidder. Moreover, in this proceeding review is limited to the analysis of the Agency action up through the act of posting the bid award.

56. It is not necessarily proper in a Section 120.57(3), Florida Statutes, proceeding to consider whether the Respondent could waive the requirement, or whether the Respondent would have abused its discretion if it had waived that requirement. In light of the above discussion regarding the nature of "de novo review" in this proceeding, the undersigned does not look

forward in order to recommend final agency action, concerning a waiver or any other issue, but rather to use evidence adduced in a de novo hearing context to "look backward" and determine if the Respondent Agency, in making its initial decision, complied with the above-discussed requirements of law. Syslogic Case No. 01-4385BID.

57. In summary, the Petitioner has the burden to show, by preponderant evidence, that the Agency action taken was contrary to its governing statutes, rules, or policies or to the solicitation specifications. State Contracting, 709 So. 2d at 609; see also § 120.57(3)(f), Fla. Stat. (2008). In order to prevail, the Petitioner must also show by preponderant evidence that any violation of statute, rule, policy or specification was also clearly erroneous, contrary to competition, arbitrary, or capricious. Id. See also Floridian Construction, DOAH Case No. 07-5636BID at page 16.

58. The Petitioner has not met its burden to show that by accepting all the bid bonds from the bidders, and then posting the award in favor of Withers, that the Respondent violated its governing statute, Chapter 255, Florida Statutes, its rules, Fla. Admin. Code Chapter 6D-5, policies or the solicitation specifications. Even if such had been violated by the Respondent, the Petitioner did not meet its burden to show that the action of accepting all bid bonds and not disqualifying all

bidders, other than the Petitioner, as the Petitioner seeks herein, was clearly erroneous, contrary to competition, arbitrary or capricious. Agencies have wide discretion in soliciting and accepting bids. When an agency makes its decision based on an honest exercise of its discretion, the decision should not be overturned, even if it may appear erroneous and even if reasonable persons may disagree. Overstreet Paving Co. v. Department of Transportation, 608 So. 2d 851, 852-853 (Fla. 2nd DCA 1992) (citing Department of Transportation v. Groves-Watkins Constructors, 510 So. 2d 912, 913 (Fla. 1988)).

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 issued by the Florida Department of Environmental Protection dismissing the protest.

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

P. MICHAEL RUFF
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/] § 120.57(3)(b), Fla. Stat. (2008).

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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.