

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TURNER PEST CONTROL,)
)
 Petitioner,)
)
 vs.) Case No. 09-3442BID
)
 UNIVERSITY OF NORTH FLORIDA,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held on September 18, 2009, by video teleconferencing with sites in Tallahassee and Jacksonville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Richard L. Maguire, Esquire
Charles F. Mills, III, Esquire
1301 Riverplace Boulevard, Suite 1500
Jacksonville, Florida 32207

For Respondent: Paul Christopher Wrenn, Esquire
The University of North Florida
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STATEMENT OF THE ISSUE

Whether Respondent's award for RFP 09-36 is contrary to law, against the University's governing statutes, rules or policies or the terms of the Request for Proposal.

PRELIMINARY STATEMENT

This Preliminary Statement will address only the current procedural and evidentiary matters.^{1/}

Following a protest by Petitioner Turner Pest Control, Respondent University of North Florida (UNF), on June 23, 2009, referred this cause to the Division of Administrative Hearings (DOAH), pursuant to UNF's contract with DOAH. After a setting of final hearing for July 14, 2009, the parties stipulated to a later hearing date anytime after September 1, 2009, and the case was ultimately scheduled for September 18, 2009.

On September 2, 2009, Terminix filed a letter-petition to intervene. On September 14, 2009, before the time had run for the parties' responses to be filed, Terminix withdrew its petition to intervene.

On September 10, 2009, Petitioner filed an Addendum to its petition for protest. Although no authority for such an addendum was cited, Respondent stipulated to the filing thereof.

Consistent with the authority granted in Florida Board of Governors Rule 18.002, and the procedures outlined in UNF Regulation 13.0020R, the parties exchanged exhibits, and on September 16, 2009, a Joint Prehearing Stipulation was filed. On September 17, 2009, an agreed Amendment to Joint Prehearing Stipulation was filed. The facts admitted by the parties have been incorporated in the Findings of Fact infra.

The video hearing was held September 18, 2009. Thirty-two joint exhibits were admitted in evidence. Petitioner presented the oral testimony of Kathy Ritter and Doug Nelson. Respondent presented the oral testimony of Paul Riel and Mark Slater.

By stipulation of the parties, the proceeding was preserved on audio tape, via UNF's paralegal, and subsequently transcribed by a certified court reporter. The Transcript was filed with DOAH on October 5, 2009. The parties stipulated to file their proposed recommended orders by October 26, 2009, and both timely-filed proposals have been considered.

FINDINGS OF FACT

1. UNF published its Request for Proposal in reference to RFP 09-36, entitled "Pest Control Services at UNF Campus" (hereafter, "Project") with a March 10, 2009, Mandatory Pre-Bid Date and a March 30, 2009, Opening Date. (Joint Stipulation 1.)

2. There was one addendum to the RFP 09-36 Project. (Joint Stipulation 2.)

3. Petitioner Turner Pest Control and Terminix submitted proposals in response to the RFP 09-36 Project. (Joint Stipulation 3.)

4. There were seven other responsive proposers besides Terminix and Petitioner.

5. Addendum No. 1, RFP 09-36 Section 6, included a heading in bold font, entitled "Rating Criteria." The third criterion,

which for scoring purposes was assigned a maximum of 20 points, reads as follows:

Provide the names and contact information to at least three (3) references to support past performance of a similar size University and/or commercial type business.

6. Paragraph 8, of the RFP provided:

For the purpose of this project, Doug Nelson, or his/her duly appointed successor or assigned representative, shall be authorized Contract Administrator . . . It shall be the Contract Administrator's responsibility to supervise the receipt and handling of proposals, to respond to all inquiries relating to the proposal or submittal procedures, to coordinate and provide required support information necessary for committee review and evaluation of proposals received and to be responsible for all contractual matters. . . .

7. UNF Contract Administrator, Doug Nelson, drafted Section 6, of the RFP and facilitated the meeting of the full evaluation committee, which analyzed the responsive proposals. In his opinion, Section 6, only required the submission of three suitable references; it permitted the committee to accept the three names and contact information at face value; and it did not presume that letters of reference from those named must be attached to the proposal, although it was acceptable to attach them. Also in Mr. Nelson's opinion, the foregoing language of the RFP did not contemplate that the evaluation committee must contact or otherwise verify the references provided.

8. The evaluation committee was carefully selected and qualified. The committee was provided a matrix that contained evaluation criteria and identified the number of points that could be assigned to each proposer for each criterion.

9. On the evaluation matrix, one column heading reads "Three (3) References and Past Performance," in the conjunctive. (Emphasis supplied.)

10. On April 7, 2009, the evaluation committee met to review all responsive proposals received pursuant to RFP 09-36. (Joint Stipulation 4, modified for detail.) What the committee did with regard to scoring references could be characterized as first separately rating proposers on their references and secondly, separately rating proposers on their past performance.

11. Utilizing the evaluation matrix provided, the committee assigned a total of 12 points to Terminix and a total of 20 points to Petitioner for their respective references.

12. The evaluation committee allocated 10 points to Petitioner and 10 points to Terminix simply because each had submitted three references and contact information.

13. Terminix did not submit a testimonial letter from a reference and did not have a history with committee members, so Terminix was awarded only two more points, beyond the first 10 points, for a total score of 12, on "references."

14. Two other proposers received a total of 20 points for their references because they had submitted three names with contact information which evaluators considered "strong" references; because the proposer had a history familiar to members of the committee; or because the proposer submitted actual testimonial letters from one or more of the proposer's listed references.

15. The committee added 10 more points to Petitioner's score for references (totaling the entire 20 points available for that category) because of committee members' personal knowledge of Petitioner's past quality performance at UNF, even though Petitioner had not submitted UNF as a reference with contact information as part of its proposal.

16. The ultimate result was that the evaluation committee rated Terminix only two points out of a possible 10 points due to Terminix's lack of direct experience with UNF, and some other proposers were rated lower than Petitioner for similar reasons.

17. On some prior UNF RFPs and ITBs, evaluation committees have gone behind the face value of references and on some they have not. On this occasion, the committee was not told either to rate references as they did or to calculate differently in rating the references provided by respective proposers.

18. Petitioner was the highest-ranked proposer overall. Terminix was the second highest-ranked proposer overall.

19. The parties have stipulated that, "The University of North Florida awarded RFP 09-36 Project to Turner Pest Control on April 9, 2009." (Joint Stipulation 5; emphasis supplied.)

20. UNF's April 9, 2009, letter to all proposers read, in pertinent part:

Please be advised that on Thursday April 9, 2009, the University of North Florida awarded Request for Proposal 09-36 "Pest Control Services at UNF" to Turner Pest Control.

The University of North Florida is providing notice to all respondents [proposers] by copy of this letter and is required to include in this notice the following statement:

Failure to file a protest in accordance with UNF Regulation 13.0020R, or failure to post the bond or other security as required in UNF Regulation 13.0030R, shall constitute a waiver of protest proceedings. (Bracketed material provided for clarity; emphasis supplied.)

21. Paragraph 12 of the RFP provided:

Any qualified offeror who is adversely affected by the University's decision may file a written notice of intent to protest within 72 hours after the University posting of the award of intent to award notice. The protesting firm must reduce its complaint to written petition and file it with the President of the University within ten (10) calendar days from registration of the original complaint. If the competitive solicitation documents require the posting of a bond with the protest, the bond shall be included with the protest. A Bond, payable to the University of North Florida, in an amount equal to: 10% of the estimated

value of the protestor's proposal; 10% of the estimate of the University's estimate of the total volume of the contract, or \$10,000, whichever is less. The bond shall be conditioned upon the payment of all costs which may be adjudged against the vendor. Failure to file a notice of protest or the written petition, including posting of the required protest bond shall constitute a waiver of the right to protest proceedings.

Upon receipt of the formal written petition filed in accordance with this regulation, the President or the President's designee shall delay the execution of the contract until the protest is resolved by mutual agreement between the parties or by final presidential action . . . (Emphasis supplied.)

22. On April 10, 2009, Terminix filed a Notice of Intent to Protest award of RFP 09-36 to Petitioner. (Joint Stipulation 6.) It was filed with Doug Nelson within 72 hours of UNF's April 9, 2009, letter. It was not inappropriate or non-compliant because only the written protest is required to be filed with the University President.

23. The thrust of Terminix's April 10, 2009, notice of intent to protest was that Terminix had submitted a proposal for a lower total cost of doing the work than had Petitioner.

24. After receiving Terminix's Notice of Intent to protest, Kathy G. Ritter, UNF's Director of Purchasing and Mr. Nelson's superior, reviewed the file. After her review, she notified UNF's General Counsel's Office (OCG) that she wanted to rescind the award to Petitioner due to an error. At that time,

her concerns were based on the RFP language seeking three references for an analysis of past performance and the matrix used by the evaluation committee and also the committee's deliberations which had separated the scoring of three references from the scoring of past performance

25. Ms. Ritter felt the RFP criteria required the evaluators to check up on all references provided in each proposal and they had not done so. She also was not satisfied that the evaluation committee had fully considered pricing issues.

26. Paragraph 10 of the RFP provided:

No interpretation of the meaning of any part of this RFP, nor corrections of any apparent ambiguity, inconsistency or error herein, will be made to any Proposer orally. All requests for written interpretation or corrections MUST be in writing.

27. Paragraph 15 of the RFP provided:

In the event that any of the provisions of the contract are violated by the successful vendor(s), the University may serve written notice upon vendor(s) of its intention to terminate the contract.

28. Paragraph 16 of the RFP provides:

. . . the University may terminate this RFP process at any time up to notice of award, without prior notice, and without liability of any kind or amount. . . .(Emphasis supplied.)

29. Nonetheless, Ms. Ritter felt her only option was to rescind the award or throw out all responses and re-bid the proposal. Because she believed the flaw in scoring was limited to the references, which flaw could be corrected, and possibly the pricing, she elected to "re-do" a portion of the evaluation and notified the evaluation committee accordingly. She considered rescission and topical reconsideration to be within the authority of her position.

30. However, Ms. Ritter referred to no specific "authority" (rule, regulation, RFP, or statute) by which she could "rescind" a notice of award or part thereof, and she did not rescind the award until after a written formal protest was filed. See infra.

31. Terminix made an oral request to Ms. Ritter for an extension of time to file a written protest. On or about April 15, 2009 (six calendar days after Terminix's notice of intent to protest), Ms. Ritter orally granted Terminix until April 24, 2009, to file its formal protest. April 24, 2009, was 14 days from UNF's receipt of Terminix's notice of intent to protest. Terminix never submitted a written request for extension and ever received a written extension, but it relied upon Ms. Ritter's oral extension.

32. In a letter dated April 20, 2009, and received by UNF on April 23, 2009, Terminix filed a written formal protest,

challenging the award of RFP 09-36, to Petitioner, Turner Pest Control. (Joint Stipulation 7, amplified for detail.) The thrust of Terminix's formal petition was that UNF had failed to contact the references provided by each bidder and that UNF had failed to properly evaluate Terminix's proposed costs.

33. With its written formal protest filed appropriately with UNF's President, Terminix submitted a protest bond that was less than that required by the RFP and by University Regulation No. 13.0030R(II)(3), which provides:

Solicitation Protest Bond. Any entity filing an action protesting a decision or intended decision pertaining to a competitive solicitation shall, at the time of filing of the formal protest, post with the University a bond payable to the University in an amount equal to the lesser of the following: 10% of the estimated value of the protestor's bid or proposal; 10% of the estimated expenditure during the contract term or \$10,000. The bond shall be conditioned upon the payment of all costs, which may be adjudged against the entity filing the protest action Failure of the protesting entity to file the required bond, . . . at the time of filing the formal protest shall result in a dismissal of the protest.

34. Terminix's proposal had been for \$32,076.00, annually, for three years, totaling \$96,028.00. Terminix posted a protest bond for only \$3,200.80, instead of for ten percent of its bid, or even for \$3,207.60 for ten percent of its bid on an annual basis.

35. There is no evidence whatsoever that Ms. Ritter's April 15, 2009, oral extension of the time to file Terminix's formal written protest in any way included a waiver of the requirements for posting a bond; that it specified a bond amount different than 10 percent of Terminix's proposal; or that it included any reduction of the amount of the required bond or security.

36. On April 24, 2009, a day after receiving Terminix's written protest, UNF rescinded its award of Project RFP 09-36 to Petitioner. (Joint Stipulation 8, amplified for detail.)

37. A letter of that date, authored by Ms. Ritter, stated:

. . . the notice of award dated April 9, 2009, is rescinded and the evaluation committee is instructed to reopen its evaluations in this RFP for the purpose of contacting all references supplied by all bidders and assigning points based upon an average of their responses supporting the bidders' past performance. Following determination of the points to be assigned for Rating Criteria 3, the evaluation committee will re-tally the total points assigned to each bidder for all rating criteria and identify the successful bidder, by issuing a new notice of award. (Emphasis supplied.)

38. The "re-evaluation" involved eight questions drafted by Ms. Ritter, a previously uninvolved employee of UNF's Purchasing Department, UNF's OCG, and possibly Mr. Nelson. The previously uninvolved Purchasing Department employee put the same eight questions (five yes/no questions and three questions

which were each to be rated on a scale of 1-10) to at least three references listed by each responsive bidder.^{2/} She unilaterally rated the three scaled questions at between 1 and 10 points. Thereafter, she deleted the evaluation committee's previous scores based on references, and the average of the three new scores per reference were substituted on the original RFP evaluation matrix. These scores were then factored into a final total score per proposer. Apparently, some adjustments were made, based on Terminix's original provision of 14 (not just three) references, and some weighting of questions also was involved, but how these latter adjustments were mathematically accomplished is not entirely clear. Therefore, even the final mathematical tabulation, ranking Terminix No. 1 and Petitioner No. 2, cannot be relied upon.

39. The final numerically altered RFP score matrix was presented to some of the evaluation committee members. Some committee members were not present when it was presented, and the members present were only permitted to approve the new scores.

40. On May 15, 2009, UNF awarded RFP 09-36 to Terminix. (Joint Stipulation 9.)

41. On May 18, 2009, Petitioner filed its Notice of Intent to Protest Award of RFP 09-36 to Terminix (Joint Stipulation 10). It is found to be timely.

42. On May 27, 2009, Petitioner filed its Bid Protest of Award RFP 09-36 to Terminix. (Joint Stipulation 11.) This item is found to be the timely written protest herein. It was correctly filed with UNF's President and was accompanied by an appropriate bid protest bond. Among the issues raised were the insufficiency of Terminix's original protest bond and the new scoring of references for past performance.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause, in accordance with Florida Board of Governors Regulation 18.002. This hearing has been conducted in accordance with the requirements of Board of Governors Regulation 18.002 and the University's Regulation 13.0020R. However, the parties have, either by express stipulation or by their actions, waived the usual period (ten days post-hearing) for entry of this Recommended Order.

44. The term used throughout most of the RFP (see Finding of Fact 21), in UNF's April 9, 2009, and April 24, 2009, letters (see Findings of Fact 20 and 37), and in the parties' factual stipulations for hearing (see Finding of Fact 19), not to mention their entire course of dealing, establish that UNF's April 9, 2009, letter constituted a notice of award, not a notice of intent to award.^{3/}

45. Even if Ms. Ritter's oral extension of the time in which to file Terminix's written protest could be considered a permissible waiver of a minor irregularity, and even if Terminix were entitled to some consideration because it relied on Ms. Ritter's representations concerning when to file its formal written protest, Petitioner Turner Pest Control must prevail herein.

46. Ms. Ritter's oral time extension did not eliminate the requirement that Terminix post a compliant bid protest bond simultaneously with filing its written protest. Although Terminix's bond's defective amount was relatively minor, Terminix's protest bond clearly was not compliant with the RFP or with UNF regulations. (See Findings of Fact 21 and 33.) Under the terms of the RFP and UNF regulations, that inadequate bond constituted Terminix's "waiver of the right to protest proceedings," and UNF was required to dismiss the protest procedure and execute a contract with Petitioner.

47. If it could be legitimately held that UNF's April 9, 2009, letter constituted a notice of intent to award, as opposed to a notice of award, UNF could, at anytime, even now, pursuant to Section 16 of the RFP, terminate and recommence the entire RFP process, but UNF has never proceeded on such a theory. Instead, UNF attempted a piecemeal approach, which is contrary

to the RFP and unacceptable to a fair bidding process. Under such circumstances, Petitioner should prevail.

48. It was not unreasonable for committee members to take into consideration their individual experience with one or more of the proposers in their first assessment of the respective proposals, and they could also legitimately have done that the second time around, had a timely written formal protest been accompanied by an adequate bond.

49. Also, had there been a timely written formal protest and the simultaneous posting of an adequate bond, there might have been an opportunity for the committee to address the references differently than it had the first time, but it is abundantly clear that the way in which the references were addressed the second time around was contrary to law, the University's rules, and the terms of the RFP.

50. Mr. Nelson's opinion notwithstanding, the only reasonable purpose for the RFP to require submittal of three references and contact information was so that the evaluation committee could actually contact the references and evaluate their responses. Therefore, the first evaluation was flawed because the committee did not contact any references and evaluate their responses, but the first evaluation flaw could not be "corrected" after an award had been posted, unless a

written protest was timely filed addressing that issue together with a compliant bond.

51. It also could not be corrected by requiring the evaluation committee to "rubber stamp" a new procedure (scoring of responses to questions) that was not arrived-at by the committee. Who drafted the uniform questions, who asked them, and who recorded the actual responses from the proposers' references, are not so much a problem as are the facts that the questions themselves were assigned points by a non-committee member and that the evaluation committee had no analytical part in that portion of the reassessment of the proposals. The result of these machinations was that the evaluation committee's score for references was recomputed by someone outside the committee, using a purely mathematical rating system based on three questions asked of each reference. That single person's subjective results on a scale of 1 to 10 were then presented to only a portion of the evaluation committee, and the whole committee did not vote. Had the questions and answers been submitted to the committee, the ministerial act of someone else recording the answers might constitute a minor irregularity, but here, the evaluation committee established by the RFP was not even given the opportunity to rank, on the newly established 1-10 scale, the answers from the references provided. Further, committee members were not given the opportunity to factor in

any other elements they might have felt were relevant to the RFP, such as the proposers' past history with UNF. This new procedure, resulting from Terminix's incomplete (and thus waived protest), was contrary to law, against the University's rules, and contrary to the terms of the RFP.

RECOMMENDATION

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

RECOMMENDED that the President of the University of North Florida, pursuant to his authority under the Board of Governors Regulation 18.002, enter a final order rescinding the award to Terminix and awarding the contract to Petitioner.

DONE AND ENTERED this 8th day of December, 2009, in Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of December, 2009.

ENDNOTES

1/ Because the prior award to Petitioner Turner Pest Control, the prior intent to protest filed by Terminix International Company, L.P. (Terminix), UNF's rescission of that prior award, UNF's re-calculation, and the instant protest are factual issues, pivotal to resolution of the present dispute, they will be discussed only in the Findings of Fact and Conclusions of Law.

2/ Terminix had submitted 14 references with contact information for each. How this situation was handled is not clear in the record. Nor is it clear how reference letters attached to certain proposals in place of just contact information were addressed, if at all.

3/ This is a crucial point. Some other entities' procurement procedures provide for a "notice of intent to award" which is not superseded by a "notice of award" until after the time has run for any protests. In other words, a notice of intent to award is entered and only after 72 hours has passed without any intent to protest being filed, will a notice of award be entered, or if an intent to protest and a compliant written protest are both timely filed, the "notice of award" is entered only after the protest has been resolved.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

Pursuant to the procedure specified in Board of Governors Rule 18.002, upon submission of this Recommended Order to the President of the University of North Florida, the President will issue a preliminary order for final action and notify the parties of such order. The preliminary order of the president shall be final, unless the firm under consideration takes exception to such order; in which event it may file with the President such exceptions within twenty-one days of receipt of notice of the preliminary order.