

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

L. COBB CONSTRUCTION,)
)
 Petitioner,)
)
 vs.) Case No. 11-0236BID
)
 HARDEE COUNTY SCHOOL BOARD,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 18, 2011, in Wauchula, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lavon Cobb, pro se
Greig Drury, Representative
L. Cobb Construction
401 South 6th Avenue
Wauchula, Florida 33873

For Respondent: Gavin W. O'Brien, Esquire
5704 Holmes Boulevard
Holmes Beach, Florida 34217

STATEMENT OF THE ISSUES

This case is a bid protest filed by Petitioner, L. Cobb Construction ("Cobb"), to contest the award of a contract by Respondent, Hardee County School Board ("School Board"), to another bidder to the exclusion of Cobb. The issue is whether

Cobb's bid was responsive to the bid criteria; and whether the School Board's award of the bid to another party should be deemed clearly erroneous, contrary to competition, arbitrary or capricious.

PRELIMINARY STATEMENT

On or about October 21, 2010, the School Board issued a Bid Proposal for Roof Removal and Replacement. Seven bids were received in response to the bid proposal, and a decision to award the contract to Latite Roofing Company ("Latite") was published on November 16, 2010. Cobb timely filed a protest with the School Board, and a formal administrative hearing was conducted, as set forth above.

At the final hearing, Cobb called three witnesses: Bill Jernigan, Mike Cobb, and Timothy Rink. Cobb did not introduce any exhibits into evidence. The School Board's Exhibits 2, 3 (parts 1 and 5), 4, and 9 through 11 were admitted into evidence. The School Board called one witness: Scott Bonk.

The parties advised that a transcript of the proceeding would be filed at the Division of Administrative Hearings ("DOAH") and were given ten days from the date of filing the transcript to file proposed recommended orders. The Transcript was filed on March 4, 2011. The School Board timely filed Proposed Findings of Fact and Conclusions of Law, and the submission was duly considered in the rendering of this

Recommended Order. As of the date of this Recommended Order, Cobb has not filed a post-hearing submission.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of the proceeding, including the Amended Joint Pre-Hearing Stipulation of the parties, the following Findings of Fact are made:

1. Cobb is a construction company with decades of experience and has been involved with projects for the School Board in the past.

2. The School Board is responsible for bidding out all construction projects and must determine the best qualified bidder at the lowest price.

3. The parties agreed to the following facts as set forth in their Amended Joint Pre-Hearing Stipulation:

- A "Bid Proposal for Roof Removal and Replacement" advertisement was placed in the Herald-Advocate newspaper on October 21, 2010. (The roof replacement will be referred to herein as the "Project.")
- A mandatory pre-bid meeting at Wauchula Elementary was held for potential roofing contractors on October 29, 2010. The meeting was led by roofing consultant Scott Bonk and Associates ("Bonk").
- The School Board received Cobb's bid on the Project at 12:34 p.m., on November 15, 2010.
- School Board officials began opening all bids for the Project at 1:00 p.m., on November 15, 2010.

- Project bids were received from Cobb, Advanced Roofing, Crowther Roofing, Hamilton Roofing, Latite Roofing & Sheet Metal, Southern Roofing, and THL Roofing.
- Bonk was present at the time the bids were opened.
- Bonk sent an email to Rob Krahl on November 16, 2010, concerning Cobb and Latite's bids. Bonk advised Krahl that the Cobb bid did not meet the specified components, but that the Latite bid met all components and timeframes for the Project.
- Bonk recommended Latite as contractor for the Project.
- The School Board approved the recommendation of Latite, whose bid was \$152,065 for the replacement of the roofs on building Nos. 5 (the exceptional student education or "ESE" building) and 6 (the media center).
- On November 17, 2010, Deputy Superintendent Woody Caligan faxed School Board Policy 6.07(5), entitled Bid Disputes and Procedures, to Cobb.
- A Notice to Proceed letter was faxed to Bonk on the same date, authorizing Latite to commence the Project. A denial letter was also faxed to each of the other bidders.
- On November 18, 2010, Cobb hand-delivered a Notice of Protest to Rob Krahl at the School Board.
- On November 26, 2010, Cobb mailed a cover letter and three original Letters of Protest, along with a cashier's check for the protest bond, to Rob Krahl.
- On November 29, 2010, Cobb faxed a copy of proof of postage, School Board Rule 6.07(5), its Letter of Protest, and a copy of its previously-issued cashier's check to Wood Caligan after Caligan indicated that he had not received the mailed version.

- The School Board is the governing entity of the school district of Hardee County, Florida.
- David Durastanti is the superintendent of schools for Hardee County; Woody Caligan is the deputy superintendent. Rob Krahl is an employee of the School Board and is responsible for facilities and construction projects for the school system. Barbara Spears is a School Board employee serving under Krahl. Joann McCray serves as secretary to the superintendent. Greg Harrelson is the chief financial officer for the school district. Harrelson's duties include the receipt, review and award of bids for the school district.

4. A document entitled, "Project Manual," was issued by Bonk relative to the request for bids on the Project. The Project Manual contained the specifications for the Project, including a section entitled, "Bid Form" (comprised of pages 20 through 22). The Bid Form is the critical portion of the Project Manual for purposes of the instant proceeding.

5. The Bid Form had several blanks to be filled in by the bidding party. The bidder was to fill in the contractor's name, a projected cost for the replacement of both roofs (the ESE building and the media center), a total cost line, a line for the amount of the payment, and a line for the performance bond amount. Following those blanks, there was a section that forms the crux of the dispute in this case. That section provided a space for identification of materials proposed by each bidder. It appeared as follows:

6. The base bid price is based on the following:

- A. Manufacturer's Name _____
- B. Base Sheet _____
- C. Intermediate Ply _____
- D. Granulated Ply _____
- E. Insulation Manufacturer _____

7. The responses by Cobb to this section of the Bid Form were deemed inappropriate by Bonk. Latite's responses to this section were deemed appropriate and compliant with the bid requirements.

8. Cobb's responses were as follows:

- A. Manufacturer's Name: GAF
- B. Base Sheet: GAF-Ruberoid Modified Base
- C. Intermediate Ply: GAF-Ruberoid
- D. Granulated Ply: GAF-Ruberoid Mop Plus
- E. Insulation Manufacturer: GAF

9. Latite's responses were as follows:

- A. Manufacturer's Name: Soprema
- B. Base Sheet: Sopra 6
- C. Intermediate Ply: Elastophene 180 Sanded
- D. Granulated Ply: Elastophene FR 6R
- E. Insulation Manufacturer: GAF (Made by Atlas)

10. These responses indicate the primary differences between Cobb and Latite's bids. Another important factor (and distinction between Cobb and Latite's bids) was the roof

insulation material proposed by each. Cobb proposed using Perlite; Latite proposed Sopra Board. These will be discussed more fully herein.

11. GAF, referenced by both Cobb and Latite in their responses, is the largest roofing manufacturer in the United States. The company is 125 years old and is based in Wayne, New Jersey. A representative of GAF testified at final hearing.

12. At about the time bids were submitted for the Project, a representative from Bonk's office called GAF to discuss specifications about various GAF products. There were at least two conversations, one of which was generic in nature and one which somewhat addressed the Project specifically.

13. Bonk determined from the discussions with GAF that neither the Ruberoid Mop Plus proposed by Cobb for its granulated ply, nor the Ruberoid Modified Base Sheet portion of the bid was available in Florida. Further, Bonk learned that the Perlite product proposed for the roof insulation by Cobb was inferior to the Sopra Board proposed by Latite. A letter setting forth his findings was sent to the School Board on November 16, 2010.

14. The Project Manual set forth certain specifications to be used by bidders concerning materials to be used for the Project. The roofing system specifications contained a direction that "[s]hould Soprema products be used, the following

membrane sheets are required," and then went on to list the various products that could be used. Latite proposed the use of Soprema products and most of its materials were Soprema brand (except for its insulation, where a GAF brand product was proposed). Cobb, on the other hand, bid GAF products for each of the major Project components.

15. By using Soprema products, Latite ensured compliance with the basic specifications set forth in the Project Manual. Generally a project bid sheet will contain an ASTM product code number which allows contractors to look at comparable materials from different manufacturers. The Project Manual in this case did not include ASTM codes. Any bidder proposing to use materials made by a company other than Soprema, therefore, would be required to independently determine comparability with the Soprema brand product.

16. Cobb's proposed materials list included non-Soprema manufactured products. The GAF products proposed by Cobb may generally have been comparable to the Soprema products, but the evidence is not persuasive as to that fact. Although the GAF representative testified that its products were of high quality and would likely satisfy the requirements for the Project, there was some question as to whether the items set forth by Cobb in its bid were sufficiently described. Bonk made some inquiry into the matter by contacting GAF, but the hearsay and nebulous

nature of those discussions does not provide sufficient detail for formulation of a finding of fact as to whether the products were of comparable quality.

17. Cobb proposed a product for the top membrane ply that was constructed using polyester material. The Project Manual called for ply with fiberglass construction. Both are quality products, but the polyester material has a tendency to shrink, especially if it is installed incorrectly.

18. Of the six other entities submitting a bid for the Project, all of them proposed use of Soprema products or materials that were deemed equal in quality. Cobb's bid was the only bidder whose proposed products were deemed insufficient. One other bidder was also rejected due to time frame issues. None of the other bidders filed a protest or challenged the final decision of the School Board.

19. The School Board's stated rationale for rejection of Cobb's bid was that the generic description of Cobb's proposed building materials made it difficult, if not impossible, to ascertain whether they met the standards set forth in the Project Manual. This rationale is neither arbitrary nor capricious and is based on sound reasoning.

20. Cobb's bid, although more generic than the School Board would have liked, was nonetheless a viable bid. Cobb would have been able to explain and make his bid more specific

had he been given the opportunity. However, the School Board did not owe Cobb the right to alter, amend, or explain its bid more fully after the bid process was complete. To do so would give Cobb an inequitable advantage, vis-à-vis, the competing bidders.

21. It is very likely that Cobb could effectively and professionally complete work on the Project. However, its bid was not exactly in accordance with the requirements of the Project Manual and was justifiably rejected in favor of Latite's bid.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2010).^{1/}

23. Subsection 120.57(3)(f) provides in pertinent part:

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.

24. "A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic." Agrico Chemical Co. v. Dep't of Env'tl' Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978). In order to prove that an action is arbitrary, capricious, contrary to competition or clearly erroneous, the challenging party is held to a preponderance of the evidence standard. Dep't of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 913-914 (Fla. 1988).

25. While section 120.57(3)(f) describes the standard of review as de novo, for the purposes of a protest to a competitive procurement, the courts have viewed the hearing as a "form of inter-agency review." State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998) (citing Intercontinental Prop. Inc. v. State Dep't of HRS, 606 So. 2d 380 (Fla. 3d DCA 1992)). The object of a bid dispute is to evaluate the action taken by the agency based upon the information that was available to the agency at the time it took such action. § 120.57(1).

26. Both Cobb and Latite submitted generally responsive bids for the Project, which were reviewed by the School Board.

The review was done logically, with forethought and reason. The review was neither arbitrary, nor capricious as carried out by the School Board. Cobb was within its rights to use other than Soprema products, but, in doing so, was bound to submit a proposal for comparable materials.

27. Within the context of its review of proposals, the owner of the project is generally given the discretion to view projects as a whole and to waive or ignore minor irregularities. A minor irregularity is a variation from the bid invitation or proposal terms and conditions, which does not affect the price of the bid or give the bidder an advantage or benefit not enjoyed by other bidders, or does not adversely affect the interests of the governmental entity letting the bid. Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982).

28. Cobb's failure to provide a list of products or materials that could be deemed equal to those set forth in the Project Manual's specifications was not a minor irregularity. If the products were inferior or less expensive and there is insufficient evidence in the record to determine one way or the other, then Cobb may have had an improper advantage over its competitors.

29. Agencies enjoy wide discretion when it comes to soliciting and accepting proposals; 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 people might disagree. Baxter's Asphalt & Concrete, Inc. v. Dep't of Transp., 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985). Capelletti Bros., Inc. v. State, Dep't of Gen. Servs., 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). DOAH has a history of upholding an agency's decision if such action was within the realm of reasonableness. See, e.g., M/A Corn, Inc. v. Dep't of Mgmt. Servs., State Tech. Ofc., Case No. 04-1091BID (DOAH May 25, 2004); Hemophilia Health Servs., Inc. v. Ag. for Health Care Admin., Case No. 04-0017BID (DOAH Apr. 29, 2004); Paul Sierra Constr., Inc. v. S.W. Fla. Water Mgmt. Dist., Case No. 02-3790BID (DOAH Dec. 4, 2002); Just for Kids, Inc. v. Palm Cnty. Sch. Bd., Case No. 03-2168BID (DOAH Nov. 7, 2003).

30. There is no evidence in the present case to suggest that the School Board acted in any fashion other than honestly and fairly. The review of competing bids was carried out uniformly as it related to each bidder. The award of the contract to Latite was based upon sound reasoning and rationale.

31. Latite submitted a responsive bid. Cobb's bid contained components which appeared to be less than what was desired. Either entity could perform the terms of the contract, but the School Board's decision to award Latite, rather than Cobb, is a matter of discretion and was supported by the facts.

It was neither arbitrary, nor capricious, to select Latite as the prevailing bidder.

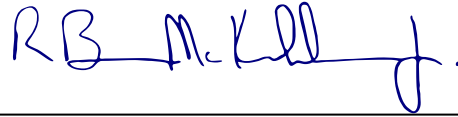
32. A decision is considered to be clearly erroneous when although there is evidence to support it, after review of the entire record, the tribunal is left with the definite and firm conviction that a mistake has been committed. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). The record in the present case does not support the contention that any mistake was made.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Respondent, Hardee County School Board, upholding its award of the contract to Latite Roofing Company and denying the protest by Petitioner, L. Cobb Construction.

DONE AND ENTERED this 30th day of March, 2011, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
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 30th day of March, 2011.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2010),
unless otherwise noted.

COPIES FURNISHED:

Dr. Eric J. Smith
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Lois Tepper, Acting General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

David Durastanti, Superintendent
Hardee County School Board
1009 North 6th Avenue
Post Office Box 1678
Wauchula, Florida 33873-1678

Lavon Cobb
Greig Drury, Representative
L. Cobb Construction
401 South 6th Avenue
Wauchula, Florida 33873

Rob Krahl
Hardee County School Board
1015 State Road 66
Wauchula, Florida 33890-3800

Gavin W. O'Brien, Esquire
5704 Holmes Boulevard
Holmes Beach, Florida 34217

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.