

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ACE WASTE SERVICES, LLC, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 12-0150BID  
 )  
 BROWARD COUNTY SCHOOL BOARD, )  
 )  
 Respondent, )  
 )  
 and )  
 )  
 CHOICE ENVIRONMENTAL SERVICES )  
 OF BROWARD COUNTY, INC., )  
 )  
 Intervenor. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice a formal hearing was conducted on February 9, 2012, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Robert E. Ferencik Jr., Esquire  
Laura Ann Papay Baker, Esquire  
Ferencik, Libanoff, Brandt, Bustamante,  
and Williams, P.A.  
150 South Pine Island Road, Suite 400  
Fort Lauderdale, Florida 33301

For Respondent: Robert Paul Vignola, Esquire  
Office of the General Counsel  
600 Southeast Third Avenue, 11th Floor  
Fort Lauderdale, Florida 33301

For Intervenor: Jonathan M. Streisfeld, Esquire  
Kopelowitz, Ostrow, Ferguson, Weiselberg,  
and Keechl  
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STATEMENT OF THE ISSUE

Whether in making a preliminary decision to award a contract for the subject services under Invitation to Bid No. 12-039T - Refuse Services (the ITB) Respondent School Board of Broward County, Florida (the School Board) 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. Specifically, Petitioner Ace Waste Services, LLC (Petitioner) challenges the determination that the bids submitted by the apparent low bidder, the apparent low second low bidder, and the apparent low third low bidder were responsive and responsible bids meeting the specifications contained in the ITB.

PRELIMINARY STATEMENT

The School Board issued the ITB to provide refuse services to certain district school sites. Among the nine bidders responding to the ITB were Choice Environmental Services of Broward Inc. (Intervenor); Republic Services of Florida d/b/a

All Service Waste (All Service); Waste Services of Florida, Inc. (WSI); and Petitioner. Petitioner is the incumbent vendor for the services at issue. All bidders were informed prior to the submission of bids that there would be a primary awardee and an alternate awardee.

Relevant to this proceeding, Intervenor was the apparent low bidder, All Service was the apparent second low bidder, WSI was the apparent third low bidder, and Petitioner was the apparent fourth low bidder.

After the bids were evaluated Respondent announced that it intended to award the contract to Intervenor as primary awardee and to All Service as alternate awardee. Petitioner thereafter timely filed this bid protest and this formal proceeding before DOAH followed. Petitioner's protest in the form of a letter dated November 14, 2011, asserted that the prices submitted in the bids of Intervenor, All Service, and WSI, although apparently lower than Petitioner's bid, were not responsive or responsible for performing the services described in the ITB's specifications. Petitioner asserts that either it should be awarded the contract or all bids should be rejected.

The Formal Written Protest was filed with DOAH on January 11, 2012. By agreement of the Petitioner and the School Board the case was scheduled for hearing on February 9, 2012.

Leave to intervene was granted on January 30, 2012 to Intervenor.

Prior to the formal hearing the parties submitted their Joint Prehearing Stipulation which contained certain stipulated facts. To the extent deemed necessary, those facts have been incorporated as findings of fact after minor editing.<sup>1/</sup>

At the formal hearing the parties presented Joint Exhibits 1 through 5 which were admitted into evidence by stipulation of the parties. In addition Petitioner presented pages 356, 358, 359, 360, and 361 of Petitioner's premarked Exhibit 18, which were admitted into evidence as Petitioner's Exhibit 18.

Petitioner presented the testimony of William B. Harris, Jr. (the School Board's Director of Supply Management and Logistics Department, which will be referred to herein as the Purchasing Department); Paul C. Baker (Petitioner's Vice President); and Patrick Pierre (Clerk Specialist IV in the School Board's Energy Conservation Utility Management Department). The School Board presented the testimony from William B. Harris, Jr. during its case in chief.

A Transcript of the proceedings consisting of one volume was filed on February 29, 2012. The parties timely filed Proposed Recommended Orders which have been duly considered by the undersigned in the preparation of this Recommended Order. All statutory references are to Florida Statutes (2011).

FINDINGS OF FACT

1. School Board Policy 3320 entitled "Purchasing Policies" is the agency's rule governing the purchasing of goods and services.

2. On October 7, 2011, the School Board issued the ITB which was entitled "Refuse Services." On October 18, 2011, the School Board issued Addendum No. 1 to the ITB. The refuse services were to be provided to 58 district school sites, which were collectively referred to as Group 1.

3. The Bidder Acknowledgement found at Section 1.0 of the ITB states in pertinent part as follows:

I agree to complete and unconditional acceptance of this bid all appendices and contents of any Addenda released hereto; I agree to be bound to all specifications terms and conditions contained in this ITB . . . . I agree that this bid cannot be withdrawn within 90 days from due date.

4. Section 3 of the ITB states as follows at General Condition 3(b):

**MISTAKES:** Bidders are expected to examine the specifications delivery schedules bid prices and extensions and all instructions pertaining to supplies and services. Failure to do so will be at Bidder's risk.

5. Section 3 of the ITB states as follows at General Condition 35:

**PROTESTING OF BID CONDITIONS/SPECIFICATIONS:**  
Any person desiring to protest the conditions/specifications of this Bid/RFP or

any Addenda subsequently released thereto shall file a notice of intent to protest in writing within 72 consecutive hours after electronic release of the competitive solicitation or Addendum and shall file a formal written protest with ten calendar days after the date the notice of protest was filed. Saturdays Sundays legal holidays or days during which the school district administration is closed shall be excluded in the computation of the 72 consecutive hours. If the tenth calendar day falls on a Saturday Sunday legal holiday or day during which the school district administration is closed the formal written protest must be received on or before 5:00 p.m. ET of the next calendar day that is not a Saturday Sunday legal holiday or days during which the school district administration is closed. Section 120.57(3)(b) Florida Statutes as currently enacted or as amended from time to time states that **"The formal written protest shall state with particularity the facts and law upon which the protest is based."**

**Failure to file a notice of protest or to file a formal written protest within the time prescribed by [section 120.57(3)(b)] or a failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under School Board Policy 3320 and [chapter 120]. The failure to post the bond required by School Board Policy 3320 Part VI within the time prescribed by School Board Policy 3320 Part VI as currently enacted or as amended from time to time shall constitute a waiver of proceedings under School Board Policy 3320 and [chapter 120]. Notices of protest formal written protests and the bonds required by School Board Policy 3320 Part VI shall be filed at the office of the Director of Supply Management and Logistics 7720 West Oakland Park Boulevard, Suite 323 Sunrise, Florida 33351 (fax 754-321-0936). Fax filing will**

**not be acceptable for the filing of bonds  
required by School Board Policy 3320 Part  
VI.**

6. Section 3 of the ITB states as follows at General  
Condition 36:

**POSTING OF BID RECOMMENDATIONS/TABULATIONS :**

Any person who files an action protesting an intended decision shall post with the School Board at the time of filing the formal written protest a bond payable to the School Board of Broward County Florida in an amount equal to one percent (1%) of the Board's estimate of the total volume of the contract. The School Board shall provide the estimated contract amount to the vendor within 72 hours excluding Saturdays Sundays legal holidays and other days during which the School Board administration is closed of receipt of notice of intent to protest. The estimated contract amount shall be established on the award recommendation as the "contract award amount." The estimated contract amount is not subject to protest pursuant to [section 120.57(3)]. The bond shall be conditioned upon the payment of all costs which may be adjudged against the protestant in an Administrative Hearing in which the action is brought and in any subsequent appellate court proceeding. In lieu of a bond the School Board may accept a cashier's check official bank check or money order in the amount of the bond. If after completion of the Administrative Hearing process and any appellate court proceedings the School Board prevails the School Board shall recover all costs and charges which shall be included in the Final Order or judgment including charges made by the Division of Administrative Hearings but excluding attorney's fees. Upon payment of such costs and charges by the protestant the bond shall be returned. If the protestant prevails then the protestant shall recover from the Board all costs and charges which

shall be included in the Final Order or judgment excluding attorney's fees.

7. Section 3 of the ITB states as follows at Special Condition 1:

**INTRODUCTION AND SCOPE:** The School Board of Broward County Florida (hereinafter referred to as "SBBC") desires bids on REFUSE SERVICES for solid waste removal as specified herein. Prices quoted shall include pick up at various schools departments and centers within Broward County Florida.

8. Section 4 of the ITB states as follows at Special Condition 3:

**AWARD:** In order to meet the needs of SBBC Bid shall be awarded in its entirety to one primary and one alternate responsive and responsible Bidders meeting specifications terms and conditions. The lowest Awardee shall be considered the primary vendor and should receive the largest volume of work. Therefore it is necessary to bid on every item in the group and all items (1-58) in the group must meet specifications in order to have the bid considered for award. Unit prices must be stated in the space provided on the Bid Summary Sheet. SBBC reserves the right to procure services from the alternate Awardee if:

- a) the lowest Bidder cannot comply with service requirements or specifications;
  - b) in cases of emergency;
  - c) it is in the best interest of SBBC.
- After award of this bid any Awardee who violates any specification term or condition of this bid can be found in default of its contract have its contract canceled be subject to the payment of liquidated damages and be removed from the bid list and not be eligible to do business with this School



Board for two years as described in General Conditions 22 and 55.

9. Section 4 of the ITB states as follows at Special Condition 7:

**ADDING OR DELETING SITES:** SBBC may during the term of the contract add or delete service wholly or in part at any SBBC location. When seeking to add a location SBBC shall request a quote from both Awardees. The lowest Bidder shall receive an award for the additional location. If additional service is requested for an existing site already receiving service the current service provider will be contacted to provide a new quote based on the pricing formula submitted in response to this ITB or a subsequent quote.

10. Section 4 of the ITB states as follows at Special Condition 11:

**RECEPTACLES:** The Awardee shall furnish receptacles in good repair. . . .The Awardee shall furnish any and all equipment materials supplies and all other labor and personnel necessary for the performance of its obligations under this contract. Design of all equipment is subject to the approval of the Manager Energy Conservation Utility Management or his designee and must be replaced upon notification without additional cost to SBBC.

A. **DESCRIPTION:** All receptacles used for solid waste referenced in Group 1 on the Bid Summary Sheets and the Tamarac location listed in Section 5 Additional Information unless otherwise indicated shall be provided by the Awardee at no additional cost. Bin receptacles shall be provided for SBBC use in the cubic yard capacities as indicated on the Bid Summary Sheets. Receptacles shall be bin-type units steel or plastic lift-up

lids **NO SIDE DOORS** unless specifically requested for 8 cu. yd. fitted for automatic loading on casters where necessary for chute operations. (Receptacles not on casters must have a **6" - 12" clearance** from ground to bottom of bin for easy cleaning underneath.)

**B. TWO AND THREE YARD CONTAINERS:** It will be necessary for The Awardee to supply the two (2) and three (3) yard containers to hold compacted refuse at a ratio of approximately 4:1. These containers are designed for front-end loading. **THESE UNITS ARE IDENTIFIED ON THE BID SUMMARY SHEET BY A SINGLE ASTERISK (\*) NEXT TO THE CONTAINER SIZE.**

11. Section 4 of the ITB states as follows at Special Condition 20:

**SMALL IN-HOUSE COMPACTION UNITS  
(approximately two yards):**

The following schools have in-house compaction units which will need to be provided by the Awardee. Waste is compacted at an approximate ratio of 3:1.

Collins Elementary  
Oakridge Elementary  
Sheridan Hills Elementary

12. Section 4 of the ITB states as follows at Revised Special Condition 14:

**PRICING - ALL INCLUSIVE COST GROUP 1 ITEMS 1**

**- 58:** Bidder shall submit fixed monthly costs where indicated on the Bid Summary Sheets for each location based on 4.33 weeks per month. (This number is derived by dividing 52 weeks by 12 months). Monthly costs stated shall be an all-inclusive cost for providing receptacles refuse removal and disposal including but not limited to all necessary labor services material equipment taxes tariffs franchise fees maintenance and

applicable fees. **SBBC agrees to pay the Broward County Disposal Adjustment (tipping fees) in effect at the time. Increases to this fee will be paid as assessed by Broward County. Any decreases in these rates shall be passed on to SBBC as well.**

13. No bid specification protest was filed by any person concerning the original ITB or Addendum No. 1.

14. Nine companies submitted timely responses to the ITB. Each bidder submitted a monthly bid and an annual bid. The School Board thereafter ranked the respective bids. Intervenor was the apparent low bidder with a monthly bid of \$39,576 and an annual bid of \$474,918.38. All Service was the apparent second low bidder with a monthly bid of \$40,540.90 and an annual bid of \$486,490.80. WSI was the apparent third low bidder with a monthly bid of \$47,671.71 and an annual bid of \$572,060.52. Petitioner was the apparent fourth low bidder with a monthly bid of \$50,177.73 and an annual bid of \$602,132.76.

15. On November 2, 2011, the School Board's Purchasing Department posted the agency's intended recommendation for award of the ITB. The intended decision was (A) to award to Intervenor as the primary vendor for Group 1 (1 through 58); and (B) to award to All Service as the first alternate for Group 1 (1 through 58).

16. On November 4, 2011, Petitioner timely filed its Notice of Protest with the School Board's Purchasing Department.

17. On November 14, 2011, Petitioner timely filed its Formal Bid Protest with the School Board's Purchasing Department and delivered the required bid protest bond.

18. The School Board formed a Bid Protest Committee that met with Petitioner on December 19, 2011, to consider Petitioner's formal written protest in accordance with section 120.57(3)(d)(1) and School Board Policy 3320. The parties were unable to resolve the protest by mutual agreement and the School Board sent Petitioner a notice of non-resolution of dispute.

19. Section 1 of the ITB precludes a bidder from withdrawing its bid within 90 days of its submission to the School Board. At the time of the formal hearing 106 days had passed since the submission of bids.

20. No bidder, including Intervenor, has indicated that it committed an error in calculating its prices submitted under the ITB or asked the School Board to excuse it from the prices it offered under the ITB. To the contrary, Intervenor's counsel represented at the formal hearing that Intervenor was standing by its bid.

21. Generally, compacted waste is heavier and more expensive to dispose of than non-compacted waste.

22. The ITB identifies the number and size (in cubic yards) of the receptacles to be placed at each location and the number of pick-ups per weeks to occur for each receptacle. The

ITB also informs the bidders whether a receptacle was compacted or non-compacted. If compacted the ITB set forth the ratio of compaction. Bidders were also asked to bid a monthly cost and any applicable fees charged by the facility receiving the waste to arrive at total monthly cost for each receptacle to be furnished. The bidders were required to provide a total monthly bid for the services and a total annual bid for the services. The bidders were to use the information set forth in the ITB to calculate their bids.

23. Petitioner asserts that the bids submitted by Intervenor, All Service, and WSI were not responsible bids because those bids failed to factor in the higher costs of disposing of waste that had been compacted. Petitioner contends that the reference to compaction ratios constitute specifications by the School Board to require all bidders to calculate their pricing utilizing the compaction ratios. Petitioner describes the referenced compaction ratios as "multipliers" that needed to be used by the bidders in calculating their prices for handling and disposing of compacted waste. Petitioner is seeking to impose its interpretation of the ITB as requiring each of the bidders to calculate its bid using the same pricing methodology that Petitioner employed.

24. There is no ambiguity in the ITB, and there is no factual basis to conclude that all bidders were required to

prepare their bids in the same fashion as Petitioner. There is nothing set forth in the ITB that required the School Board to interpret its reference to the compaction ratios as being a specification of a "multiplier" for pricing as opposed to a description of the capacity of the receptacles to be used at each of the school locations. At no point is the word "multiplier" used in the ITB to specify that the bidders were required to engage in mathematics involving multiplying their prices against some unit price the bidders were specifying in their bids.

25. The ITB specifies the frequency with which the varying container sizes needed to be picked up at each of the 58 schools with the weight or volume of the container not being a factor in setting the specification of how often the container is to be picked up by the awardee. No adjustments were to be made to the prices paid by the School Board based on the weight of the container when removed. The School Board did not specify in the ITB that a bidder was required to charge the same monthly cost at each school for a similarly-sized refuse container nor did the School Board require different pricing for compacted waste as compared to non-compacted waste.

26. Petitioner's assertion that the bidders were required to use those ratios as a multiplier when bidding on the cost of disposing of compacted waste is rejected as being contrary to

the plain language of the ITB. The compaction ratios were provided to the bidders as information only. There is no requirement that a bidder use a particular methodology in determining its bid amounts.

#### CONCLUSIONS OF LAW

27. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3).

28. This is a de novo proceeding. The First District Court of Appeal has construed the term "de novo proceeding" as used in section 120.57(3)(f) to "describe a form of intra-agency review. The judge may receive evidence as with any formal hearing under section 120.57(1) but the object of the proceeding is to evaluate the action taken by the agency." See State Contracting and Eng'g Corp. v. Dep't of Transp. 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

29. 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, 709 So. 2d at 609.

Petitioner must sustain its burden of proof by a preponderance of the evidence. See Fla. Dep't of Transp. v. J.W.C. Co. Inc. 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

30. 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.

31. 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.

32. 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.

33. 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.

34. 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.

35. Petitioner contends that the three bidders that submitted bids lower than its bid were not "responsible" or "responsive" bidders. Section 287.012(24) defines "responsible vendor" to mean a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance." Section 287.012(25) defines a "responsive bid" to mean a bid submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation. As will be discussed below Petitioner failed to prove that any of the three apparent low bidders was not a "responsible" or was not a "responsive" bidder.

36. The School Board has determined that the bids submitted by Intervenor, All Service, and WSI were responsive and responsible. Petitioner has failed to prove by a preponderance of the evidence that the School Board acted fraudulently,

arbitrarily, illegally, or dishonestly in determining that Intervenor, All Service, and WSI had submitted responsive and responsible bids. Consequently, Petitioner's challenge to the responsiveness and responsibility of those bids should be rejected.

37. An agency has wide discretion in soliciting and accepting bids and its decision if based on an honest exercise of this discretion will not be overturned even if reasonable persons may disagree with the outcome. See: C.H. Barco Contracting Co. v. State Dep't of Transp., 483 So. 2d 796 800 (Fla. 1st DCA 1986); Liberty Cnty. v. Baxter's Asphalt & Concrete Inc., 421 So.2d 505 507 (Fla. 1982). The School Board's determination that the challenged bids were responsive and responsible was well within its discretion.

38. Petitioner seeks relief in the alternative. If Petitioner is not awarded the contract Petitioner asks that all bids be rejected. Both requests for relief should be denied. A public agency may not arbitrarily or capriciously reject responsive bids. See Dep't of Transp. v. Grove-Watkins Constr. 530 So. 2d 912, 914 (Fla. 1988). The agency soliciting bids must have a rational basis for rejecting responsive bids. To permit the soliciting agency to arbitrarily reject responsive bids would undermine and eventually destroy the integrity of the competitive bid process.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law it is

RECOMMENDED that the School Board of Broward County Florida enter a Final Order that adopts the findings of fact and conclusions of law contained herein, dismisses the protest filed by Petitioner Ace Waste Services LLC, and upholds the award of the procurement to Choice as primary awardee and to All Service as alternate awardee.

DONE AND ENTERED this 20th day of March 2012, in Tallahassee Leon County Florida.



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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of March 2012.

ENDNOTE

<sup>1/</sup> The Pre-Hearing Stipulation filed by the parties contains verbatim quotes from the ITB. The emphasis contained in each quote set forth below as a Finding of Fact is in the original.

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.