

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FBM GENERAL CONTRACTING)
CORPORATION,)
)
Petitioner,)
)
vs.) Case No. 09-2149BID
)
DEPARTMENT OF CHILDREN AND)
FAMILY SERVICES,)
)
Respondent,)
)
and)
)
LEO PREMIER HOMES, LLC, d/b/a)
LEO ROOFING AND CONSTRUCTION,)
f/k/a LEO DEVELOPMENT,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 13, 2009, by video teleconference with connecting sites in Miami and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael Falls, pro se
FBM General Contracting Corporation
750 East Sample Road, Building 3 S-222
Pompano Beach, Florida 33064

For Respondent: Javier A. Ley-Soto, Esquire
Department of Children and Family Services
401 Northwest Second Avenue, Suite N-1014
Miami, Florida 33128

For Intervenor: Frank A. Leo, pro se
Leo Premier Homes, LLC
15634 98th Trail North
Jupiter, Florida 33478

STATEMENT OF THE ISSUE

The issue for determination is whether the Intervenor was properly qualified to complete the construction project contemplated by Invitation to Bid No. DCF-03211120 (ITB)

PRELIMINARY STATEMENT

The Department of Children and Family Services (Department) issued the ITB for the re-roofing of two of its buildings. FBM General Contracting Corporation (FBM) and Leo Premier Homes, LLC, d/b/a Leo Roofing and Construction, f/k/a Leo Development (Leo Development) were two of several bidders on the ITB. The Department excluded FBM from the bid tabulation. The Department determined that Leo Development was the lowest responsive bidder and awarded the ITB to Leo Development. Afterwards, FBM filed a protest of its exclusion from the bid tabulation. The Department dismissed FBM's protest by final order. No appeal was taken by FBM of the Department's final order. Subsequently, FBM filed the instant matter alleging that Leo Development was not licensed by the Department of Business and Professional Regulation (DBPR) at the time of the bidding and, therefore, was

not qualified to complete the work contemplated by the ITB. On April 22, 2009, 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. Official Recognition was taken of Section 865.09, Florida Statutes (2008), regarding fictitious names.

At hearing, Leo Development requested the dismissal of FBM's challenge on the basis that FBM was not on the ITB's tabulation sheet and, therefore, has no interest in this matter, i.e., FBM lacked standing. The request for dismissal was denied by this tribunal on the basis that a recommendation would be made to the Department as to what final action the Department should take in this matter and that, in order to do so, an evidentiary hearing was necessary; and that, however, a request for dismissal would be permitted to be made in post-hearing submissions.

Further, at hearing, FBM presented the testimony of one witness (Michael Falls, its owner) and offered one exhibit (Petitioner's Exhibit numbered 1) into evidence, which was rejected.¹ The Department presented the testimony of three witnesses (Bill Bridges, an architect; Terry Holt, an architect; and Frank A. Leo, Leo Development's owner) and entered five

exhibits (Respondent's Exhibits numbered 1 through 5) into evidence. Intervenor presented the testimony of one witness (Frank A. Leo) and entered no exhibits 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 June 9, 2009. The parties timely filed their post-hearing submissions. Subsequently, on July 6, 2009, the Department filed a Motion to Tax Costs, with invoices attached, in the amount of \$1,311.05. No response was filed to the Department's motion. The parties' post-hearing submissions have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department issued the ITB for a construction project, involving the re-roofing of Buildings 1 and 2 at 12195 Quail Roost Drive, Miami, Florida. The ITB was published in the Florida Administrative Weekly on December 24, 2008.

2. The ITB outlined the terms and conditions for responsive bids.

3. The ITB indicated, among other things, that all sealed bids were required to be submitted at 401 NW 2nd Avenue, S-714, Miami, Florida 33128, by January 15, 2009, at 2:00 p.m.

4. Leo Development submitted its sealed bid at the location and by the date and time, in accordance with the ITB.

5. FBM submitted its sealed bid by the date and time, but at a different location—the offices of Russell Partnership—contrary to the ITB.

6. All other bidders submitted their sealed bids at the location and by the date and time, in accordance with the ITB.

7. The Department's architect of record on the project, Russell Partnership, and one of its principals, Terry Holt, performed the examination and bid tabulation. Mr. Holt, a registered architect for approximately 36 years, was very familiar with the procurement process and had extensive experience in determining whether a bidder was licensed by DBPR in order to complete the work contemplated for a project.

8. The sealed bids submitted at 401 NW 2nd Avenue, S-714, Miami, Florida 33128, on or before January 15, 2009, at 2:00 p.m. were as follows:

All Time Roofing, with a bid of \$73,400.00;

Taylor Roofing, with a bid of \$59,708.00;

Leo Development, with a bid of \$54,109.00;

John W. Hunter Enterprises, with a bid of \$75,000.00; and

Trintec Construction, with a bid of \$75,500.00.

9. FBM's bid was \$71,600.00.

10. Mr. Holt determined that Leo Development was the lowest bidder.

11. FBM's bid was not considered as being non-responsive.

12. Additionally, Mr. Holt reviewed Leo Development's website to ascertain as to whether any factors existed to disqualify Leo Development. The website failed to reveal any basis for Mr. Holt to disqualify Leo Development.

13. Having discovered no basis to disqualify Leo Development as the lowest bidder, Mr. Holt submitted the list of bidders, with their bids, to Bill Bridges, the Department's senior architect and a registered architect for approximately 25 years. Mr. Bridges was the person responsible for oversight of the ITB process.

14. As Leo Development was the lowest bidder, Mr. Bridges reviewed the website of the Florida Department of State, Division of Corporations (Division of Corporations) in order to ensure that Leo Development was registered with the Division of Corporations. His review revealed that Leo Development was a fictitious name properly registered to Leo Premier Homes, LLC.

15. Further, Mr. Bridges performed a license background check on Leo Development in order to ensure that Leo Development was licensed by DBPR. Mr. Bridges reviewed DBPR's website, which revealed that Frank Anthony Leo was the owner of Leo Development and that the following licenses were issued by DBPR:

Qualified Business Organization License
#QB50182 to Leo Premier Homes, LLC, Leo
Development;

Certified Building Contractor License
#CBC1254723 to Frank Anthony Leo, Leo
Development; and

Certified Roofing Contractor License
#CCC1328402 to Frank Anthony Leo, Leo
Development.

16. Mr. Bridges confirmed and was satisfied that Leo Development was properly licensed to complete the work contemplated by the ITB.

17. Mr. Bridges recommended that Leo Development be awarded the ITB as the lowest responsive bidder.

18. FBM filed a written protest (Initial Protest) of "its exclusion from the bid tabulation." The Department issued a Final Order Rejecting Bid Protest (Final Order) on February 19, 2009. The Final Order provided in pertinent part:

FBM was determined non-responsive because the bid was not presented at the time and place specified in the ITB. . . FBM's formal written protest alleges that FBM, on the date of the bid submission/bid opening, was misdirected as to the location of the bid opening. . . .

FBM's protest must be rejected because it does not state a claim that could entitle it to relief. . . In the context of a bid protest proceeding . . . the protest must adequately allege that the protestor could obtain the contract award or otherwise benefit should the protest be successful. . . Assuming all of FBM's factual allegations are true and that those

facts entitle FBM to have its bid considered, FBM would still be entitled to no relief. Had FBM's bid been accepted, FBM would have been the third lowest of six bidders. FBM's formal protest does not allege that the lowest and second lowest bids were deficient in any manner. FBM was not injured in fact, because it still would not have received the contract award.

Accordingly, FBM's formal written protest is REJECTED.

19. No appeal was taken by FBM of the Department's Final Order rejecting FBM's Initial Protest.

20. Among other findings, the Department's Final Order on FBM's Initial Protest found that, taking FBM's allegations as true, FBM would have been the third lowest bidder. FBM would not have been the second lowest bidder.

21. The parties agree that the holder of a certified building contractor's license and a certified roofing contractor license would be permitted to complete the work contemplated by the ITB.

22. Subsequent to the opening of the sealed bids, Leo Premier Homes, LLC, registered the fictitious name of Leo Roofing & Construction with the Division of Corporations.

23. After the registration with the Division of Corporations and after the Department's Final Order, licenses were issued by DBPR. As to the licenses issued, the record of the instant case provides²:

Qualified Business Organization License
#QB50182 to Leo Premier Homes, LLC, Leo
Roofing & Construction;

Certified Building Contractor License
#CBC1254723 to Frank Anthony Leo, Leo
Roofing & Construction; and

Certified Roofing Contractor License
#CCC1328402 to Frank Anthony Leo, Leo
Roofing & Construction.

The licenses reflect the same license numbers, as before, and only the fictitious name is different on each license to indicate Leo Roofing & Construction.³

24. The contract for the ITB was entered into between the Department and Leo Development.

25. In these proceedings, the Department incurred costs in the amount of \$1,311.05.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter of these proceedings and the parties thereto pursuant to Section 120.569 and Subsections 120.57(1) and (3), Florida Statutes (2009).

27. Subsection 120.57(3), Florida Statutes (2009), 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. . . .

28. FBM, as the protestor, has the burden of proof.

29. FBM 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), Fla. Stat. (2008).

30. The hearing conducted by the undersigned was a de novo hearing. § 120.57(3)(f), Fla. Stat. (2009). 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)

31. Not only must FBM show that the Department's action is contrary to the Department's governing statutes, rules or

policies, or the bid or proposal specifications, but FBM must also show, pursuant to the standard of proof, that the Department's action is clearly erroneous, contrary to competition, arbitrary, or capricious.

32. FBM 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.

33. 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 irrationally. 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).

34. 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); Emerald Correctional Management v. Bay County Board of County Commissioners, 955 So. 2d 647, 651 (Fla. 1st DCA 2007); 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).

35. At hearing, Leo Development contested the standing of FBM and requested a dismissal of FBM's challenge. The request was denied without prejudice in order to provide for a full evidentiary hearing. In its post-hearing submission, the Department argues, among other arguments, that FBM lacks standing in this matter.

36. FBM alleges that this matter affects its substantial interests. See § 120.52(13)(b), Fla. Stat. (2009) for definition of party.

37. In resolving the issue of standing, the undersigned finds the case of Menorah Manor, Inc. v. Agency for Health Care Administration, 908 So. 2d 1100 (Fla. 1st DCA 2005) instructive and persuasive as to whether one's substantial interests are affected by administrative action. The First District Court of

Appeal applied the "two-prong test" for determining whether substantial interests have been affected. The court held that both prongs must be satisfied and what must be shown is:

(1) that [the party] will suffer injury in fact which is of sufficient immediacy to entitle [the party] to a section 120.57 hearing, and (2) that [the party's] substantial injury is of a type or nature which the proceeding is designed to protect.

Ybor II, Ltd. v. Florida Housing Fin. Corp., 843 So. 2d at 346, quoting Agrico Chem. Co. v. Dep't of Env'tl. Reg'l, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

Id. at 1104. Further, the court held that:

The first [prong] involves the degree of the injury and the second concerns the nature of the injury at stake. . . With respect to the second prong, this factor usually requires that 'the injury is of the type that the statute pursuant to which the agency has acted is designed to protect.' Fairbanks, Inc. v. State Dep't of Transp., 635 So. 2d 58, 59 (Fla. 1st DCA 1994).

Id.

38. FBM has failed to demonstrate that its substantial interests have been affected by the Department's action of awarding the bid to Leo Development. Hence, FBM has failed to demonstrate that it has standing.

39. The Department's Final Order on FBM's Initial Protest determined, among other things, that FBM was a non-responsive bidder and that, even if FBM was a responsive bidder, it would

have been the third, not the second, lowest bidder. The Department's Final Order was not appealed by FBM.

40. "A second lowest bid establishes [a] substantial interest." Preston Carroll Company, Inc. v. Florida Keys Aqueduct Authority, 400 So. 2d 524, 525 (Fla. 3rd DCA 1981). A "third low bidder [is] unable to demonstrate that it [is] substantially affected; it therefore lack[s] standing to protest the award of the contract to another bidder." Ibid.

41. Assuming that FBM could demonstrate that it has standing, based on the totality of the evidence presented, FBM failed to meet its burden. The evidence fails to demonstrate that the Department's action of awarding the ITB to Leo Development is in contradiction to any of the Department's statutory or rule provisions, or policies, or specifications. Furthermore, the evidence fails to demonstrate that the Department's action of awarding the ITB to Leo Development is clearly erroneous, contrary to competition, arbitrary, or capricious.

42. The evidence demonstrates that, at the time of the bidding and the bid award, Leo Premier Homes, LLC, properly registered Leo Development as a fictitious name with the Division of Corporations. The evidence further demonstrates that, at the time of bidding and the bid award, Leo Development was properly licensed by DBPR as a qualified business

organization, certified building contractor, and certified roofing contractor. Moreover, the evidence demonstrates that, at the time of bidding and the bid award, Leo Development was properly qualified to complete the work contemplated by the ITB.

43. Furthermore, the evidence demonstrates that, subsequent to the bid award, Leo Premier Homes, LLC, properly registered Leo Roofing & Construction with the Division of Corporations; that, subsequent to the bid award, Leo Roofing & Construction was properly licensed by DBPR as a qualified business organization, certified building contractor, and certified roofing contractor; and that, subsequent to the bid award, Leo Roofing & Construction was properly qualified to complete the work contemplated by the ITB.

44. As to the taxing of costs, the Department filed a Motion to Tax Costs subsequent to the conclusion of the hearing. No response was filed to the Department's Motion to Tax Costs. Section 287.042(2), Florida Statutes (2009), provides in pertinent part:

The department [Department of Management Services] shall have the following powers, duties, and functions:

(2)

* * *

(c) Any person who files an action protesting a decision or intended decision pertaining to contracts administered by the

department, a water management district, or an agency pursuant to s. 120.57(3)(b) shall post with the department, the water management district, or the agency at the time of filing the formal written protest a bond payable to the department, the water management district, or agency in an amount equal to 1 percent of the estimated contract amount. For protests of decisions or intended decisions pertaining to exceptional purchases, the bond shall be in an amount equal to 1 percent of the estimated contract amount for the exceptional purchase. The estimated contract amount shall be based upon the contract price submitted by the protestor or, if no contract price was submitted, the department, water management district, or agency shall estimate the contract amount based on factors including, but not limited to, the price of previous or existing contracts for similar commodities or contractual services, the amount appropriated by the Legislature for the contract, or the fair market value of similar commodities or contractual services. The agency shall provide the estimated contract amount to the vendor within 72 hours, excluding Saturdays, Sundays, and state holidays, after the filing of the notice of protest by the vendor. The estimated contract amount is not subject to protest pursuant to s. 120.57(3). The bond shall be conditioned upon the payment of all costs and charges that are adjudged against the protestor in the administrative hearing in which the action is brought and in any subsequent appellate court proceeding. In lieu of a bond, the department, the water management district, or agency may, in either case, accept a cashier's check, official bank check, or money order in the amount of the bond. If, after completion of the administrative hearing process and any appellate court proceedings, the department, water management district, or agency prevails, it shall recover all costs and charges which shall be included in the final

order or judgment, excluding attorney's fees. This section shall not apply to protests filed by the Office of Supplier Diversity. Upon payment of such costs and charges by the protestor, the bond, cashier's check, official bank check, or money order shall be returned to the protestor. If, after the completion of the administrative hearing process and any appellate court proceedings, the protestor prevails, the protestor shall recover from the department, water management district, or agency all costs and charges which shall be included in the final order or judgment, excluding attorney's fees.

45. The amount of the taxable costs submitted and requested by the Department is \$1,311.05, which does not include attorney's fees. The Department is the prevailing party in this matter. The Department should be awarded costs in the amount of \$1,311.05.

RECOMMENDATION

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

RECOMMENDED that the Department of Children and Family Services enter a final order dismissing FBM General Contracting Corporation's Protest and awarding costs in the amount of \$1,311.05 to the Department of Children and Family Services.

DONE AND ENTERED this 21st day of August 2009, in
Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of August, 2009.

ENDNOTES

^{1/} Petitioner's Exhibit numbered 1 was the project manual for the ITB. FBM failed to submit the project manual to this tribunal for inclusion as an exhibit.

^{2/} Leo Development attached to its Petition to Intervene the documents from the Division of Corporations and DBPR. Further, Mr. Leo provided uncontradicted testimony at hearing regarding registering Leo Roofing & Contracting with the Division of Corporations and licensing issued by DBPR to Leo Roofing & Contracting, except for the license numbers.

^{3/} Id.

COPIES FURNISHED:

Michael Falls
FBM General Contracting Corporation
750 East Sample Road, Building 3 S-222
Pompano Beach, Florida 33064

Javier A. Ley-Soto, Esquire
Department of Children and Family Services
401 Northwest Second Avenue, Suite N-1014
Miami, Florida 33128

Frank A. Leo
Leo Premier Homes, LLC
15634 98th Trail North
Jupiter, Florida 33478

George H. Sheldon, Secretary
Department of Children and Family Services
Building 1, Room 202
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

John J. Copelan, General Counsel
Department of Children and Family Services
Building 2, Room 204
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

Gregory Venz, Agency Clerk
Department of Children and Family Services
Building 2, Room 204B
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

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.