

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

UNIVERSAL ENGINEERING SCIENCES,)
INC.,)
)
Petitioner,)
)
and)
)
ELIPSIS ENGINEERING AND)
CONSULTING, LLC,)
)
Intervenor,)
)
vs.) Case No. 11-3284BID
)
DEPARTMENT OF TRANSPORTATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on September 8, 2011, at Tallahassee, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: C. Denise Johnson, Esquire
Department of Transportation
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Tallahassee, Florida 32399

For Respondent: Thomas H. Justice, III, Esquire
Thomas H. Justice III, P.A.
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For Intervenor: Thornton J. Williams, Esquire
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STATEMENT OF THE ISSUES

Whether, in making a preliminary decision to award a contract for the subject services, the Florida Department of Transportation (Respondent) acted contrary to a governing statute, rule, policy, or project specification; and, if so, whether such misstep(s) was/were clearly erroneous, arbitrary or capricious, or contrary to competition.

PRELIMINARY STATEMENT

Respondent issued the subject Request for Proposals (RFP) for a multi-year, continuing services contract (CSC) for professional materials testing and geotechnical services for its District 5, which is headquartered in Deland. The RFP was designated as "Financial Project ID Nos: 241084-2-32-09 & 241084-2-62-09."

After initial responses were reviewed, three proposers were shortlisted to submit proposals. The three proposers were Ellipse Engineering and Consulting, L.L.C. (Intervenor), Universal Engineering Sciences, Inc. (Petitioner), and Ellis & Associates (Ellis). All three proposers were well-known to

Respondent, and all three are qualified to perform as the prime consultant with the use of sub-consultants.

A Technical Evaluation Committee (TEC), consisting of three of Respondent's employees, reviewed the proposals and each employee separately assigned scores to the proposals. The RFP explained to the proposers the areas that would be scored and the maximum value of each area. The scores were added together.¹ The TEC ranked Intervenor first, Petitioner second, and Ellis third. The selection committee thereafter decided to award the CSC to Intervenor.

On March 21, 2011, Respondent posted its notice of intent to award the CSC to Intervenor. Petitioner thereafter timely filed a notice of protest and, subsequently, timely filed a petition with Respondent on March 29, 2011. On June 28, 2011, an Amended Petition challenging the proposed award was filed with DOAH.² Ellis did not participate in this proceeding.

Along with the Amended Petition, Respondent referred to DOAH on June 28, 2011, Intervenor's Motion to Intervene, which was promptly granted.

Following a telephone conference call, the matter was scheduled for hearing on September 8 and 9, 2011. The parties waived the requirement that the hearing be scheduled within 30 days of the referral to DOAH.

Intervenor filed a Motion to Dismiss on August 25, 2011. The motion was denied on September 1, 2011.

On September 2, 2011, Respondent filed a Motion for Videoconference Appearance for Respondent's employee Frank Smith. Following a brief telephone conference with the parties, the undersigned authorized Mr. Smith to testify by telephone.

On September 6, 2011, the parties filed a Pre-hearing Stipulation that contained certain stipulated facts. Those facts have been incorporated into the Findings of Fact set forth in this Recommended Order.

At the formal hearing, the parties submitted four joint exhibits, each of which was admitted into evidence. In addition, Petitioner presented three sequentially-numbered exhibits, each of which was admitted into evidence. Respondent and Intervenor offered no additional exhibits.

Petitioner presented the testimony of John Barker, P.E. (a corporate officer and director of Petitioner); the telephonic testimony of Mr. Smith (Respondent's District 5 Consultant Manager for Materials and Research); Kathy Gray, P.E. (Respondent' District 5 Geotechnical Engineer and a member of the TEC); and Roger Schmitt, P.E. (Respondent's District 5 Materials and Research Engineer and a member of the TEC).

In its Amended Petition, Petitioner alleged "certain elements of the scoring" by Jeremy Wolcott (the third member of

the TEC) and Ms. Gray were arbitrary, capricious, erroneous, and applied standards that were not included in the RFP. At the formal hearing and in its Proposed Recommended Order, Petitioner did not address the alleged deficiencies in Mr. Wolcott's scoring, but did offer evidence and argument as to Ms. Gray's scoring. Consequently, this Recommended Order will conclude that Petitioner has abandoned the allegations pertaining to Mr. Wolcott and will focus on the scoring of Ms. Gray.

A Transcript of the proceedings, consisting of one volume, was filed September 22, 2011. Thereafter Petitioner and Respondent party filed Proposed Recommended Orders, which have been duly-considered by the undersigned in the preparation of this Recommended Order. At the conclusion of the hearing, Intervenor announced that it would coordinate with Respondent in the filing of its proposed recommended order. Intervenor did not file a separate proposed recommended order.

All statutory references are to Florida Statutes (2011).

FINDINGS OF FACT

1. Respondent is an agency of the State of Florida and is the procuring agency in this proceeding.
2. Petitioner's Notice of Protest and its Amended Petition were timely filed.
3. The services being procured were advertised as the "Continuing Services Contract for Materials Testing and

Geotechnical Services Request for Proposals." The procurement sought to secure the services of a prime consultant to support Respondent's District 5 by providing professional services in the fields: soil exploration; geotechnical exploration testing; highway material testing; foundation studies; pavement evaluation; and construction materials sampling, testing, and reporting.

4. Due to the nature of the services to be provided, the RFP contemplated that the prime consultant would have to use sub-consultants for certain services. Each proposer was required to list the sub-consultants it would use and identify the fields of work the sub-consultants would perform.

5. There were no challenges to the specifications of the RFP.

6. Petitioner, Intervenor, and Ellis were the three shortlisted firms and submitted proposals, which included a "Project Related Information Package."

7. All three members of the TEC made an affirmative finding that all three proposers are qualified to perform the required services as the prime consultant.

8. Roger Schmitt, Kathy Gray, and Jeremy Wolcott acted as the TEC, and performed the evaluation and scoring of the technical proposals submitted in response to the RFP. All three

are professional engineers. There was no issue as to whether the evaluators were qualified to serve in that capacity.

9. The TEC was charged with evaluating the materials submitted by the three proposers in accordance with the RFP (Joint Exhibit 1) and Procurement Topic 375-030-002-i, styled Acquisition of Professional Services (Joint Exhibit 4).

10. The responses could be awarded a maximum of 100 points.

11. A maximum of 30 points could be awarded under the heading: "Management Plan." A maximum of 15 of those 30 points could be awarded under the subheading: "What is your Management Plan for this Contract." A maximum of 15 of those 30 points could be awarded under the subheading: "Explain your ability to provide services in a timely and effective manner."

12. A maximum of 30 points could be awarded under the heading: "Geotechnical Services." A maximum of five of those 30 points were to be awarded under the subheading: "Describe how you will provide Geotechnical support for Design." A maximum of 25 of those 30 points could be awarded under the subheading: "Describe your approach to providing PDA [pile driver analysis] testing and engineering."

13. A maximum of 40 points could be awarded under the heading: "Construction Materials Testing and Evaluations." A maximum of ten of those 40 points could be awarded under the

subheading: "What qualified technicians (including qualified Pre-Stress inspectors) are available for this contract and what Certifications do they currently hold? (See scope of services for qualifications list.)" A maximum of 20 of those 40 points could be awarded under the heading: "What is your plan for staffing, oversight activities, recruitment, and training of VT [verification technician] asphalt plant technicians? How do you plan to manage the program to make sure the asphalt plants are staffed without disruption to construction and to keep costs in check?" A maximum of ten of those 40 points could be awarded under the subheading: "Describe your experience, commitment to turnaround time and internal review process for performing pavement survey evaluations. Describe how you propose to manage the program for Maintenance of Traffic, lane closures, and meeting the Department production for coring."

14. Mr. Barker is a professional engineer and a professional geologist. He is a director and vice president of Petitioner. He was actively involved with preparing the proposal submitted by Petitioner. Mr. Barker is a former employee of Respondent, having served as the District Materials Engineer for Districts 1 and 7 until he moved to Petitioner five years ago.

15. Frank Smith is the consultant project manager for District 5 for Materials Research. Mr. Smith also assigned the

performance grade associated with the most recent contract between Petitioner and Respondent for District 5 materials testing. Mr. Smith gave Petitioner a score of 4.7 out of a possible 5 points.

16. Each TEC member scored each proposer pursuant to the terms of the RFP. After the three TEC members scores were compiled, Intervenor had a total score of 263 points (for an average of 87.67), Petitioner had a total score of 262 points (for an average of 87.33), and Ellis had a total score of 257 points (for an average of 85.67). The TEC ranked Intervenor first, Petitioner second, and Ellis third. Respondent's selection committee decided to award the RFP to Intervenor based on the rankings of the TEC.

17. Ms. Gray is a 23-year veteran with Respondent's District 5. She has served on many evaluation committees during her employment with Respondent. She reviewed the RFP before it was issued, and she participated in determining what entities should be shortlisted.

18. Ms. Gray is very familiar with Intervenor and Petitioner.

19. Ms. Gray read all information submitted by the three proposers, with the exception of certain employee resumes, before assigning scores to any response. Her scoring reflects

her evaluation of the strength of each response as compared with the other responses.

MANAGEMENT PLAN

20. As reflected above, under the subheading "Management Plan for Contract," a proposer could be awarded a maximum of 15 points. For that category, Ms. Gray awarded Intervenor a score of 15, while awarding Petitioner a score of 10.

21. In determining Petitioner's score for "Management Plan for Contract", Ms. Gray made the following notations on the scoring form:

Good overall Plan and Project Manager.

Since we will only have two CSC Materials and Research contracts in the future, the potential for conflict of interest problems is a bigger concern than in the past. Universal has the highest conflict of interest risk of the three firms.

Universal has a preference for maximizing the use of in-house resources even when qualified sub-consultants are available and closer to the job. Their approach would be stronger if the welfare of the project was the highest priority.

The Firm only committed to 10% DBE [Disadvantaged Business Enterprise] participation.[³]

22. It was reasonable for Ms. Gray to conclude that Petitioner's response to the RFP stressed its in-house capabilities.

23. Mr. Smith gave advice to the TEC. Prior to the review, Mr. Smith related to the TEC members that Mr. Barker had, in the past, expressed a strong preference on the part of Petitioner to use in-house resources rather than sub-consultants when it could. It was reasonable for Ms. Gray to rely on Mr. Smith's advice, particularly when she was familiar with Petitioner and the way Petitioner operated.

24. It was reasonable for Ms. Gray to consider the three proposers' potential for conflict of interests in scoring their proposals.

25. Petitioner failed to establish that Ms. Gray's scoring for this category, as compared with the other proposals, was arbitrary or capricious.

ASSIGNMENT OF SUB-CONSULTANTS

26. The Scope of Services, which is attached to joint exhibit 1 as exhibit A, provides at page nine:

The assignment of dynamic pile testing/analyses personnel to projects shall be at the sole discretion of the District Geotechnical Engineer.

27. As noted above, Ms. Gray is the District Geotechnical Engineer. Ms. Gray testified that she has been instructed not to tell prime consultants what sub-consultant to use for any services, including PDA. Mr. Schmitt explained that the foregoing provision is used to provide Respondent the authority

to prohibit a prime consultant from using an unqualified sub-consultant. Because of this policy, Ms. Gray could not order the prime consultant to use a sub-consultant instead of using its in-house resources.

28. Mr. Barker testified that Petitioner had been asked by District 5 project managers to use certain sub-consultants for certain work. He further testified that Petitioner has never refused such a request, even if it had to add a sub-consultant to its list of sub-consultants. There was insufficient evidence to establish that Ms. Gray had ever asked Petitioner to use a particular sub-consultant.

APPROACH TO PDA

29. As reflected above, under the subheading "Approach to providing PDA testing and engineering," a proposer could be awarded a maximum of 25 points. For that subheading Ms. Gray awarded Petitioner a score of 20 while awarding Intervenor a score of 25.

30. In determining Petitioner's score for "Approach to providing PDA testing and engineering," Ms. Gray made the following notations on the scoring form:

Universal has expressed a strong preference for using in-house PDA resources; however, their small in-house staff does not meet all the scope requirements and is not located in the District. They have reluctantly used sub-consultants in the past, but it is not clear how committed they are to using the

most qualified and efficient resources available. Some firms are more cooperative in this area.

31. In scoring this subheading, Ms. Gray considered Petitioner's response, which emphasized its in-house capability to do PDA as required by the RFP. Ms. Gray was concerned that Josh Adams, the person Petitioner identified as the employee responsible for the in-house performance of PDA, was not qualified to perform PDA services. After describing its in-house resources for performing PDA, including equipment, Petitioner's response included the following (at page 3 of Joint Exhibit 2):

PDA testing field services and all corresponding analyses/recommendations are performed by our in-house staff (Josh Adams) or by our subconsultants [sic] RS&H, CS, GRL, F&GE of AFT. Our subconsultants [sic] can provide additional equipment and have performed PDA for numerous FDOT projects.

32. Ms. Gray was familiar with three of the proposed subconsultants and considered the three to be qualified.

33. At the time of the technical evaluation and at the time of the formal hearing, Josh Adams did not have the qualifications to conduct the PDA required by the RFP and could not perform the services for Petitioner on an in-house basis. Mr. Adams had recently joined Petitioner's employment to replace an employee who had previously done the PDA work for Petitioner. Petitioner's proposal did not discuss Petitioner's future plans

for Mr. Adams or how it intended to develop in-house capability to perform PDA work.

34. Intervenor's response to the PDA inquiry indicated that in addition to one other sub-consultant (URS), which Ms. Gray considered to be qualified, it would use the three qualified sub-consultants to perform the PDA services identified by Petitioner.

35. Intervenor does not have in-house capability to perform the required PDA services.

36. Ms. Gray deducted points from Petitioner under the subheading "Approach to providing PDA testing and engineering" because of its "reluctance" to use sub-consultants and because it failed to include URS as a sub-consultant. Ms. Gray's use of the term "reluctance" was not supported by the evidence. While there was sufficient evidence to establish that Petitioner had a strong preference to use its in-house resources when it could, there was insufficient evidence to establish Petitioner's "reluctance" to use sub-consultants when necessary. Her testimony explained that her concern was Petitioner's strong preference to use in-house resources, when the use of a sub-consultant would better serve the interests of District 5. She was of the opinion that Petitioner's failure to include URS as a sub-consultant signaled that Petitioner was not as committed as the other proposers to using sub-consultants.

37. Petitioner failed to establish that Ms. Gray's scoring for this category, compared with the other proposers, was arbitrary or capricious.

CERTIFICATIONS

38. As reflected above, under the subheading "Qualified technicians and what Certifications do they currently hold," a proposer could be awarded a maximum of 10 points. Ms. Gray awarded Petitioner a score of 8 while awarding Intervenor a score of 10.

39. In determining Petitioner's score for that subheading, Ms. Gray made the following notations on the scoring form:

Universal has many qualified technicians. However, it is not clear what they will do for Prestress inspectors. Their Qualified Personnel matrix shows one good sub-consultant we are familiar with, but the other two Prestress technicians listed are based outside the District and we have no experience with them.

40. Petitioner failed to establish that Ms. Gray's scoring of this subheading, compared with the other proposals, was arbitrary or capricious.

ASPHALT PLANT TECHNICIANS

41. As reflected above, under the subheading "plan for staffing, oversight activities, recruitment, and training of VT asphalt technicians", a proposer could be awarded a maximum of

20 points. Ms. Gray awarded Petitioner a score of 15 while awarding Intervenor a score of 18.

42. In determining Petitioner's score for that subheading, Ms. Gray made the following notations on the scoring form:

Universal has a good group of qualified Asphalt VT technicians.

However, it appears supervision of the program is planned to be by the general Contract Manager, who is not Plant Certified. Other firms have a stronger Asphalt Plant VT Quality Assurance oversight plan.

43. Although the RFP did not specifically address "Quality Assurance," the term "oversight activities" is sufficiently broad to encompass "Quality Assurance."

44. There is no requirement for the supervisor to be "Plant Certified." Petitioner failed to establish that it was inappropriate for Ms. Gray to consider whether the supervisor was plant certified in comparing proposals. Petitioner failed to establish that Ms. Gray's scoring of this subheading, compared with the other two proposals, was arbitrary or capricious.

BIAS

45. There was no evidence that Ms. Gray was biased in favor of or against any proposer. Ms. Gray based her evaluation of Petitioner on the basis of the criteria established by the RFP using her background and experience dealing with the

proposers. There was no evidence that the methodology she employed in weighing the merits of the three proposals was improper.

46. Respondent's selection committee acted reasonably in selecting the consultant (Intervenor) that the TEC ranked first.

CONCLUSIONS OF LAW

47. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes. The parties have standing.

48. An agency enjoys wide discretion when it comes to soliciting and accepting proposals in response to competitive procurement. The agency's decision, when based on an honest exercise of such discretion, should not be set aside even if it appears erroneous or reasonable people may disagree.

49. Pursuant to section 120.57(3)(f) the burden of proof rests with the party opposing the proposed agency action, here Petitioner. See State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Petitioner must sustain its burden of proof by a preponderance of the evidence. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

50. Section 120.57(3)(f) spells out the rules of decision applicable in bid protests. In pertinent part, the statute provides:

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

51. The foregoing requires the party protesting the intended award to identify and prove, by the greater weight of evidence, a specific instance or instances where the agency's conduct in taking its proposed action was either:

- (a) contrary to the agency's governing statutes;
- (b) contrary to the agency's rules or policies; or
- (c) contrary to the bid or proposal specifications.

Further, the protester must establish that the agency's misstep was:

- (a) clearly erroneous;
- (b) contrary to competition; or
- (c) an abuse of discretion.

52. A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chemical Co. v. State Dep't of Env'tl. Reg., 365 So. 2d 759, 763

(Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979).

The reviewing court must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of each of these factors to its final decision. Id.

53. The second district framed the "arbitrary or capricious" review standard in these terms: "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." Dravo Basic Materials Co., Inc. v. State Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992). As the court observed, this "is usually a fact-intensive determination." Id. at 634.

54. The test for reviewing discretionary decisions has been discussed as follows:

"Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980), quoting Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942). Further, [t]he trial

court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness. Canakaris, 382 So. 2d at 1203.

55. Petitioner has failed to prove that Ms. Gray's scoring of its proposal, when compared to the other two proposals, was arbitrary or capricious.

56. Petitioner abandoned its allegations that Mr. Wolcott's scoring was arbitrary or capricious.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the Department of Transportation enter a final order that denies Petitioner's bid protest and upholds the award of the procurement to Intervenor.

DONE AND ENTERED this 24th day of October, 2011, in
Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of October, 2011.

¹ Two members of the TEC (Ms. Gray and Mr. Wolcott) ranked Intervenor in first place.

² In its Proposed Recommended Order, Respondent explained that the initial petition was dismissed by Respondent because it did not conform to pleading requirements and there was no bond filed. The Order of Dismissal entered by Respondent gave Petitioner a deadline to file an amended petition and a protest bond. Petitioner thereafter met that deadline, Respondent referred Petitioner's Amended Petition to DOAH, and this proceeding followed.

³ Petitioner's Amended Petition did not raise an issue as to DBE participation.

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.