

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BLUECHIP ENERGY LLC,)
)
 Petitioner,)
)
 vs.) Case No. 11-0538BID
)
 UNIVERSITY OF CENTRAL FLORIDA,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 18, 2011, in Orlando, Florida, before Susan B. Harrell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas Gregory, Qualified Representative
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent's intended decision to reject Petitioner's bid for University of Central Florida (UCF) Invitation to Bid No. 1030LCSAR (ITB) was arbitrary, unreasonable, or capricious.

PRELIMINARY STATEMENT

Respondent, UCF, issued ITB No. 1030LCSAR for photovoltaic systems for emergency systems. Petitioner, BlueChip, LLC (BlueChip), submitted a bid. By letter dated November 19, 2010, UCF notified BlueChip that its bid was being rejected. By letter dated November 20, 2010, BlueChip advised UCF that BlueChip was concerned that its bid was rejected and wanted a clear explanation for the reasons for rejection. The letter did not indicate that it was a notice of protest. By letter dated November 24, 2010, BlueChip wrote to UCF and addressed each of the grounds set forth in UCF's letter dated November 19, 2010. The second letter did not specifically request an administrative hearing, but stated: "[W]e insist UCF immediately reinstate and reconsider our bid."

By letter dated January 26, 2011, UCF sent the two letters to the Division of Administrative Hearings and requested that the Division of Administrative Hearings conduct a bid protest hearing. However, UCF specifically preserved any objections to

the letters, including whether the letters constituted a bid protest in conformance with UCF regulations.

At the final hearing, the following witnesses were presented by BlueChip: Andrew N. White, Dimitri Nikitin, and Thomas Gregory. Petitioner's Exhibits 1, 2, 3, 4, 6, 8, 9, 11, and 12 were admitted in evidence. Petitioner's Exhibits 5, 7, and 10 were not accepted in evidence. UCF called the following witnesses: Luis Aviles, Mary C. Huggins, and David K. Click. Respondent's Exhibits 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 17, 21, 22, 23, 24, and 29 were admitted in evidence.

The two-volume Transcript was filed on March 8, 2011. On March 18, 2011, the parties filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. UCF received a grant for \$10,000,000.00 through the United States Department of Energy pursuant to the American Recovery and Reinvestment Act (ARRA) for, among other things, the construction and installation of turnkey 10kW PV systems with battery backup at schools located in Florida and designated as emergency shelters. Part of the grant money was to be used for administration and for education of Florida school children concerning renewable energy sources and energy efficiency.

2. In order to procure the construction and installation of the PV systems, UCF issued the ITB. This was the second invitation to bid issued for PV systems. The first invitation to bid was issued during the summer of 2010, and all the bids received were over budget.

3. The introduction in the ITB provides:

As part of the Florida SunSmart Schools Emergency Shelter Program, the University of Central Florida intends to purchase at least ninety (90) turnkey installations of 10 kWdc (minimum) grid-tied photovoltaic (PV) systems with battery backup for specified Florida schools designated as EHPA (Enhanced Hurricane Protection Area) emergency shelters. This program provides for emergency electrical power for critical loads and provides ongoing educational programs for students. UCF/Florida Solar Energy Center will select the schools at which the PV systems will be installed. It is expected that at least one system will be installed in each County in the State of Florida.

It is anticipated that multiple Bidders will be selected for participation in this program. One bidder will be selected for each Region, as defined in the Bid Document. A Bidder may be awarded more than one Region.

All PV modules and systems must be certified by the Florida Solar Energy Center as specified in the bid document.

4. The Florida Solar Energy Center (FSEC) is a statutory affiliate of UCF which "develop[s] and promulgate[s] standards for solar energy systems manufactured or sold in this state

based on the best currently available information and shall consult with scientists, engineers, or persons in research centers who are engaged in the construction of, experimentation with, and research of solar energy systems to properly identify the most reliable designs and types of solar energy systems."

§ 377.705(4)(a), Fla. Stat. (2010).^{1/} All solar equipment that is sold or manufactured in the State of Florida must be certified by FSEC. § 377.705(4)(d).

5. BlueChip was among the 19 bidders, which submitted bids in response to the ITB. On November 19, 2010, UCF posted the intent to award the contract for all regions to Vergona-Bowersox Electric, Incorporated (Vergona-Bowersox). By letter dated November 19, 2010, UCF notified BlueChip that its bid was rejected for a number of deficiencies. The Sunny Island inverter, which BlueChip included in the system it bid, is not made in America, and, therefore, does not comply with the Buy America provision of the ITB. Sunny Boy inverters, which BlueChip included in the system it bid, are undersized and do not meet the specifications of the ITB. The batteries used in BlueChip's bid do not meet the specifications of the ITB. FSEC did not receive a PV System Certification Application from BlueChip as required by the ITB. BlueChip does not hold a solar contractor license, nor does it hold an electrical contractor license as required by the ITB.

6. By letter dated November 20, 2010, Dimitri Nikitin (Dr. Nikitin), president of BlueChip, wrote to UCF concerning the rejection of BlueChip's bid. The letter stated in part:

On behalf of BlueChip Energy, LLC, which submitted a bid for the SunSmart Emergency Shelters project on November 8, I would like to express my concerns and ask for clarification regarding the Intent to Award notice for UCF Bid 1030lcsar posted on the UCF Purchasing website on November 19.

First, we would like a written explanation why UCF rejected BlueChip Energy's bid. Our bid followed the requirements of the ITB to the letter, including compliance with the Buy America Act and ability to provide a payment and performance bond.

* * *

We would like to receive a clear explanation of why the only solar panel manufacturing, engineering and Installation Company in Florida with first hand PV module manufacturing experience and multi-Megawatt international install base was simply rejected as a bidder. To find out the reasons for your decision we will initiate a media investigation and congressional and Florida Energy Commission inquiry into the administration of UCF bid 1030LCSAR, and the possible conflict of interests of UCF employees and related parties.

Your timely response to our questions and concerns is very much appreciated.

7. The BlueChip letter dated November 20, 2010, did not state that it was intended to be a Notice of Protest. By letter dated November 24, 2010, BlueChip responded to each of the deficiencies listed in UCF's letter to BlueChip dated

November 19, 2010. BlueChip's letter dated November 24, 2010, did not state that the letter was supposed to be a formal protest, but did state:

Due to the spurious and baseless nature of the issues raised by your November 19 letter we insist UCF immediately reinstate and reconsider our bid. In the absence of that we will have no choice but to initiate a media investigation and congressional and Florida Energy Commission inquiry into the administration of ECF [sic] bid 1030LCSAR and the possible conflict of interest of UCF employees and related parties.

Additionally, the November 24, 2010, letter did not include a protest bond.

8. Appendix II, section 13, of the ITB provides:

13. Compliance with the Buy America Recovery Act Provisions (Section 1605 of Title XVI)--

By accepting funds under this Agreement [State of Florida Grant Assistance Pursuant to American Recovery and Reinvestment Act], the Grantee [UCF] agrees to comply with sections [sic] Section 1605 of the American Recovery and Reinvestment Act (ARRA)." The Grantee should review the provisions of the Act to ensure that expenditures made under this Agreement are in accordance with it.

The Buy American provision in the American Recovery and Reinvestment Act of 2009 (section 1605 of title XVI), provides that, unless one of the three listed exceptions applies (nonavailability, unreasonable cost, and inconsistent with the public interest), and a waiver is granted, none of the funds appropriated or otherwise made available by the Act may be used for a project for the construction, alteration, maintenance, or

repair of a public building or public work unless all the iron, steel, and manufactured goods are produced in the United States.

9. On September 30, 2010, the United States Department of Energy granted a limited waiver of the Buy America provision of ARRA with respect to certain PV equipment. The waiver provided:

This amended public interest determination waives the Buy American requirements of EERE-funded Recovery Act projects for the purchase of the following solar PV equipment: (1) Domestically-manufactured modules containing foreign-manufactured cells, (2) foreign-manufactured modules, when completely comprised of domestically-manufactured cells, and (3) any ancillary items and equipment (including but not limited to, charge controllers, combiners, and disconnect boxes, breakers, fuses, racks, lugs, wires, cables and all otherwise incidental equipment with the exception of inverters and batteries) when utilized in a solar installation involving a U.S. manufactured PV module or a module manufactured abroad but comprised exclusively of domestically-manufactured cells. (emphasis added).

10. BlueChip's bid specifies inverters manufactured by SMA America Solar Technologies, Inc. (SMA), specifically SMA's Sunny Boy 4000US inverter and Sunny Island 5048US inverter. SMA's Sunny Island 5048US inverter is made in Germany, not the United States. The United States Office of Management and Budget (OMB) has issued interim final guidance, directing that the Buy American provision shall not be applied where the iron, steel, or manufactured goods used in the project are subject to an

international agreement. The recipient of ARRA funds is to treat the goods subject to an international agreement the same as domestic goods and services. In Florida, only executive branch agencies may invoke the United States' international trade agreements. State of Florida universities may not participate in the international trade agreements.

11. The total bid of BlueChip was \$6,383,811.00. The value of the contract awarded to Vergona-Bowersox pursuant to the ITB was \$6,720,896.70.

12. Appendix 1, section 2(C)(8), of the ITB states: "The battery bank shall have a minimum usable capacity (at C/100) of 25kWh." BlueChip's bid specifies a battery bank capable of producing and delivering a maximum energy output of 24 volts to its specified Sunny Island 5048US inverter. In order to turn on and function, the Sunny Island 5048US inverter requires a minimum energy input of 41 volts from the battery bank. The 24 volts produced by the battery bank specified by BlueChip is insufficient to turn on the inverter. Therefore, the PV system bid by BlueChip would not be functional and would not meet the minimum usable capacity required by the ITB, because the inverter could not be activated by the battery bank.

13. Appendix 1, section 2(C)(8), of the ITB provides the following requirements:

PV systems must be capable of parallel operation with the utility supplied electrical service to the facility. The entire PV system must also be capable of stand-alone operation, providing backup power to a critical load panel when the utility supplied electrical service is unavailable. Systems will be grid-interactive, providing power to a collection of pre-determined critical loads.

14. BlueChip's electrical schematic is non-conforming to the ITB, because it does not properly allow for the required operation with the utility supplied electrical service to the facility and is not capable of a stand-alone operation, providing backup power to a critical load panel when the utility supplied electrical service is unavailable.

15. BlueChip's bid specifies a PV array capable of producing and delivering a maximum energy output of approximately 90 volts to its specified Sunny Boy 4000US inverter. In order to turn on and function, the Sunny Boy 4000US inverter requires a minimum energy input of 295 volts from the PV array. Therefore, the system bid by BlueChip cannot turn on the Sunny Boy 4000US inverter included in BlueChips's system, which makes the system nonfunctional.

16. BlueChip's bid contains a schematic showing a Sunny Boy 4000US inverter with two DC inputs and two AC outputs. Sunny Boy 4000US inverters have only one DC input connection and

one AC output connection. Based on the schematic submitted by BlueChip, the system is nonfunctional.

17. The ITB provides that UCF may waive "any minor irregularity." BlueChip contends that any technical issues with the system bid could be corrected by FSEC during the certification process after the bids were opened and the intended award was announced.

18. Appendix 1, section 1(C)(1), of the ITB provides:

Bidders will serve as the prime contractor and must be licensed to install photovoltaic systems in the State of Florida. Bidder must hold a valid license as a certified solar contractor or electrical contractor, per Chapter 489, Florida Statutes. General Contractors may not serve as a prime contractor for the installation of a photovoltaic system due to the limitations provided in Section 489.113(3), Florida Statutes. Bidders may include subcontractors as deemed necessary, but subcontractors must be identified in the bid response, with a description of the work to be performed by each subcontractor. A successful Bidder will be solely responsible for fulfilling the terms of award.

19. BlueChip submitted the bid and identified itself as the prime contractor in its bid. In its bid, BlueChip identified Advanced Solar Photonics and Complete Electrical Contractors as wholly-owned subsidiaries of BlueChip. BlueChip purchased Complete Electric Contractors, Inc., and the name was changed to Complete Electric Contractors, LLC. On January 5,

2010, Complete Electric Contractors, LLC, registered to do business under the fictitious name of BlueChip Energy.

20. No evidence was presented at the final hearing that BlueChip was a certified solar contractor or that BlueChip was registered or certified pursuant to section 489.521, Florida Statutes.

21. BlueChip contends that BlueChip meets the requirement as an electrical contractor, because Complete Electrical Contractors, Inc., was registered as a business performing electrical contracting with Andrew White (Mr. White) as the qualifying agent and is a wholly-owned subsidiary of BlueChip. Complete Electrical Contractors, LLC, is the wholly-owned subsidiary of BlueChip and is a separate legal entity from BlueChip. The bid was not submitted by Complete Electrical Contractors, LLC, or by Complete Electrical Contractors, Inc. Additionally, Mr. White is the qualifying agent for Complete Electrical Contractors, Inc., not Complete Electrical Contractors, LLC.

22. BlueChip did not list Complete Electrical Contractors, LLC, as a subcontractor in its bid.

23. Appendix 1, section 1(D), of the ITB provides that, if a bidder chooses not to use a PV system that is not already certified by FSEC, the bidder is responsible for submitting an application for system certification. There is a special

application process in FSEC for applications that are being made as part of a bid solicitation process. The applications are submitted, but the processing fee is not required at the time of the submittal of the application, and only the applications for bidders selected for a contract will be certified.

24. The directions for submittal of the applications for certification are contained in Appendix 1, section 1(4), of the ITB, which provides:

4. **IMPORTANT:** The Florida Solar Energy Center has established a modified application process for certifying PV systems *for this program only*. The following process should be followed carefully to qualify for this offer.

a. **On or before the deadline date of the ITB, Bidder must complete and electronically submit (see ii below) the Photovoltaic System Certification--SunSmart E-Shelter Program Application form available at:** <http://www.fsec.ucf.edu/en/education/sunsmart/e-shelters/documents/EShelterApplication.pdf>. Applications submitted under previous solicitations will not be considered under this program. Only certification applications submitted through the current bid process will be considered.

i. Only fully completed applications will be accepted for consideration under this program. The application must include all required documentation to be considered complete. All materials must be submitted electronically to FSEC in a single email. FSEC will not accept partial submissions. All email attachments must be in PDF format.

ii. All certification applications must be sent to pvshelter@fsec.ucf.edu. A complete

electrical schematic that includes the following information is required as part of the system certification package. (This list is provided for guidance and assistance only and is not the only information required in the certification application.)

- 1) Modules labeled and shown in correct array configuration (source circuits)
- 2) Size, type, and location of all conductors (+dc, -dc, L1, L2, L3, N, G, etc.) in the system
- 3) Complete circuit paths shown
- 4) Size, current rating, voltage rating, and location of all over-current protection devices
- 5) Inverter/Charger/Controller equipment correctly identified
- 6) Data acquisition system (DAS) [monitoring equipment] identified
- 7) Battery wiring and cables labeled and shown in correct bank configuration
- 8) Complete details of the system grounding in compliance with NEC 690 V. Grounding
- 9) Point of interconnection specified and in compliance with NEC 690.64(B)(7)
- 10) Ratings and locations of all disconnects

iii. Incomplete applications will be rejected and the applicant's system and bid may be ineligible for an award under this program. The applicant will be so notified but application materials will not be returned to the applicant.

25. The system bid by BlueChip had not been certified by FSEC. BlueChip was required to submit an application to FSEC as part of the bid process. BlueChip had submitted applications to FSEC as part of the previous solicitation for PV systems for emergency systems, which had been cancelled in October 2010. At the final hearing, Dr. Nikitin testified that he had submitted other applications for the ITB; however, the only receipt that he could produce was for an email delivery dated August 23, 2010, which was before the ITB was issued. The totality of the evidence does not establish that BlueChip sent an application by email to FSEC for the ITB. BlueChip did include with its bid two applications submitted in response to the previous invitation to bid. One application was dated July 28, 2010, and one was dated August 19, 2010. Because BlueChip submitted no application to FSEC for the ITB by email, FSEC evaluated the technical aspect of BlueChip's bid based on the application submitted with the bid.

26. BlueChip asserted in its letters to UCF, dated November 20, 2010, and November 24, 2010, that there had been a conflict of interest concerning a member of the Policy Advisory Board of FSEC and Vergona-Bowersox. However, no evidence was presented to support this assertion.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.65(7), Fla. Stat.

28. UCF Regulation 7.130(5) sets forth the procedures for solicitation and provides:

(5) Solicitation Protest Procedures

(a) 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 university posting of award or intent to award notice. The protesting firm must reduce its complaint to a written protest and file it with the department that issued the solicitation within ten (10) calendar days from registration of the original complaint. The bond shall be included with the formal written protest.

(b) The notice of protest shall contain the following information:

1. The notice must be addressed to the department that issued the solicitation or that made a decision that is intended to be protested;

2. The notice must identify the solicitation by number and title and any other language that will allow for identification; and

3. The notice must state that the person intends to protest the decision.

(c) The "formal written protest" required by BOG regulation 18.002 is a petition that states with particularity the facts and law upon which the protest is based. The formal

protest shall be filed with the office issuing the competitive solicitation within ten (10) calendar days of the notice of intent to protest. The formal written protest shall contain the following information:

1. The name of the protestor;
2. A statement of when and how the protestor received notice of the University's action or proposed action;
3. An explanation of how the protestor's substantial interests are or will be affected by the action or proposed action;
4. A statement of all material facts disputed by the protestor or a statement that there are no disputed facts;
5. A statement of the facts alleged, including a statement of the specific facts the protestor contends warrant reversal or modification of the university's proposed action;
6. A statement of the specific regulations or statutes that the protestor contends require reversal or modification of the university's proposed action, including an explanation of how the alleged facts relate to the specific regulations or statutes;
7. A statement of the relief sought by the protestor, stating precisely the action protestor wishes the agency to take with respect to the proposed action.

(d) The failure to adhere to filing deadlines will result in the rejection of the protest.

29. UCF Regulation 7.130(4)(c) requires that a protest bond be submitted with the formal written protest and states:

Solicitation Protest Bond. Any contractor that files a formal written protest pursuant to the protest procedures of BOG Regulation 18.002 and this regulation (see section (5) below) protesting a decision or intended decision pertaining to a 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 10% of the estimated value of the protestor's bid or proposal; 10% of the estimated expenditure during the contract term; \$10,000; or whichever is less. The bond shall be conditioned upon payment of all costs which may be adjudged against the contractor filing the protest action. In lieu of a bond, the University may accept a cashier's check or money order in the amount of the bond. Failure to file a protest in accordance with BOG regulation 18.002 or failure to post the bond or other security as required by the BOG regulation 18.003, shall constitute a waiver of proceedings.

30. BlueChip's letter dated November 20, 2010, did not advise UCF that BlueChip was intending to protest the notice of the award of the contract for PV systems to Vergona-Bowersox. The letter asked for an explanation of why BlueChips's bid was rejected and cited various concerns about the rejection of BlueChip's bid. The letter was not sufficient to put UCF on notice that BlueChip was protesting the intended award. UCF Regulation 7.130 clearly requires that the notice of protest state that the bidder intends to protest the decision.

31. If the letter dated November 19, 2010, were deemed to be the notice of protest and the letter dated November 24, 2010, were deemed to be the formal written protest, BlueChip did not

submit the required protest bond with the November 24, 2010, letter as required by UCF Regulation 7.130(4) and has thus waived any protest.

32. Assuming arguendo that BlueChip's letter of November 19, 2010, is deemed to be sufficient as a notice of protest and a bid protest bond had been included with the November 24, 2010, letter, BlueChip's bid fails to meet the requirements of the ITB in numerous respects.

33. The ITB provides that the bidders must abide by the Buy America requirement of the ARRA. BlueChip's bid included SMA's Sunny Island 5048US inverter, which is made in Germany. Although the ARRA provides for a Buy American requirement, it also provides that the Buy American requirement be applied in a manner consistent with United States' obligations under international agreements. Thus, goods purchased pursuant to an international agreement are to be considered the same as domestic goods and services. Two C.F.R. section 176.90 provides:

The Buy American requirement set out in § 176.70 shall not be applied where the iron, steel, or manufactured goods used in the project are from a Party to an international agreement, listed in paragraph (b)(2) of this section, and the recipient of is required under an international agreement, described in the appendix to this subpart, to treat the goods and services of that Party the same as domestic goods and services. This obligation shall only apply

to projects with an estimated value of \$7,443,000 or more and projects that are not specifically excluded from the application of those agreements.

34. Article IX, section 7, of the Florida Constitution provides that there shall be a single state university system that is comprised of all public universities, which includes UCF. The state university system is not included in the executive branch of government. Appendix to subpart B of 2 C.F.R. part 176 lists the state entities that are subject to United States obligations under international agreements. Only the executive agencies of the State of Florida are subject to the World Trade Organization Government Procurement Agreement, which includes Germany. Thus, UCF is not exempt from the Buy America provision of ARRA because of an international agreement.

35. Even if UCF were considered to be obligated to abide by international agreements, the project amount is less than \$7,443,000.00. BlueChip contends that the project amount is the entire grant amount of \$10,000,000.00. The project is considered to be the construction, alteration, maintenance, or repair of a public building. 2 C.F.R. § 176.70(a). The project at issue is the alteration of school buildings to include PV systems for schools designated as emergency shelters. A school building is a public building. Therefore, the project amount is

insufficient to exempt UCF from the Buy America provisions of the ARRA.

36. BlueChip did not meet several technical requirements of the ITB. The battery bank and the Sunny Island 5048US inverter bid by BlueChip are not compatible because the battery bank does not have sufficient energy output to start the inverter; therefore, the system bid will not function.

37. The electrical schematic submitted by BlueChip does not properly allow for the operation with the utility supplied electrical service to the facility as required by the ITB. The electrical schematic does not show that the system is capable of stand-alone operation, with backup power to a critical load panel when the utility supplied electrical service is unavailable as required by the ITB.

38. BlueChip stated that its system was capable of producing a maximum energy output of 90 volts to the Sunny Boy 4000US inverter, which BlueChip included in its system. However, the Sunny Boy 4000US inverter requires a minimum of 285 volts in order to turn on and work. Additionally, the Sunny Boy 4000US inverter does not have the number of DC inputs and AC outputs as specified in BlueChip's bid. Essentially, the use of the Sunny Boy 4000US inverter as set forth in BlueChip's bid will result in a nonfunctional system.

39. BlueChip contends that these errors could be corrected by FSEC during the certification process after the bids were opened and the intended award was announced. BlueChip's contention is without merit. In Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931), the court described the object and purpose of fundamental policies underlying competitive procurement and stated:

[T]he object and purpose of [the policies underlying competitive procurement] is to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the [governmental agency] at the lowest possible expense, and to afford an equal advantage to all desiring to do business with the [governmental agency] by affording an opportunity for an exact comparison of bids.

40. The ITB provides that UCF may waive "any minor irregularities." A variance from the bid specifications is considered minor if it does not give a bidder a competitive advantage over another bidder. See Intercontinental Properties, Inc. v. Dep't of HRS, 606 So. 2d 380 (Fla. 3d DCA 1992); Trobabest Foods, Inc. v. Dep't of Gen. Servs., 493 So. 2d 50 (Fla. 1st DCA 1986); and Robinson Electrical Co., Inc. v. Dade Cnty., 417 So. 2d 1032 (Fla. 3d DCA 1982).

41. The failure to bid a system that would work is not a minor irregularity. To allow BlueChip to bid a nonfunctional system and make corrections to the system after the bids were opened in order to make the system functional would give BlueChip an unfair advantage over the other bidders.

42. BlueChip did not meet the ITB requirement that it hold a valid license as a certified solar contractor or electrical contractor. No evidence was presented that BlueChip was registered or certified as a business conducting electrical contracting as required by section 489.521 or that it held a valid license as a certified solar contractor. BlueChip relied upon the electrical contractor license of Mr. White as the qualifying agent for Complete Electric Contractors, Inc., as meeting the license requirement for a certified electrical contractor. BlueChip's contention is without merit. Complete Electrical Contractors, Inc., for whom Mr. White is the qualifying agent, no longer exists and was changed to a limited liability corporation. Complete Electrical Contractors, LLC, is a separate legal entity from BlueChip, did not submit the bid, and was not listed as a subcontractor in BlueChip's bid.

43. BlueChip did not submit an application for certification to FSEC as required by the ITB. It did submit an application for the previous invitation to bid. However, the ITB provides that applications submitted for previous

procurements would not be acceptable. FSEC did evaluate the applications submitted with the bid, which were the applications submitted for the previous invitation to bid, and found that BlueChip's bid was nonresponsive.

44. In Sutron Corp. v. Lake County Water Authority, 870 So. 2d 930, 932-933 (Fla. 5th DCA 2004), the court stated:

It is well established in Florida that a public entity's rejection of contract bids will be affirmed when challenged in court, unless the action of the public body was arbitrary, unreasonable or capricious. Even if the public entity makes an erroneous decision about which reasonable people may disagree, the discretion of the public entity to solicit, accept and or reject contract bids should not be interfered with by the courts, absent a showing of dishonesty, illegality, fraud, oppression or misconduct. See Scientific Games v. Dittler Brothers, Inc., 586 So. 2d 1128 (Fla. 1st DCA 1991); City of Cape Coral v. Water Services of America, 567 So. 2d 510 (Fla. 2d DCA 1990); Capeletti Brothers v. State Dept. of General Services, 432 So. 2d 1359 (Fla. 1st DCA 1983).

45. A decision is arbitrary if it is not supported by fact or logic. A decision is capricious if it is taken without thought or reason. In determining whether an agency has acted arbitrarily or capriciously, consideration should be given to the following factors: (1) has the agency considered all relevant factors; (2) has the agency given actual, good faith consideration to those factors; and (3) has the agency used reason rather than whim to progress from consideration of those

factors to its final decision. Adam Smith Enterprises, Inc. v. State Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). A decision is neither arbitrary nor capricious if the decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance. Dravco Basic Materials Co., Inc. v. State Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2nd DCA 1992).

46. UCF's decision to reject BlueChip's bid is not arbitrary or capricious. BlueChip's bid was evaluated and found nonresponsive. The decision to reject BlueChip's bid is reasonable based on BlueChip's failure to adhere to the specifications of the ITB.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that BlueChip failed to submit a notice of protest in accordance with UCF Regulation 7.130; finding that the rejection of BlueChip's bid is not arbitrary, unreasonable, or capricious; and rejecting BlueChip's bid.

DONE AND ENTERED this 8th day of April, 2011, in
Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
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 April, 2011.

ENDNOTE

^{1/} Unless otherwise stated, all references to the Florida
Statutes are to the 2010 version.

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.