

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RHC AND ASSOCIATES, INC.,)
)
 Petitioner,)
)
vs.) Case No. 09-6060BID
)
HILLSBOROUGH COUNTY SCHOOL)
BOARD,)
)
 Respondent.)

)

RECOMMENDED ORDER OF DISMISSAL

This cause came before the undersigned on Respondent's Motion to Dismiss Formal Protest for the 2010 HVAC Projects Engineers Final Ranking Decision Dated October 7, 2009 Pursuant to [Florida Statutes] 120.57(3) ("Motion to Dismiss"), filed November 18, 2009; and Petitioner's response in opposition to Respondent's motion to dismiss ("Response in Opposition to Motion to Dismiss"), filed November 30, 2009. A hearing on the Motion to Dismiss was held in Tampa, Florida, on December 3, 2009.¹

APPEARANCES

For Petitioner: Joseph W. J. Robinson, President/CEO
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For Respondent: Thomas M. Gonzalez, Esquire
Thompson, Sizemore, Gonzalez
& Hearing, P.A.
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PRELIMINARY MATTERS

Respondent electronically posted its final ranking of applicants seeking to provide project engineering services for six 2010 School Board heating ventilation and air-conditioning ("HVAC") projects. Petitioner timely filed a Notice of Intent to File Protest, and on October 22, 2009, filed a Formal Written Protest for the 2010 HVAC Projects Engineers Final Ranking Decision Dated October 7, 2009 Pursuant to [Florida Statutes] 120.57 ("Protest").

Petitioner did not file a protest bond, and in its Protest, asserts that it was relieved of that obligation because Respondent's electronic posting of the final ranking did not include the notice prescribed in Subsection 120.57(3)(a), Florida Statutes.² That provision states, "[f]ailure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120."

The parties were unable to resolve the Protest by informal means. The case was filed with the Division of Administrative Hearings on November 5, 2009.

On November 6, 2009, Petitioner supplemented its Protest by filing Petitioner's Notice of Filing Letters to Respondent Transmitting Cashier's Check (Bond) on November 3, 2009, for Case No. 09-6060BID[;] and July 17, 2008[,] for Previous Case No. 09-3584BID[,] Including the Respondent's DOAH Transmittal Letter Dated July 25, 2008 ("Notice of Filing"). Attached to the Notice of Filing were copies of correspondence between Petitioner and Respondent regarding posting of the bond, including correspondence showing that on November 3, 2009, Petitioner submitted to Respondent a cashier's check in the amount of \$3,143.70 "as required by [Florida Statutes] 287.042(2)(c) based on [one percent] of the largest proposed contract award amount of \$314,370.00 for the Protest."

Pursuant to notice issued November 17, 2009, the Protest was scheduled for final hearing on December 3, 2009.

Respondent filed its Motion to Dismiss on November 18, 2009, and Petitioner filed its Response in Opposition to Motion to Dismiss on November 30, 2009. In the Motion to Dismiss, Respondent urges several grounds for dismissal, which included that Petitioner had waived its right to protest the ranking because it had failed to file the bond or other security

required by law. In the Response in Opposition to Motion to Dismiss, Petitioner contends that: (1) The subject procurement is governed by Section 287.055, Florida Statutes³; (2) Based on the foregoing assertion, Respondent is a "local public agency or public body corporate," subject to procurement requirements in Part I, Chapter 287, Florida Statutes, and Florida Administrative Code Rule 28-110.005; and (3) In the past, Respondent has accepted bonds pursuant to the requirements in Subsection 287.042(2)(c), Florida Statutes.

FINDINGS OF FACT

The findings below are based on the undisputed facts set forth in Petitioner's Protest and supplements thereto, Respondent's Motion to Dismiss, Petitioner's Response in Opposition to Motion to Dismiss, and representations by the parties during the motion hearing.

1. On October 7, 2009, Respondent electronically posted its final ranking of firms which had submitted proposals to provide mechanical engineering services for six HVAC projects for Respondent in 2010.

2. Respondent's electronic posting of the final ranking of firms included the following language: "Failure to file a protest within the time prescribed in Section 120.57(3), shall constitute a waiver of proceeding under Chapter 120, Florida Statutes."

3. On October 12, 2009, Petitioner filed a Notice of Intent to Protest the final rankings. On October 22, 2009, Petitioner filed its Protest.

4. Although Petitioner's Protest was timely filed, Petitioner initially did not file a bond or other security. The Protest alleges that Petitioner was not required to file a bond, because Respondent did not include in its final ranking notice that a failure to post a bond would constitute a waiver of proceedings under Subsection 120.57(3)(a), Florida Statutes. Additionally, the Protest alleges that Respondent: (1) failed to provide Petitioner with notice of the estimated contract amounts within 72 hours, exclusive of Saturdays and Sundays and state holidays, of the filing of a notice of protest as required by Subsection 287.042(2)(c), Florida Statutes; and (2) because Respondent had not provided that notice, Petitioner was unable to calculate the amount of the bond required and was, therefore, relieved of the obligation to file a bond.

5. On October 30, 2009, Respondent, through counsel, wrote to Petitioner. In this correspondence, Respondent informed Petitioner that Section 287.042, Florida Statutes, did not apply to Respondent because it was not an "agency" for purposes of that law. Respondent further informed Petitioner that Section 255.0516, Florida Statutes, allowed Respondent to require a bond in the amount of two percent of the lowest accepted bid or

\$25,000. Respondent also notified Petitioner that because it was protesting all six project awards, all awards must be included in the calculation of the bond amount required. Finally, Petitioner was allowed ten days within which to post a bond.

6. On November 3, 2009, Petitioner submitted to Respondent a cashier's check in the amount of \$3,143.70 and noted that the check was intended to serve as security for the Protest "as required by F.S. 287.042(2)(c)." In the letter which accompanied the check, Petitioner also noted that: (1) the amount of the check was determined by calculating one percent of the largest proposed contract award amount of \$314,370.00; and (2) Petitioner was providing that amount "under duress," because Respondent had "just published the contract award amounts."

7. The relief requested by Petitioner in the Protest is that: (1) it be awarded one of the six HVAC projects comprising the final ranking; and/or (2) alternatively, all six awards be rescinded and "start the entire process over."

8. The final ranking which Petitioner protests included six separate projects, each of which had a separate construction budget. Those projects and their respective construction budgets are as follows: Northwest--\$1,144,000; Tampa Palms--\$2,649,081; Yates--\$2,770,828; Ferrell--\$2,550,758; Stewart--\$2,805,437; and Erwin--\$4,191,603.

9. The proposed fees for each project were as follows:
\$97,240 (Northwest); \$211,926 (Tampa Palms); \$221,666 (Yates);
\$204,061 (Ferrell); \$224,435 (Stewart); and \$314,370 (Erwin).

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. See § 120.57, Fla. Stat.

11. The subject Protest is governed by Subsection 120.57(3), Florida Statutes, which provides that an agency shall provide notice of a decision or intended decision concerning a solicitation or contract award by electronic notice. With regard to the notice, that provision states:

The notice shall contain the following statement:

"Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes."

12. It is undisputed that Respondent's notice of its intended decision of the final ranking did not include language required by Subsection 120.57(3), Florida Statutes, concerning the requirement to post a bond. Pursuant to that provision, if a party wishing to protest fails to timely file a protest or fails to post the bond required by law, that party waives its

right to a proceeding under Chapter 120, Florida Statutes. The language in Subsection 120.57(3), Florida Statutes, is mandatory, not discretionary.

13. About a week after Petitioner filed its Protest, Respondent cured its omission of the language regarding the bond requirement and notified Petitioner that a bond was required and in what amount. Respondent's correspondence cited Section 255.0516, Florida Statutes, as the bond amount that it was requiring and as its authority for doing so.

14. Subsection 255.0516(1), Florida Statutes, provides in relevant part:

With respect to state contracts and bids pursuant to competitive bidding, whether under chapter 1013, relating to educational facilities, or under this chapter, related to public buildings, if a school board . . . uses procedures pursuant to chapter 120 for bid protests, the board may require the protestor to:

(1) Twenty-five thousand dollars or 2 percent of the lowest accepted bid, whichever is greater, for projects valued over \$500,000;

15. Petitioner failed to post a bond in the amount required by Section 255.0516, Florida Statutes.

16. In the Protest, Petitioner cites Subsection 287.042(2)(c), Florida Statutes, as governing the bond requirement for the bid that is the subject of this proceeding. That section provides in pertinent part:

Any person who files an action protesting a decision or intended decision pertaining to contracts administered by . . . an agency pursuant to s. 120.57(3)(b) shall post with the . . . agency at the time of filing the formal written protest a bond payable to the . . . agency in amount equal to 1 percent of the estimated contract amount.

17. Section 287.012, Florida Statutes, provides definitions of various terms "as used in this part." Among the terms for which definitions are provided is the term "agency." Subsection 287.012(1), Florida Statutes, defines that term as follows:

(1) Agency" means any of the various state officers, departments, boards, commissions, divisions, bureaus and councils and any other unit of organization, however designated, of the executive branch of state government.

18. Respondent is not a unit of the executive branch of state government, and, thus, the provisions of Section 287.042, Florida Statutes, do not apply to it. Dealer Tag Agency v. First Hillsborough County Tag Agency, Inc., 14 So. 3d 1238 (Fla. 2d DCA 2009); and Dunbar Electric Supply, Inc. v. School Board of Dade County, 690 So. 2d 1339 (Fla. 1st DCA 1997).

19. If it is assumed that Subsection 287.042(2)(c), Florida Statutes, applied to Petitioner's Protest, by the terms of that provision, Petitioner would be required to post a bond in an amount equal to one percent of the contract price. In this case, Petitioner protests the rankings of applicants for

professional services for six projects. The total combined contract amount of those projects is \$1,273.698. Therefore, if Subsection 287.042(2)(c), Florida Statutes, applied to the subject Protest, Petitioner would be required to post a bond of \$12,736.98.

20. Petitioner tendered a check in the amount of \$3,143.70, an amount representing one percent of the contract price for one project, the Erwin project with a cost of \$314,370. The amount tendered by Petitioner is insufficient for the Protest under Subsection 287.042(2)(c), Florida Statutes, the provision which Petitioner contends applies.

21. Respondent's omission of the bond requirement language in Subsection 120.57(3), Florida Statutes, was cured by the notice that it provided. The notice gave Petitioner ten days from the date of that notice to post the bond.

22. Petitioner did not post a bond that complied with the terms of Section 255.0516, Florida Statutes, and does not claim to have done so.

RECOMMENDATION

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

RECOMMENDED that Respondent, Hillsborough County School Board, issue a final order dismissing the Protest filed by Petitioner, RHC and Associates, Inc.

DONE AND ENTERED this 20th day of January, 2010, in
Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of January, 2010.

ENDNOTES

^{1/} Pursuant to Notice, the final hearing was scheduled on this date. However, the pending Motion to Dismiss and response thereto were argued when the hearing convened. At the close of argument, the undersigned indicated the Motion to Dismiss would be granted. The parties were given the opportunity to file proposed orders. The undersigned advised the parties that any additional legal authority would be considered prior to issuing the ruling on the Motion to Dismiss.

^{2/} All statutory references are to Florida Statutes (2009), unless otherwise noted.

^{3/} The Response in Opposition to Motion to Dismiss states that the subject procurement was for professional engineering services and not a construction bid pursuant to Chapter 255 or Chapter 1013, Florida Statutes.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.