

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN LIGHTING )  
AND SIGNALIZATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 10-7669BID  
 )  
DEPARTMENT OF TRANSPORTATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
MILLER ELECTRIC COMPANY, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A formal hearing was conducted in this case on September 16, 2010, and October 1, 2010, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Karen D. Walker, Esquire  
Holland and Knight  
315 South Calhoun Street, Suite 600  
Tallahassee, Florida 32301

For Respondent: C. Denise Johnson, Esquire  
Department of Transportation  
Haydon Burns Building, Mail Station 58  
605 Suwannee Street  
Tallahassee, Florida 32399-0450

For Intervenor: Charles R. Walker, Jr., Esquire  
Regan Zebouni and Walker, P.A.  
9905 Old St. Augustine Road  
Jacksonville, Florida 32257

STATEMENT OF THE ISSUE

The issue is whether Respondent Florida Department of Transportation's (the Department or FDOT) determination that Intervenor Miller Electric Company (Miller) is a responsive design-build proposer was clearly erroneous, contrary to competition, or arbitrary and capricious.

PRELIMINARY STATEMENT

By formal written protest dated July 2, 2010, Petitioner American Lighting and Signalization, Inc. (ALS) protested FDOT's intended decision to award a design-build contract to Miller. The contract involves the design and construction of the SR 5 (U.S. 1) Intelligent Transportation System (ITS) from SR 9 north to Wister Street, Duval County, Florida, Contract Number E2077 (Project).

The Department referred this matter to the Division of Administrative Hearings on August 17, 2010. A Notice of Hearing dated August 18, 2010, scheduled the hearing for September 16, 2010.

On August 26, 2010, Miller filed its Petition to Intervene. An Order Granting Petition to Intervene was entered on September 1, 2010.

The hearing commenced on September 16, 2010, as scheduled. However, the matter could not be concluded in the time allotted. Therefore, the case was continued to October 1, 2010.

During the hearing, Stipulated Exhibits 1-21 were received into evidence.

ALS called five witnesses. ALS offered seven exhibits that were accepted as evidence.

The Department called two witnesses. The Department offered one exhibit that was accepted as evidence.

Miller called two witnesses. Miller offered one exhibit that was received into evidence.

The transcripts of the first and second day of the hearing were filed on September 30, 2010, and October 14, 2010, respectively. The parties filed their Proposed Recommended Orders on October 28, 2010.

Except as otherwise noted, all references hereinafter shall be to Florida Statutes 2010.

#### FINDINGS OF FACT

1. This protest arises out of FDOT's April 19, 2010, request for a design-build proposal (RFP) relating to the Project referenced above. The RFP requires the services performed by the Proposer to be in compliance with all applicable manuals and guidelines. FDOT issued three addenda to the RFP, the last of which (Addendum #3) was issued two days prior to the advertised proposal submission deadline.

2. The specific services were outlined as follows in the RFP:

The ITS Project (Project) consists of the installation of ten (10) arterial dynamic message signs (ADMS), interconnection with the existing FDOT District 2 and City of Jacksonville fiber optic networks (FON), installation of a closed-circuit television (CCTV) camera subsystem with eighteen (18) CCTV cameras, and the upgrade of eighteen (18) existing signal cabinets for central command and communication. The Project shall also include all ancillary components and device configuration adjustments needed to connect and operate a complete ITS.

3. The RFP is a low bid design-build technically acceptable procurement. The RFP states that after the public bid opening:

The FDOT shall open all bids received at a public bid opening on the date found in Section II of this document. The FDOT Technical Review Committee will review the Technical Proposal of the lowest bidder. The Technical Review Committee will then establish if the Technical Proposal is responsive or non-responsive based on the criteria described in the document. If the proposal is responsive, that Proposer will be awarded the project. If the proposal is found to be non-responsive, the FDOT Technical Review Committee will review the Technical Proposal of the next lowest bidder and establish if the Technical Proposal is responsive or non-responsive based on the criteria described in this RFP and so on.

4. In a low bid design-build procurement, price is particularly important because bidders are eliminated solely on price. In this RFP, bidders were to base their technical and price proposals on the RFP package as well as the addenda and question and answers issued by FDOT. In Section III, Subsection H, the RFP states as follows in relevant part:

The Department may waive minor informalities or irregularities in proposals received where such is merely a matter of form and not substance, and the correction or waiver of which is not prejudicial to other Proposers. Minor irregularities are defined as those that will not have an adverse effect on the Department's interest and will not affect the price of the Proposals by giving a Proposer an advantage or benefit not enjoyed by other proposers.

1. Any design submittals that are part of a proposal shall be deemed preliminary only.

2. Preliminary design submittals may vary from the requirements of the Design and Construction Criteria. The Department, at their discretion, may elect to consider those variations in awarding points to the proposal rather than rejecting the entire proposal.

3. In no event will any such elections by the Department be deemed to be a waiver of the Design and Constructions Criteria.

4. The Proposer who is selected for the project will be required to fully comply with the Design and Construction Criteria for the price bid, regardless that the proposal may have been based on a variation from the Design and Construction Criteria.

5. In Section III, Subsection I, the RFP addressed modification of proposals. Proposers could modify previously submitted proposals at any time prior to the proposal due date.

6. The Department opened eight proposals on June 9, 2010. Miller was the low bidder with a total price of \$1,549,875.00. ALS was the second lowest bid with a total price of \$1,564,189.00, a difference of \$14,314.00.

7. Miller's proposal was submitted to the Department's Technical Review Committee (TRC) for a determination whether its Technical Proposal was responsive or non-responsive. The TRC was comprised of the following members of FDOT's staff: (a) John Kell, ITS Project Manager; (b) Jerry Ausher, P.E., Traffic Operation Engineer; and (c) Amy Williams, P.E., Senior Project Manager. Kathy Thomas, P.E., District Two Consultant Design Engineer, was not a member of the TRC but provided guidance to it.

8. The Department has adopted Design Build Guidelines (the guidelines) that address the role of the TRC in low bid design-build procurements. In Section 4.13, the guidelines state that the "TRC shall review the design concepts and preliminary designs of the lowest bidder proposed in order to assess the responsiveness of the lowest bidder's technical proposal compared to the Design and Construction Criteria Package." The guidelines also state as follows in pertinent part:

In the event the lowest bidder's technical proposal is found to be non-responsive, the TRC will then review the next lowest bidder's technical proposal to determine its responsiveness . . . A Bid Proposal is considered non-responsive if it does not contain all of the required information and level of detail, or is non-compliant with the design and construction criteria defined in the RFP. It may be appropriate for the Department to contact the non-responsive firm to discuss/clarify its concerns prior to moving on to the next lowest bidder. However, once determined that the low bidder is non-responsive, the process shall continue

until the lowest bidder having a responsive proposal is found.

9. The Department has also adopted a Design-Build Procurement and Administration Policy (the policy) which specifically references the guidelines and contains language similar to the guidelines with respect to the role of the TRC. The policy authorizes the Department to contact a firm to discuss or clarify its concerns before moving on to the next lowest bidder.

10. Sometime before the Department issued the RFP, it had a meeting with some of its staff, including Ms. Thomas. During the meeting, the Department's staff was advised that they were scrutinizing technical proposals submitted by low bidders too thoroughly. The new philosophy was for TRCs to ask clarifying questions of the low bidder if they had concerns and if those questions were not answered correctly, to find the low bidder non-responsive.

11. The TRC in this case met for the first time on June 15, 2010. During that meeting, the TRC developed a list of concerns they had with Miller's proposal and submitted those to the Department's procurement staff.

12. The Department forwarded three questions to Miller. First, the TRC questioned whether Miller intended to reference "mast arm" structures or cantilever sign structures in a section of the proposal. Second, the TRC questioned whether Miller's bid included the installation of new conduit at Shad Road as opposed

to using the less expensive existing conduit. Third, the TRC questioned whether Miller's proposal included the deletion of the wireless assembly at Shad Road.

13. On or about June 16, 2010, Kirk Townsend, Miller's Senior Project Manager, responded to all three questions. The next day, the TRC met and voted unanimously to recommend the award to Miller.

14. The TRC did not look at each requirement in the RFP. Instead, the TRC looked at the overall intent of Miller's technical proposal.

15. Mr. Kell, a member of the TRC, stated at hearing that the procurement process for this RFP was different from any other procurement that he has participated in and that he did not make a specific responsiveness determination. Mr. Kell also stated that Miller's proposal did not contain all of the information required by the RFP and that under the guidelines and policy manuals, the proposal would have been deemed non-responsive. However, under the terms of the RFP, Mr. Kell found that there was sufficient information in Miller's preliminary plans to understand how Miller would prosecute the work to his satisfaction.

16. Mr. Ausher, another member of the TRC, testified at the hearing. According to Mr. Ausher, the essential items in the RFP were included in Miller's technical proposal. Mr. Ausher was of the opinion that the role of the TRC was to review the



requirements of the RFP, review the proposal, and verify that the proposal met the intent of the RFP.

17. Ms. Williams was the third member of the TRC. She evaluated Miller's proposal and found it to be responsive. She did not believe that any additional clarification was needed, but heard Miller's response to the three clarifying questions and found the response satisfactory.

18. On June 22, 2010, the Department posted its notice of intent to award the contract to Miller.

19. When ALS learned of the Department's intended contract award to Miller, ALS requested a copy of Miller's technical proposal from the Department. ALS then reviewed the proposal and identified a number of issues that ALS believed would render the Miller proposal non-responsive.

20. James Hardiman is Vice President of ALS. Mr. Hardiman contacted Jane Jones, FDOT's Purchasing Director, and asked if she would meet with him to discuss issues that ALS had with the intended contract.

21. Ms. Jones met with Mr. Hardiman after June 22, 2010, but prior to the protest period running on June 25, 2010. Ms. Jones made a list of ALS' concerns and provided the list to Ms. Thomas by e-mail.

22. Ms. Thomas provided a revised list of issues to Ms. Jones with instructions to question Miller regarding the

revised issue list. Ms. Thomas' revised list reflected only those questions that she felt needed to be asked of Miller.

23. Ms. Jones sent an e-mail to Mr. Townsend, Miller's Senior Project Manager on June 24, 2010. The e-mail stated that the Department would like to clarify certain contract requirements. The e-mail asked Miller to verify that it would complete the scope in the RFP for the price bid and within the contract duration. The e-mail requested Miller to provide the required listing of categories for the Schedule of Values.

24. On the evening of June 24, 2010, Mr. Townsend responded by e-mail, stating that Miller would complete the scope required by the RFP within the 360-day contract duration. The following morning, Mr. Townsend sent an e-mail to Ms. Jones, providing the "preliminary schedule of values as required by the RFP."

25. The clarifications from Miller, as a result of the allegations by Mr. Hardiman, were not received or considered by the TRC. The TRC did not meet again following the posting of the intended award to Miller.

26. There is nothing in the RFP, the guidelines or the policy that authorizes the Department to ask clarifying questions of a bidder or to ask the bidder to provide additional information not included in the technical proposal after the intended award has been posted and prior to the protest period running. It concerned Ms. Jones that the Department was asking Miller questions about its proposal during this time period.

27. On July 2, 2010, ALS filed its formal written protest with the Department. The protest alleges in relevant part that Miller's technical proposal was non-responsive for the following reasons: (a) Miller's preliminary schedule failed to provide 45 days for Department shop drawing review; (b) Miller failed to provide splice boxes at all fiber optic splice field locations; (c) Miller failed to include a preliminary listing of categories for the Schedule of Values; (d) Miller failed to comply with the requirements for guardrails; and (e) Miller did not show a 60-month warranty period for the Ethernet Field Switches.

28. To support its protest at hearing, ALS relied heavily on a strict interpretation of RFP language requiring a technical proposal to contain all required information and level of detail in order to be responsive. However, if that language was strictly enforced, the Department could never award a contract.

29. With a design-build project there is more than one way to build something. The technical proposals submissions are preliminary in nature. The RFP would be the controlling document if there is an unacceptable variance in the proposal.

#### Schedule of Values

30. ALS has complained that Miller failed to provide the "preliminary listing of categories for the Schedule of Values" with its technical proposal. Typically, the Department does not request a Schedule of Values in a design-build proposal.

31. It is true that Miller's original proposal did not include the Schedule of Values. In Section V, Subsection P, the RFP states the "[t]he Proposer shall submit a preliminary listing of categories for the Schedule of Values with the Technical Proposal. No price information shall be provided in the Technical Proposal."

32. A Schedule of Values usually is the way a contractor breaks down items for payment. It is a tool that the Department uses to make sure that a contractor does not front load payments on a job. In this case, the Department wanted to see a preliminary listing of the categories of the Schedule of Values so that it would know what the pay items would be and that they would cover the contract.

33. Mr. Kell, as a member of the TRC, testified on direct examination that the use of the word "shall" in the RFP made the requirement for a Schedule of Values a mandatory requirement. Mr. Kell also testified that under the terms of the guidelines and policy manuals, the failure to include the Schedule of Values would mean that Miller's proposal was non-responsive.

34. Mr. Kell testified that he helped develop the RFP but did not know why the Department used the word "shall" in requiring a Schedule of Values. His testimony that the word "shall" was included in the RFP only because the Department used a generic form to write the RFP is not persuasive.

35. Dale Cody is Senior Vice President over production for Metric Engineering. Mr. Cody served as Miller's proposal designer. At the hearing, Mr. Cody admitted that the plans included in Miller's proposal were not designed to show all of the required parts of the RFP.

36. The most persuasive evidence indicates that the TRC overlooked the missing Schedule of Values in Miller's proposal. Allowing Miller to provide the schedule after announcing the contract award permitted Miller to supplement its proposal.

37. In this case, the omission of the Schedule of Values had no affect on the pricing of the project. During the hearing, Phil Karaganis, Supervisor for ALS, admitted that the failure to timely submit a Schedule of Values had no price impact on the bid. However, the absence of the mandatory schedule deprived the Department of having knowledge of the proposed pay items and knowledge that they would cover the contract.

#### Cantilevered Sign Supports

38. ALS contends that Miller's technical proposal is non-responsive based on a typographical error in one place of Miller's proposal that references mast arm structures instead of tricord cantilever structures. Miller's proposal clearly included tricord cantilever sign supports. Several areas of the technical proposal demonstrated Miller's understanding that cantilevered sign supports were required. This issue was

resolved pursuant to the clarifying questions asked by the Department before making the award.

#### Preliminary Schedule

39. ALS asserts that Miller's proposal is non-responsive based on alleged omission in the preliminary schedule submitted with Miller's technical proposal. The schedule provided with the technical proposal is preliminary and simply shows that the proposer possesses a basic understanding of the requirements of the RFP.

40. The RFP required a construction schedule to be included in a bidder's technical proposal with a maximum contract duration of no more than 360 calendar days. Failure to complete the project in 360 days would negatively impact the Department's interest and increase the cost of the project.

41. In Section VI, Subsection I, the RFP initially stated as follows:

The Proposer must account for a 10 working day shop drawing review time by the Department in its schedule.

42. On June 7, 2010, the Department issued Addendum #3, which changed the time to 45 working days for the Department's shop drawing review time. The addendum did not extend the maximum contract duration of 360 days.

43. Miller's proposal provides for only 14 calendar days for review of shop drawings. Miller's proposal identifies review and approval of shop drawing as a critical item by showing a red "critical bar" next to this item on the schedule.

44. Despite showing only 14 days for the Department's review and approval of shop drawings, Miller's schedule would not have to be significantly revised in order to complete the project in 360 days. Miller can adjust its activities during the 90 percent design phase by overlapping the shop drawing review with the plans development period. The scheduling can be accomplished by sliding certain activities and using "negative lag" to allow for shop drawing review during the plans development period.

45. Mr. Ausher, as a member of the TRC, testified that he reviewed Miller's preliminary schedule and was satisfied that Miller could meet the 45-day shop drawing review and approval requirement. Ms. Ausher made this determination by noting the 50-day float in Miller's schedule with respect to shop drawing submittal.

46. In contrast, ALS' proposal expressly provided for a 45-day period as required by Addendum #3. After receiving the addendum, ALS adjusted its schedule to account for the 31 additional days.

47. ALS also adjusted its price to add additional dollars for overtime, equipment costs, and possible night work that it believed would be needed to accommodate the additional review and

approval time. If ALS had not been required to include 45 days for Department review of shop drawings in its schedule, ALS' price would have been approximately \$20,000 less. On the other hand, there is no persuasive evidence that Miller's accommodation of additional time for shop drawing review and approval in the design phase would modify the price of Miller's proposal or impact the bid price.

#### New Conduit at Shad Road

48. ALS complained that Miller's proposal did not account for new conduit at Shad Road as provided in Addendum #1 to the RFP. However, upon receipt of the addendum, Miller adjusted its price proposal to account for new conduit at Shad Road. Miller also confirmed its intent to install the new conduit in response to the Department's clarifying questions prior to the award of the contract.

#### Splice Boxes

49. ALS complained that Miller's technical proposal included pay item references to pull boxes instead of splice boxes. The RFP required a proposer to "furnish and install splice boxes at all fiber optic field locations as shown on the plans and at other locations as required." The plans that were part of the RFP specifications require splice boxes at four locations.



50. A splice box is different from a pull box. A splice box is larger, deeper, and more expensive than a pull box.

51. Miller's plans include references to Pay Item No. 783-5-1 at locations where the RFP calls for splice boxes. That pay item is for a pull box. Pay Item No. 783-6-1 is the pay item for a splice box.

52. However, the plan sheets submitted by Miller clearly identify the utilization of splice boxes. Miller's failure to use specific language referencing splice boxes was due to a technician oversight. Most importantly, Miller's Price Proposal included the use of splice boxes. The typographical error in omitting specific references to splice boxes in the technical proposal had no impact on the method used to arrive at Miller's Price Proposal.

#### Guardrails

53. ALS complained that Miller failed to provide guardrails at locations required by the RFP. The RFP states that guardrails will only be permitted upon the written approval of the Department.

54. Chapter 2 of the Department's Plans Preparations Manual (PPM) provides that if a sign has to be placed in the clear zone, it must be protected with a barrier. Based on the plans included in the RFP, two of the Arterial Dynamic Messaging Sign (ADMS) structures for the Project have to be placed in the clear zone due to overhead power lines in the area.

55. Chapter 4 of the PPM addresses roadside safety. This chapter of the PPM provided that a non-breakaway sign, such as the ADMS signs required by the Project, are normally considered more hazardous than a roadside barrier, such as a guardrails. Miller's proposal did not include any guardrails and was priced accordingly. Including the guardrails added approximately \$18,000.00 to ALS' price proposal.

56. Miller's decision not to include guardrails was an engineering determination based on the application of the Resurfacing, Restoration and Rehabilitation (RRR) criteria in Chapter 25 of the PPM. The RRR criteria provide for more relaxed clear zone requirements and would eliminate the requirement for a guardrails in this case.

57. Chapter 2 of the PPM states that "design criteria for Resurfacing, Restoration, and Rehabilitation are presented in Chapter 25 of this volume and are applicable only on programmed RRR projects." The Project here has not been programmed as and is not an RRR project. Further, Chapter 25 of the PPM states that it does not apply to strategic intermodal systems (SIS) or to new construction. The instant Project is both.

58. In this case, Miller presented persuasive evidence that the PPM is an engineering guide to design. Miller's design engineer, Mr. Cody, pointed out that sections of the PPM establish that RRR criteria can be used on projects not specifically designated as RRR. In determining that guardrails

were not required, Mr. Cody considered Chapters 2, 7, and 25 of the PPM. Based on the only engineering testimony provided, the Design-Build Criteria Requirements do not require the installation of guardrails.

#### Warranty

59. A table in Miller's technical proposal relating to warranties included a typographical error referencing a 36-month warranty period instead of the specified 60-month period for Ethernet Switches. That same page of Miller's proposal included language clarifying and demonstrating Miller's knowledge that a 60-month warranty was required for the switches. The error had no price impact on the bid.

#### ALS' Proposal

60. ALS alleged in its formal protest that its proposal was fully compliant with the RFP. At hearing, Miller introduced evidence in an attempt to show that ALS' proposal was not responsive, and therefore, that ALS had no standing. FDOT has never reviewed ALS' proposal.

61. ALS' construction schedule does not use the words "operational test." However, the 14-day operational test is included in the portion of the ALS schedule entitled Systems Integration. Thus, ALS would not have to revise its construction schedule to include the 14-day operational test.

62. ALS' construction schedule has no task that specifically accounts for preparation of shop drawings. Even so, there is no persuasive evidence that the failure to include time for preparation of shop drawings would make ALS' proposal non-responsive.

63. Similarly, although ALS did not specifically identify environmental permit acquisition in its proposed schedule, this was included under the heading of "Permitting" in ALS' construction schedule included in its technical proposal.

64. ALS' proposal does not include pay items for a fiber jumper or Gbic. There is no such pay item because the Gbic is part of the Ethernet Switch included in ALS' proposal. Additionally, jumpers are covered based on a plan note in the ALS proposal.

65. ALS' proposal shows a directional bore for the fiber optic conduit and cable, and uses the pay item 555-1-1 for the directional bore. The proposal also uses a pay item for underground conduit where there is a median.

66. Language in the RFP refers to CCTV cameras in MPEG2 format. The ALS proposal includes a cut sheet for a CCTV camera that uses MPEG4 encoding, which is a better camera and cost about the same as the camera required in the RFP.

67. The evidence relative to ALS' proposal shows that it has standing to challenge the contract award to Miller. The

evidence presented regarding ALS' proposal does not speak to the responsiveness of ALS' proposal as a whole.

#### CONCLUSIONS OF LAW

68. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 120.57(3)(f), Florida Statutes.

69. ALS has two burdens in this case. First, ALS must demonstrate that its bid was responsive before it can successfully challenge the award of the contract to another proposer. See Intercontinental Properties v. State of Florida, Department of Health and Rehabilitative Services, 606 So. 2d 380, 384 (Fla. 3d DCA 1992). ALS has met its burden of proving standing to challenge the contract award to Miller.

70. The scope of this proceeding and the nature of ALS' second burden is set forth in Section 120.57(3)(f), Florida Statutes, which states as follows in relevant part:

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 specification. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

71. Section 337.11, Florida Statutes, requires the Department to adopt procedures by rule for administering design-build contracts, including rules relating to TRCs. The Department has adopted Florida Administrative Code Rule 14-91.007(4) (b), which states in pertinent part as follows:

A technical proposal shall include all information requested in response to the request for proposals.

72. The Department has also adopted the guidelines and policy referenced above in the Findings of Fact that expressly address low bid design-build procurement. In this case, the Department's TRC failed to follow the policies requiring a TRC to find a bid non-responsive if it does not contain all mandatory information and if it is non-compliant with the design and construction criteria defined in the RFP.

73. The RFP here requested some preliminary information and allowed the Department to ask clarifying questions before announcing the award. The RFP allows the Department to waive minor irregularities. It does not allow the Department to waive or ignore information that is mandatory on its face.

74. In Robinson Electrical Co. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982), the court set forth the analysis for determining what constitutes a material variance or irregularity as follows:

In determining whether a specific noncompliance constitutes a substantial and hence nonwaivable irregularity, the courts have applied two criteria - first, whether

the effect of a waiver would be to deprive the [government entity] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing the bidder in a position of advantage over other bidders or by otherwise undermining the common standard of competition.

75. Miller's proposal contains a material variation from the RFP specifications that the Department could not waive. Specifically, the omission of preliminary listing of the categories for the Schedule of Values was a mandatory requirement that the TRC overlooked. Miller's failure to include this information was fatal to the responsiveness of Miller's proposal. In other words, it deprived FDOT of its assurance that the contract will be entered into, performed and guaranteed according to its "specified requirements."

76. The failure of the TRC to find Miller's proposal non-responsive based on the missing schedule was contrary to FDOT's rules, policies, and/or the solicitation specifications. The Department's contract award to Miller was clearly erroneous, arbitrary and capricious, because the TRC did not require all mandatory information to be included in the proposal. Instead, the TRC looked only to whether Miller's technical proposal conformed to the "intent" of the RFP. See Coin Laundry Equip. Co. v. The University of West Florida, Case No. 96-0962BID (DOAH July 5, 1996) ("The failure of a public entity to follow its own

bid specifications is an arbitrary and capricious act and undermines the integrity of the bid process.").

77. In all other respects, it is arguable that the TRC properly waived other minor irregularities in Millers' proposal. As to the cantilevered sign supports, construction schedule, new conduit, splice boxes, guardrails, and warranties, the TRC could read the proposal as a whole to find that it was responsive.

RECOMMENDATION

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

RECOMMENDED:

That the Department of Transportation enter a final order rescinding its intended award to Miller, finding Miller's proposal non-responsive, and providing for review of ALS' proposal by FDOT's TRC.

DONE AND ENTERED this 1st day of December, 2010, in Tallahassee, Leon County, Florida.



---

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

Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of December, 2010.



COPIES FURNISHED:

C. Denise Johnson, Esquire  
Department of Transportation  
Haydon Burns Building, Mail Station 58  
605 Suwannee Street  
Tallahassee, Florida 32399-0450

Karen D. Walker, Esquire  
Holland & Knight, LLP  
315 South Calhoun Street, Suite 600  
Tallahassee, Florida 32301

Anthony B. Zebouni, Esquire  
Regan Zebouni & Walker, P.A.  
9905 Old St. Augustine Road, Suite 400  
Jacksonville, Florida 32257

Deanna Hurt, Clerk of Agency Proceedings  
Department of Transportation  
Haydon Burns Building, Mail Station 57  
605 Suwannee Street  
Tallahassee, Florida 32399-0450

Stephanie C. Kopelousos, Secretary  
Department of Transportation  
Haydon Burns Building, Mail Station 57  
605 Suwannee Street  
Tallahassee, Florida 32399-0450

Alexis M. Yarbrough, General Counsel  
Department of Transportation  
Haydon Burns Building, Mail Station 58  
605 Suwannee Street  
Tallahassee, Florida 32399-0450

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.