

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEDROCK INDUSTRIES, INC.,)
)
 Petitioner,)
)
vs.) Case No. 11-1431BID
)
OSCEOLA COUNTY SCHOOL BOARD,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on July 20, 2011, in Kissimmee, Florida, before Susan Belyeu Kirkland, f/n/a as Susan B. Harrell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert Bernard Worman, Esquire
Worman and Sheffler, P.A.
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Winter Park, Florida 32789

For Respondent: Michael Vernon Hammond, Esquire
Brown, Garganese, Weiss & D'Agresta, P.A.
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent's intended contract award pursuant to Invitation to Bid No. SDOC-11-B-049-CJ for ready-mix concrete is contrary to Respondent's governing

statutes, Respondent's rules or policies, or the solicitation specifications.

PRELIMINARY STATEMENT

On December 10, 2010, the School District of Osceola County (School District) issued a rebid for ready-mix concrete, Invitation to Bid No. SDOC-11-B-049-CJ (the rebid ITB). Petitioner, Bedrock Industries, Inc. (Bedrock), among others, filed a response to the rebid ITB. On March 1, 2011, Respondent, Osceola County School Board (School Board), voted to award the contract for ready-mix concrete to Prestige AB Management Co., LLC (Prestige). Bedrock timely filed a protest to the intended award, and the case was forwarded to the Division of Administrative Hearings on March 18, 2011.

With agreement of the parties, the final hearing was scheduled for May 24, 2011. On May 23, 2011, the parties filed a Stipulated Emergency Motion for Continuance. The final hearing was rescheduled for July 20 and 21, 2011.

On July 13, 2011, the parties filed an Amended Pre-hearing Stipulation in which the parties agreed to certain facts contained in section (e) of the Amended Pre-hearing Stipulation. To the extent those stipulated facts are relevant, they have been incorporated in this Recommended Order.

On July 19, 2011, the School Board filed Respondent, Osceola County School Board's Motion in Limine. The motion was heard at the final hearing and denied.

At the final hearing, Bedrock called the following witnesses: Lou DeBeradinis, Michael Grego, Scott Stegall, Cheryl Olson, and Deborah Pace. Petitioner's Exhibits 1 through 12 were admitted in evidence. The School Board called the following witnesses: Clyde Wells, Cindy Hartig, and Thomas Long. Respondent's Exhibits 1 through 4 were admitted in evidence.

Neither of the parties ordered a transcript of the final hearing. On August 1, 2011, the parties filed their proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. In October 2010, the School District issued an invitation to bid for ready-mix concrete (the original ITB). The only bidder who submitted a bid in response to the original ITB was Bedrock. Bedrock had had the concrete contract with the School District for the prior three years and had used a front discharge delivery method.

2. On December 7, 2010, Cindy Hartig (Ms. Hartig) and Michael Grego (Mr. Grego), who at the time was the superintendent of the School District, had a conversation

concerning the award of the concrete contract to Bedrock pursuant to the original ITB. Mr. Grego testified that Ms. Hartig told him that the School Board would not support a recommendation to award the contract to Bedrock. Mr. Grego further testified that when he asked Ms. Hartig how she knew that the School Board would not support an award to Bedrock, she did not say how she knew. Ms. Hartig testified that Mr. Grego told her that he had polled the School Board members and that they advised they would not support an award of a contract to Bedrock. Having considered the testimony of Mr. Grego and Ms. Hartig, the testimony of Mr. Grego is more credible.

3. On December 7, 2010, prior to the School Board meeting in which the School Board considered the original ITB, Ms. Hartig sent an email to Mr. Grego and Cheryl Olson (Ms. Olson), who was the director of purchasing for the School District. The email stated:

Team,

An ex board member works for bedrock
An ex board member is building the house for
the owner of bedrock
Bedrock is only one of two companies that
have front discharge trucks
And reality is the front discharge is not
needed, most CM's will not use them

Please re look at the requirements for this
bid prior to rebid
Also make sure that each company is getting
the vendor request and that it is not in
their spam

thank you
cindy lou

The former board member to whom Ms. Hartig was referring was John McKay (Mr. McKay). There had been friction between Ms. Hartig and Mr. McKay in the past.

4. At the School Board meeting on December 7, 2010, the School Board voted to reject all bids for the original ITB. The reasoning for rejecting all bids was not apparent from the minutes of the School Board meeting. There was no evidence presented that the School Board, as a whole, was biased against Bedrock or that Ms. Hartig had influenced the School Board to reject all bids.

5. On December 10, 2010, the School District issued the rebid ITB, which allowed the vendors to bid front and rear discharge methods of delivery. It was felt that having both front and rear delivery would give the maintenance staff an opportunity to choose the method they wanted to use on a job-by-job basis.

6. The rebid ITB includes a bid submittal form on which the bidders are to submit their prices. There are 15 separate line items on which the bidders may submit a bid. Line items 1 and 2 are for delivery of ready-mix concrete using a front discharge cement truck. Line items 3 and 4 are for delivery of ready-mix concrete using a rear discharge cement truck. The

rebid ITB did not specify whether the bidders had to submit a price for each line item in order to be deemed responsive.

7. Paragraph 25, on page 2 of 29 of the rebid ITB states:

AWARD: As the best interests of the School Board may require, the School Board reserves the right to make award(s) by individual item, group of items, all or none, or a combination thereof; on a geographical basis and/or on a district wide basis with one or more supplier(s) or provider(s); to reject any and all offers or waive any minor irregularity or technicality in offers received. Offerors are cautioned to make no assumptions unless their offer has been evaluated as being responsive. Any and all award(s) made as a result of this invitation shall conform to applicable School Board Rules, State Board Rules, and State of Florida Statutes.

8. Page 3 of 39 of the rebid ITB provides: "THE SCHOOL BOARD RESERVES THE RIGHT TO REJECT ANY OR ALL OFFERS, TO WAIVE ANY INFORMALITIES, AND TO ACCEPT ALL OR ANY PART OF ANY OFFER AS MAY BE DEEMED TO BE IN THE BEST INTEREST OF THE SCHOOL BOARD."

9. Section 2.09 of the rebid ITB provides:

The School Board reserves the right to award the contract to the bidder(s) that the Board deems to offer the lowest responsive and responsible bid(s), as defined elsewhere in this solicitation. The Board is therefore not bound to accept a bid on the basis of lowest price. In addition, the Board has the sole discretion and reserves the right to cancel this Bid, to reject any and all bids to waive any and all information and/or irregularities, or to re-advertise with either the identical or revised specifications, if it is deemed to be in the best interest of the Board to do so. The

Board also reserves the right to make multiple awards based on experience and qualifications or to award only a portion of the items and/or services specified, if it is deemed to be in the Board's best interest.

10. Section 2.42 of the rebid ITB provides: "The School Board reserves the right to award one or more contracts to provide the required services as deemed to be in the best interest of the School Board."

11. Section 2.11 of the rebid ITB defines "responsive and responsible" as follows:

Each bid submittal shall be evaluated for conformance as responsive and responsible using the following criteria:

A. Proper submittal of ALL documentation as required by this bid. (Responsive)

B. The greatest benefits to the School District as it pertains to: (Responsible)

1. Total Cost.

2. Delivery.

3. Past Performance. In order to evaluate past performance, all bidders are required to submit:

a. A list of references with the bid and;

b. A list of relevant projects completed within the last 3 years that are the same or similar to the magnitude of this ITB.

4. All technical specifications associated with this bid.

5. Financial Stability: Demonstrated ability, capacity and/or resources to acquire and maintain required staffing.

Bidders are reminded that award may not necessarily be made to the lowest bid. Rather, award will be made to lowest responsive, responsible, bidder whose bid represents the best overall value to the School District when considering all evaluation factors.

12. Two vendors, Bedrock and Prestige, submitted bids in response to the rebid ITB. Bedrock does not have the capability to provide concrete with rear delivery trucks. Therefore, Bedrock did not submit a bid for concrete delivered by rear discharge trucks. Bedrock submitted a bid for concrete delivered with front discharge trucks. Bedrock's total bid price was \$74,887.50.

13. Prestige's bid was for concrete delivered by rear discharge trucks. Prestige did not submit a price for concrete delivered by front discharge trucks. Prestige's total bid price was \$70,300.00.

14. The bid tabulation was posted on January 18, 2011.

15. Staff of the School District made a recommendation to the School Board to award the front discharge portion of the rebid ITB to Bedrock and to award the rear discharge portion to Prestige. The recommendation was placed on the agenda for the School Board meeting scheduled for February 1, 2011.

16. There was a discussion among the School Board members concerning notification to the vendors. Thomas Long (Mr. Long) became a School Board member in November 2010. He was concerned by the lack of response to the original ITB and, on January 27, 2011, requested Ms. Olson to send him a list of local vendors who did not respond to the rebid ITB. The purpose of the communication was to learn why vendors were not submitting bids. He contacted one vendor who did not submit a bid, but he did not contact either Bedrock or Prestige. The communication would have had to have been made after he received the list of vendors on January 28, 2011.

17. Section 7.70 I. G. of the School Board Policy Manual provides:

Vendors, contractors, consultants, or their representatives shall not meet with, speak individually with, or otherwise communicate with School Board members, the Superintendent, or School District Staff, other than the designated purchasing agent, and School Board members, the Superintendent, or School District staff, other than the designated purchasing agent shall not meet with, speak individually with, or otherwise communicate with vendors, contractors, consultants, or their representatives, about potential contracts with the School Board once an invitation to bid, request for quote, request for proposal, invitation to negotiate, or request for qualification has been issued. Any such communication shall disqualify the vendor, contractor, or consultant from responding to the subject invitation to bid, request for quote, request for proposal,

invitation to negotiate, or request for qualifications.

18. At the February 1, 2011, School Board meeting, the School Board voted to appoint Scott Stegall (Mr. Stegall) as the new chief facilities officer for the School District. The School Board also voted to table the issue of the concrete contract in order to give Mr. Stegall an opportunity to review the procurement.

19. Mr. Stegall did review the procurement and recommended that the contract award be split between Bedrock and Prestige. There was no difference between the quality of the concrete whether it was delivery by a front discharge truck or a rear discharge truck. Whether it would be more efficient to use a front discharge versus a rear discharge method of delivery would depend on the job for which the concrete was ordered.

20. The recommendation to split the award of the concrete contract was placed on the agenda for the School Board meeting scheduled for March 1, 2011. Five School Board members were present for the School Board meeting of March 1, 2011. Four School Board members voted to reject the staff recommendation and to award the contract to Prestige. One School Board member voted against awarding the contract to Prestige. Thus, the School Board's intended award of the contract was to Prestige.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 & 120.57, Fla. Stat. (2010).^{1/}

22. Section 120.57(3)(f) provides that, in a protest to a proposed contract award pursuant to an invitation to bid:

[u]nless 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.

23. The court in Colbert v. Department of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), defined the clearly erroneous standard to mean "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations. If however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." (citations omitted).

24. An agency action is "contrary to competition" if it unreasonably interferes with the purposes of competitive

procurement, which has been described in Wester v. Belote, 138 So. 721, 722 (Fla. 1931), as follows:

The object and purpose of competitive bidding 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 at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the public authorities, by providing an opportunity for an exact comparison of bids.

25. A capricious action has been defined as an action, "which is taken without thought or reason or irrationally." Agrico Chem. Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979). "An arbitrary decision is one that is not supported by facts or logic." Id. The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner involves consideration of "whether the agency: (1) has considered all relevant factors; (2) given actual, good faith consideration to the factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enter. v. Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has also been formulated by the court in Dravo Basic Materials Co. v.

Department of Transportation, 602 So. 2d 632, 632 n.3 (Fla. 2d DCA 1992), as follows: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious."

26. Bedrock has the burden to establish the allegations in the protest by a preponderance of the evidence. Dep't of Transp. v. Groves-Watkins, 530 So. 2d 912, 913-914 (Fla. 1988). Bedrock has alleged that Ms. Hartig was biased against Bedrock, that Mr. Long had improperly contacted vendors while the rebid ITB was open, and that the School Board rejected staff's recommendation to award the delivery of concrete by front discharge truck to Bedrock and the delivery of concrete by rear discharge truck to Prestige.

27. Bedrock has demonstrated that Ms. Hartig was not inclined to award a contract to Bedrock because of the relationship between Bedrock and Mr. McKay; however, no evidence was presented that any other School Board member may have been biased against Bedrock or that Ms. Hartig influenced the vote of any School Board member regarding the award of the contract for concrete. The decision to award the contract to Prestige was a decision based on the vote of School Board members present at the March 1, 2011, meeting and not a decision of a single School Board member. If Ms. Hartig's vote had not been considered, the

School Board would have awarded the contract to Prestige on a three-to-one vote. Any bias on the part of Ms. Hartig did not affect the vote to award the contract. Thus, the award to Prestige was not contrary to competition.

28. Bedrock claims that Mr. Long violated School Board Policy 7.70 I. G. Technically, Mr. Long did violate the policy; however, it is a violation without consequences. Mr. Long contacted a concrete vendor after the bids were submitted and tabulated to determine why the vendor did not bid. The remedy for the violation is to disqualify the vendor with whom the School Board member communicated from submitting a bid to invitation to bid to which the communication was addressed. It was too late to disqualify the vendor because the bids were already submitted. Mr. Long did not contact either Bedrock or Prestige; thus, they were not subject to disqualification.

29. Bedrock claims that the School Board should have followed the recommendation of the staff of the School District to split the award. The ITB clearly gives the School Board discretion to award all or part of the contract. Thus, the decision to award to Prestige was not clearly erroneous.

30. Prestige submitted the lowest bid. It was neither arbitrary nor capricious to award the rear discharge portion of the contract to the low bidder. It is also clear that the

School Board gave consideration to its decision. The contract award was discussed at length at two School Board meetings.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that the intended award to Prestige was not contrary to the School Board's governing statutes, the School Board's policies or rules, or the rebid ITB and that the intended award to Prestige was not clearly erroneous, arbitrary, capricious, or contrary to competition.

DONE AND ENTERED this 16th day of August, 2011, in Tallahassee, Leon County, Florida.



SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
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this 16th day of August, 2011.

ENDNOTE

^{1/} Unless otherwise indicated, 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.