

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

K AND M PINE STRAW, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 11-1670BID  
 )  
 DEPARTMENT OF CORRECTIONS, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to Notice, this cause came on for formal hearing before the Division of Administrative Hearings by Diane Cleavinger, a duly-designated Administrative Law Judge, on May 2, 2011, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Kurt Eldridge, pro se  
K & M Pine Straw  
20583 John G. Bryant Road  
Blountstown, Florida 32424

For Respondent: Edith McKay  
Susan P. Stephens  
Assistants General Counsel  
Florida Department of Corrections  
501 South Calhoun Street  
Tallahassee, Florida 32399-2500

STATEMENT OF THE ISSUE

The issue in this proceeding is whether the award of a bid for the sale of scrap metal to Cumbaa Enterprises, Inc. was

arbitrary, capricious, clearly erroneous, or contrary to competition or the bid specifications.

#### PRELIMINARY STATEMENT

On March 14, 2011, K & M Pine Straw (K & M or Petitioner) filed a Notice of Intent to Protest the Department of Correction's (Department or Respondent) award of Invitation to Bid No. 10-Apalachee-8252 (ITB) to Cumbaa Enterprises, Inc. (Cumbaa). On March 23, 2011, Petitioner timely filed a formal written protest. Later, the matter was referred to the Division of Administrative Hearings.

At the hearing, Respondent offered the testimony of three witnesses. Petitioner offered the testimony of its owner. Both parties introduced four joint exhibits into evidence. Additionally, both parties agreed to proceed with the hearing without the presence of a court reporter.

After the hearing, Petitioner filed a Proposed Recommended Order on May 12, 2001. Similarly, Respondent filed a Proposed Recommended Order on May 12, 2001.

#### FINDINGS OF FACT

1. On January 19, 2011, the Department issued Invitation to Bid (ITB) #10-Apalachee-8252. The ITB was a revenue-generating contract for the sale of scrap metal at Apalachee Correctional Institution in Sneads, Florida. Since the contract would generate revenue to the State, the Department's purpose

was to award the contract to the highest responsive bid and developed bid specifications and criteria to accomplish that goal.

2. The specifications for the ITB stated in relevant part:

**1.5 Material Deviations:** The Department has established certain requirements with respect to bids to be submitted by bidders. The use of *shall*, *must* or *will* (except to indicate simple futurity) in this ITB indicates a requirement or condition which may not be waived by the Department except where the deviation therefrom is not material.[emphasis added]. A deviation is material if, in the Department's sole discretion, the deficient response is not in substantial accord with this ITB's requirements, provides an advantage to one bidder over other bidders, has a potentially significant effect on the quantity or quality of items bid, or on the cost to the Department. Material deviations cannot be waived and shall be the basis for rejection of a bid.

**1.6 Minor Irregularity:** A variation from the ITB 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 impact the interests of the Department.

**1.10 Responsive Bid:** A bid submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation.

\* \* \*

#### **4.3.1 Submission of Bids**

Each bid shall be prepared simply and economically, providing a straightforward, concise delineation of the bidder's

capabilities to satisfy the requirements of this ITB, fancy bindings, colored displays, and promotional material are not desired. Emphasis in each bid must be on completeness and clarity of content. In order to expedite the review of bids, it is essential that bidders follow the format and instructions contained in the Bid Submission Requirements (Section 5), with particular emphasis on the Mandatory Responsiveness Requirements.

#### **4.3.6 Rejection of Bids**

The Department shall reject any and all bids containing material deviations. The following definitions are to be utilized in making these determinations.

##### **4.3.6.1 Material Deviations**

The Department has established certain requirements with respect to bids to be submitted by bidders. The use of *shall*, *must* or *will* (except to indicate simple futurity) in this ITB indicates a requirement or condition which may not be waived by the Department except where the deviation therefrom is not material. A deviation is material if, in the Department's sole discretion, the deficient response is not in substantial accord with the ITB's requirements, provides an advantage to one bidder over other bidders, has a potentially significant effect on the quantity or quality of items bid, or on the cost to the Department. Material deviations cannot be waived and shall be the basis for rejection of a bid.

##### **4.3.6.2 Minor Irregularities**

A variation from the ITB 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 impact the interests of the Department.

3. As indicated, Section 5 of the specifications outlined the contents of the bid. Section 5 stated in relevant part:

**SECTION 5 - CONTENTS OF BID**

This section contains instructions that describe the required format for the submitted bid. Bids shall be submitted in a sealed envelope, clearly marked "**Bid - ITB#-Apalachee-8252**".

. . . . [T]he following paragraphs contain instructions that describe the required format for bid responses.

**5.1 Responsiveness Requirements**

The following terms, conditions, or requirements must be met by the bidder to be considered responsive to this ITB. Failure to meet these responsiveness requirements may cause rejection of a bid. [emphasis added].

**5.1.1** Bidder shall complete, sign and return the ITB Bidder Acknowledgement Form (page 1 & 2). The bidder must return either the original or a copy of both pages with an original signature on page one (1).

**5.1.2** The bidder shall complete, sign, date, and return (all) pricing pages, entitled Cost Information Sheet, which consists of page 28. By submitting a bid or bids under this ITB, each bidder warrants its agreement to the prices submitted. The Department objects to and shall not consider any additional terms or conditions submitted by a bidder, including any appearing in documents attached as part of a bidder's response. In submitting its bid, a bidder agrees that any additional terms or conditions, whether submitted intentionally

or inadvertently, shall have no force or effect. Any qualifications, counter-offers, deviations, or challenges may render the bid un-responsive . . . .

\* \* \*

### **5.3 Certificate of Insurance**

Bidders shall return a fully executed Certificate of Insurance . . . .

4. In this case, Section 5.1 contains two bid specifications essential to a bid's responsiveness. Those two requirements were submission of a signed and completed, original or copy, of the bidder acknowledgement form and submission of a completed Cost Information Sheet. The Cost Information Sheet is not at issue here.

5. The bidder acknowledgement form is a double-sided Department of Management Services form containing general boilerplate contractual language. The back of the form is a continuation of standard contractual terms from the front. Oddly, signatures acknowledging these terms and the terms of the ITB are on the front page (page 1) of the form. By signing the front page of the bidder acknowledgement form the bidder agrees to abide by all conditions of the bid.

6. The remainder of Section 5 of the ITB contains bid specifications that are not considered essential to determine the initial responsiveness of the bid at the bid opening, but are to be returned at some later point in time after the bid's

are opened. However, the language of Section 5 effecting that intent is unclear. In particular, the bid specification contained in Section 5.3 requires the bidder to "return" an "executed" Certificate of Insurance. The Certificate of Insurance provides the Department with proof of a variety of required insurance coverage of the vendor. However, later in the ITB Section 7.14 clarifies that the Certificate of Insurance need only be supplied with the later-signed contract documents. Section 7.14 states, in relevant part:

**7.14 Contractor's Insurance**

The contractor shall not commence any work in connection with this ITB . . . until he has obtained all of the . . . types of insurance and such insurance has been approved by the Department. The Department shall be furnished proof of coverage of insurance by Certificates of Insurance . . . accompanying the contract documents and shall name the Department as an additional named insured [emphasis added].

7. Indeed, the evidence demonstrated that the Department has long interpreted these provisions to require a winning bidder to provide Certificates of Insurance at the time a contract is entered into and not as part of the essential requirements of the bid due at bid opening. While the Department could (and probably should) clarify this provision, its interpretation of its bid specifications is not unreasonable under these facts.

8. In this case, five bids were timely submitted in response to the ITB, including those of K & M and Cumbaa. On March 8, 2011, the Department opened bids for the ITB.

9. Cumbaa submitted the highest bid for the contract, at \$22,197.48. K & M submitted the next highest bid at \$20,001.00.

10. At the bid opening, Cumbaa's bid included a Cost Information Sheet, a copy of the signed front page of the bidder acknowledgement form, and the Contact for Contract Administration form known as Attachment 1. However, the bid did not contain the second side of the bidder acknowledgement form or a Certificate of Insurance form at the time the bid was opened. K & M's bid contained the same documents as Cumbaa's bid, as well as the second side of the bidder acknowledgement form and a number of certificates of insurance for K & M.

11. The evidence showed that Cumbaa did not include the Certificate of Insurance form in its sealed bid upon the advice of the Department that the form was not required at bid opening. However, Cumbaa had insurance coverage in place at the time of the bid opening and faxed its certificates of insurance to the Department on March 10, 2011. Given these facts and the Department's reasonable interpretation of its ITB, the omission of Cumbaa's certificate of insurance was neither required at the time of the bid opening, nor material to the award of the bid.

12. The omission of the second page of the bidder's acknowledgement form was not noticed by anyone reviewing the bids until its omission was pointed out by K and M in this bid protest. Cumbaa faxed a copy of the back side of the document to the Department on April 11, 2011. Clearly, this lack of notice demonstrates the immateriality of the back side of the bidder's acknowledgement form. Additionally, since the signatures of both bidders were on the front page of the form submitted by them and those signatures bound the bidders to the terms of the ITB, there was no evidence that demonstrated why submission of a copy of the back side of the form was material to the award of this bid.

13. Ultimately, the Department reviewed the bids for responsiveness and determined that Cumbaa was the highest responsive bid. On March 11, 2011, the Department posted its intent to award the bid to Cumbaa Enterprises, Inc.

14. As indicated, there was no evidence that the omission of these two documents from the Cumbaa bid were material deviations from the bid specifications since neither omission impacted the ultimate contract requirements and did not materially impact the integrity of the bid process. Indeed, the insurance certification was not required for responsiveness under Section 5.1 of the bid under a long-standing and

reasonable interpretation of that requirement by the Department. For these reasons, this bid protest should be dismissed.

#### CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).

16. Petitioner, K & M, has standing to challenge the proposed action of the Department in this proceeding. Section 120.57(1), Florida Statutes (2010).

17. Section 120.57(3)(f), governs bid protest hearings. Section 120.57(3)(f), provides in pertinent part:

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 specification.

Thus, Petitioner, K & M, has the burden to demonstrate that Respondent's bid award did not comply with the bid specifications or is otherwise arbitrary, capricious or against the competitive bidding process.

18. 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't'l Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

19. An act is contrary to competition when it offends the purpose of competitive bidding. That purpose has been articulated as follows:

[T]o 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 [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Wester v. Belote, 103 Fla. 976, 138 So. 721, 723-4 (1931).

Harry Pepper & Assoc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

20. In this case, the evidence did not demonstrate that the Department's acceptance of the certificates of insurance after the bid opening but before the bid award, or the later acceptance of the second side of the bidder acknowledgement form, afforded Cumbaa any sort of advantage over other bidders. The Cumbaa price was set at the time of the bid opening, as were all work requirements of the bid. It is undisputed that Cumbaa had the necessary insurance in place prior to the bid opening. However, even if it had not, the Department does not require

certificates of insurance to be submitted until a contract is awarded.

21. Likewise, the evidence did not demonstrate any prejudice to the integrity of the bid process in the omission of Cumbaa's insurance documents and the second side of the bidder acknowledgement form at the time of the bid opening.

22. Cumbaa agreed to comply with the requirements of the ITB, just as K & M did and as their signatures on the front side of the bidder acknowledgement form bound them to do. In general, documents meeting the essential requirements of a bid should not be accepted after bid opening and the Department should be extremely cautious in permitting such a submission. However, in this case, to reject a bid for the late submitted second side of the bidder acknowledgement form would put form over substance since submitting a copy of the back part of a form which the Department already has makes no material contribution to the legitimacy or legality of the bids submitted. Under the evidence, the lack of the second page of the bidder acknowledgement form at the time of the bid opening, was clearly not a material deviation from the bid specifications and had no impact on the award of the bid to Cumbaa. Given these facts, this protest should be dismissed.

RECOMMENDATION

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

RECOMMENDED that Respondent, Department of Corrections, enter a final order dismissing the Protest of K & M Pine Straw.

DONE AND ENTERED this 1st day of July, 2011, in Tallahassee, Leon County, Florida.

*Diane Cleavinger*

---

DIANE CLEAVINGER  
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 July, 2011.

COPIES FURNISHED:

Kurt Eldridge  
K and M Pine Straw  
20583 John G Bryant Road  
Blountstown, Florida 32424

Edith McKay, Esquire  
Department of Corrections  
2601 Blair Stone Road  
Tallahassee, Florida 32399-2500

Edwin G. Buss, Secretary  
Department of Corrections  
2601 Blair Stone Road  
Tallahassee, Florida 32399-2500

Jennifer Parker, General Counsel  
Department of Corrections  
2601 Blair Stone Road  
Tallahassee, Florida 32399-2500

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.