

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LABCORP, )  
)  
Petitioner, )  
)  
vs. )  
)  
DEPARTMENT OF HEALTH, ) Case No. 12-0846BID  
)  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On April 3, 2012, a duly-noticed hearing was held in Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert Raymond Hearn, Esquire  
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Tampa, Florida 33602

For Respondent: Janine Bamping Myrick, Esquire  
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Department of Health  
Bin A02  
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STATEMENT OF THE ISSUE

Whether Respondent's action to reject all bids submitted in response to ITB DOH 11-004, relating to a multi-year contract to provide laboratory services to state and local government

agencies in the State of Florida, is illegal or arbitrary, as alleged in the Petition.

PRELIMINARY STATEMENT

On December 20, 2011, Respondent Department of Health (Department) advertised an Invitation to Bid to solicit competitive bids for the award of a three-year contract to provide clinical laboratory services to Florida's 67 county health departments. On January 20, 2012, the Department announced its intent to award the contract to Laboratory Corporation of America (LabCorp). The next-lowest bidder, Quest Diagnostics (Quest), served the Department with a notice of its intent to protest the decision to award the contract to LabCorp on January 20, 2012, and filed a formal bid protest on February 6, 2012.

On February 14, 2012, the Department noticed its intent to reject all bids and to re-solicit bids for the relevant contract at a later date. Petitioner LabCorp then filed a Notice of Protest of Respondent's decision to reject all bids on February 16, 2012, and filed its formal bid protest on February 24, 2012. On March 6, 2012, Petitioner's bid protest was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

Hearing was set for April 2, 2012, and in response to an unopposed Motion for Continuance of one day, was moved to April 3, 2012. At hearing, Joint Exhibits A through X were admitted into evidence, including a detailed stipulation. Four witnesses testified, all employees of the Department of Health. Ms. Susan Renee Gregory, Dr. Max Salfinger, and Ms. Cheryl Robinson were called by both Petitioner and Respondent; Ms. Sandra Bailey was called by Respondent.

The one-volume Transcript of the proceedings was filed with the Division on April 8, 2012.

#### FINDINGS OF FACT

1. Respondent Department of Health is an agency of the State of Florida that requires a broad range of clinical laboratory testing services for the diagnosis, treatment, or monitoring of diseases, illnesses, and hazards to human health.

2. Petitioner LabCorp is a for-profit corporation providing nationwide laboratory testing services. It is authorized to conduct business and operates in the State of Florida.

3. On December 20, 2011, Respondent advertised an Invitation to Bid (ITB) to solicit competitive bids for the award of a three-year statewide contract to provide clinical laboratory services to the Department of Health, primarily through its county health departments. Petitioner is the

incumbent contractor, and has been providing Respondent with services substantially similar to those solicited in the ITB since 2005.

4. In the ITB, the contract was estimated to require approximately 861,000 tests annually and to produce approximately \$9,300,000 in annual sales. In fiscal year (FY) 2010-11, the total amount received under the existing contract was \$9,320,522.

5. A Special Condition of the ITB, Section 6.10, entitled "Basis of Award," provided:

The Department anticipates making a single or multiple Contractor awards based on services provided. Any award shall be based on the rates for service requested herein. The determination shall be based on a comparative analysis of submitted bids and existing pricing. The Department reserves the right to award to either a single or multiple Contractors to meet the needs and to serve the State of Florida's best interest.

Bids shall be evaluated on the price submitted and whether the requirements of the bid are met the multiple awards may be allowed if the bids are within 10% of the lowest bid for the services.

The Department reserves the right to make awards as determined to be in the best interest of the State of Florida, and to accept or reject any and all offers, or separable portions, and to waive any minor irregularity, technicality, or omission if the Department determines that doing so will serve the State of Florida's best interest.

Bid price shall include all necessary supplies and equipment to allow proper collection, preparation, and transportation of specimens and meet all specifications and conditions. All cost for transportation for pick-up/delivery must be included in the unit cost per test.

6. Attachment I to the ITB, entitled "Specifications of Clinical Laboratory Services" included at page 21:

Staffing Levels

Each prospective offeror shall include their proposed staffing for technical, administrative, and clerical support. A Contract Representative, Quality Control Manager, Staff Pathologist, Project Manager, Technical Support Manager, Technical Support Staff and statewide field representatives shall be required. The offeror is encouraged to provide on an as needed basis, as an option to the contract, an on-site Phlebotomist. The successful offeror shall maintain an adequate administrative organizational structure and support staff sufficient to discharge its contractual responsibilities. In the event the Department determines that the successful offeror's staffing levels do not conform to those promised in the proposal, it shall advise the successful offeror in writing and the successful offeror shall have 30 days to remedy the identified staffing deficiencies. The successful offeror shall replace any employee whose continued presence would be detrimental to the success of the project as determined by the Department with an employee of equal or superior qualifications. The Department's contract manager will exercise exclusive judgment in this matter.

7. Attachment III, entitled the "Bid Price Page," consisted of five pages. Following a certification page, it contained three and one-half pages listing 119 "core tests" in a table format. The table contained columns filled with information as to the "CPT Codes," the laboratory test name, and the estimated quantity of that test, as well as two columns labeled "Price per Test" and "Extended Price" which contained no information, only blank squares. The blank columns allowed a bidder to fill in the price of the test, and then multiply that value times the estimated quantity of that test that had been provided by the Department to determine the Extended Price. On the bottom half of the final page was a notation of "Grand Total" with an empty square underneath the Extended Price column, to allow a bidder to compute the Grand Total by adding together all of the Extended Prices. Below the term Grand Total were additional notations. There was the phrase "Balance of Line Tests" followed by "Minimum fixed volume discount off current published price list for balance of tests/non-core tests:" In the same row as this phrase, in the empty square of the Extended Price column, was a percentage sign, allowing a bidder to enter a percentage in that space. Below this, there was a phrase, "Phlebotomy Services:" followed by "\$\_\_\_\_\_ HOURLY RATE" in the same row in the empty square of the Extended Price column.

8. The price of a particular test as entered in the Price per Test column only applied to instances in which the Department itself would pay for the test, if a third-party payer was involved, they would pay their customary rate.

9. The Basis of Award as published omitted a sentence from the second paragraph which the Department had intended to include. The sentence "Single award will be made to the responsive, responsible bidder offering the lowest grand total for the core tests on attachment III" was supposed to be inserted, but was not.

10. Neither Quest nor any other bidder filed a notice of protest to the terms, conditions, or specifications contained in the solicitation, including the Basis of Award provision or the Bid Price Page, within 72 hours of the posting of the solicitation.

11. As provided in the ITB, on January 3, 2012, Quest submitted questions to the Department to be answered prior to bidding, which the Department answered in writing on January 6, 2012. Relevant questions and answers read as follows:

Q1) The third party payer bill mix percentages for major payer groups (Medicare, Medicaid, Private Insurance, Capitation, Patient, Client bill and other) so contractor can confirm and evaluate the payers with whom we will need to process claims.

A: STATEWIDE PERCENTAGES UNKNOWN SINCE IT IS HANDLED BY CURRENT VENDOR. HOWEVER, THE MAJOR PAYER GROUPS ARE MEDICARE AND MEDICAID.

Q2) A list of Private Insurance payers so contractor can verify certification with those payers.

A: VARIOUS INSURANCE PAYERS, WILL NEED TO DETERMINE AFTER THE BID IS AWARDED.

\* \* \*

Q4) The Department's annual spend on send-out testing for the each of the past five years.

A:	<u>FISCAL YEAR</u>	<u>DEPARTMENT</u>	<u>DEPARTMENT/THIRD PARTY</u>
	FY 10/11	\$4,680,833.00	\$9,320,522.00
	FY 0910	\$4,401,298.00	\$9,471,529.00
	FY 08/09	\$3,897,406.00	NOT AVAILABLE
	FY 07/08	\$5,376,868.00	NOT AVAILABLE
	FY 06/07	\$5,565,934.00	NOT AVAILABLE

12. As the manager for the laboratory services contract, Ms. Cheryl Robinson prepared or gave the responses to both the written pre-bid questions and subsequent verbal questions posed at the pre-bid conference on behalf of the Department.

13. The Department's written answer to question 1 was not completely responsive. Quest had asked for bill mix percentages for the major third-party payers. The Department stated that statewide percentages were unknown. As it turned out later, the Department did have historical information as to percentages from fiscal year 2009-2010, information that was a bit dated, but Ms. Robinson did not realize this when she responded.



However, the Department did note in its response that the major payer groups were Medicare and Medicaid, which, based on historical data, the Department anticipated would continue to be the major third-party payers. While this response did not indicate what percentage either of these two third-party payers constituted, it did indicate that these were the two largest.

14. The Department's answer to question 2 was, in one sense, a technically accurate response to an ambiguous question. The question asks for a list of Private Insurance payers. As the answer noted, until after the contract was awarded, and individuals began utilizing laboratory services under it, it would be impossible to know what private insurance providers would be involved prospectively. This answer provided no useful information. The question did not explicitly ask for a list of historic private insurance payers under the existing contract, though it this was the information actually sought by Quest, which the Department should have realized.

15. The Department's answer to question 3 was completely responsive. It provided exact figures for the amounts of money spent by the Department under the contract for the previous 5 years. In fact, it also provided additional information not actually requested -- specifically, the total amount of money spent by the Department and third parties combined for each of the previous two fiscal years.

16. At the pre-bid conference for the ITB, conducted on January 6, 2012, vendors verbally posed questions to the Department, to which the Department verbally responded. Quest asked, in essence, "Is it possible to get a breakdown of the third-party payers from LabCorp?" The Department responded, in substance, "No, it is not possible at this time, but the answer to Q&A #4 should help you determine what the Department and third-party spend is under the contract." Since Quest was asking for information from LabCorp, it again was requesting historical information, not future projections, as the Department understood.

17. The question posed by Quest at the pre-bid conference was similar to its earlier question regarding bill mix percentages for the major third-party payers. Again, the Department did actually have some historical information responsive to the question at the time it was asked, but Ms. Robinson was not aware of that.

18. The Bureau of Laboratories of the Department of Health was the program office and was responsible for making the determination as to which bidder would be awarded the contract. Dr. Max Salfinger is the Bureau Chief of the Bureau of Laboratories, Florida Department of Health.

19. Neither Quest nor LabCorp had any information as to the pricing methodology that the Department would apply in assessing bids submitted in response to the ITB that was different from, or in addition to, that set forth in the Basis of Award and the Bid Price Page of the ITB.

20. On January 18, 2012, both Quest and LabCorp submitted bids that the Department accepted as responsive to the ITB.

21. LabCorp's bid package did not include the required staffing plan.

22. The Department applied the same pricing methodology when assessing both Quest and LabCorp's bids.

23. After reviewing both Quest and LabCorp's bids, the Department determined that LabCorp was the low bidder.

24. The bid tabulation sheet dated January 20, 2012, only shows the "Grand Total" values submitted by the bidders. It lists three bidders, one of whom, CentreWell, has a notation indicating that it was "non-responsive - did not attend pre-bid conference." The bid tabulation sheet does not indicate any figures for volume discount pricing for the Balance of Line tests. It does not contain any reference to an hourly rate for phlebotomy services. The bid tabulation compared only the "Grand Total" amounts, reflecting the total of the bids to provide the 119 core tests.

25. The Grand Total of LabCorp's bid was \$6,235,265.99.

26. The Grand Total of Quest's bid was \$7,922,533.36.

27. On January 20, 2012, the Department announced its intent to award the contract subject to the ITB to LabCorp.

28. On January 25, 2012, Quest served the Department with a notice of intent to protest the Department's decision to award the contract to LabCorp.

29. On January 26, 2012, Quest served the Department with a public records request seeking 19 categories of information relating to the ITB and the then-existing laboratory services contract between the Department and LabCorp. Quest's January 26, 2012 public records request sought more information from the Department than the pre-bid questions that it had asked the Department.

30. Between approximately January 26, 2012, and February 2, 2012, the Department provided documents to Quest that were responsive to Quest's public records request.

31. One of the documents the Department provided to Quest in response to its public records request was LabCorp's complete bid submitted in response to the ITB, which included the test-specific pricing that LabCorp had offered to the Department.

32. Another document the Department provided to Quest in response to its public records request was a lengthy electronic Excel spreadsheet document. Ms. Robinson located the Excel document in an archive folder, using the computer system to

which she has routine access, only after looking for more than a day.

33. The Excel document was not a regular utilization report received from LabCorp, but had been received by the Department on August 10, 2010, as part of a submission from LabCorp in support of a proposed price increase. It contained detailed records of specific payments from various third-party payers under the contract for FY 2009-2010 and consisted of some 698 pages when printed out. It also contained a summary of these individual payments, both in actual dollar amounts paid and as percentages, for major payer groups (Medicare, Medicaid, and Private Insurance, for example) on a month-by-month basis. The payers identified in the Excel Document did not necessarily reflect all the same payers that would be responsible for the reimbursement of tests ordered pursuant to the contract that would be awarded under the ITB. It was only historical data, and not even the most recent historical data. However, the historic information it contained was responsive to Quest's first written pre-bid question and its first question at the pre-bid conference.

34. Ms. Robinson immediately turned the Excel document over to the Office of the General Counsel because she had not recalled having it, and was concerned that the information should have been given to Quest in response to its pre-bid

questions. The Excel document was the only document or written record in the Department's possession, custody, or control at the time Quest submitted its pre-bid questions which the Department believes should have been, but was not, produced in response to those requests. Ms. Robinson testified that she would have given it to Quest when the questions were asked if she had been aware of it at that time. Any failure of the Department to provide Quest with public records responsive to its pre-bid questions was unintentional.

35. All public records provided to Quest were simultaneously provided, as requested, to LabCorp.

36. On February 6, 2012, Quest served the Department with a formal Bid Protest claiming, among other things: that LabCorp's bid was non-responsive because it did not include a staffing plan; that the Department violated the public records law by failing to produce certain documents, including the Excel Document, in response to its pre-bid questions; and that the Department's pricing evaluation was inconsistent with the terms of the ITB.

37. LabCorp sought and was granted permission to intervene in Quest's Bid Protest proceeding.

38. On or about February 10, 2012, the Department held a meeting to consider the options available to it in responding to the Quest bid protest. This was the only meeting at which it

discussed whether to reject all bids submitted in response to the ITB. Dr. Max Salfinger, Ms. Jodi Bailey, Ms. Renee Gregory, as well as Ms. Jan Myrick and some staff from the Office of the General Counsel attended the meeting. Prior to the meeting, Dr. Salfinger reviewed Quest's bid protest, and reviewed some documents relating to the drafts of the ITB before it was posted. In addition, Dr. Salfinger was generally familiar with the utilization data under the current contract.

39. As Ms. Gregory later testified, the problems that had been raised by Quest in its Bid Protest were discussed at the meeting. The Department considered: LabCorp's failure to include a staffing plan; core pricing v. balance of line, and failure to comply with a public records request.

40. At hearing, there was no testimony regarding LabCorp's failure to submit a staffing plan and it is clear that this issue played little, if any, role in the Department's decision to reject all bids.

41. The failure of the Department to provide the Excel document in response to Quest's pre-bid requests for third-party payer bill mix percentages for the major payer groups was also discussed. The fact that the Department might have violated the public records law was of great concern. The Department concluded that there may have been a violation of the public records law, and that the Department failed to provide all of

the information Quest had asked for in its pre-bid questions. Dr. Salfinger did not personally review the Excel document. Dr. Salfinger did not personally consider whether or not the Excel Document should have been given to Quest in response to its pre-bid request, and there was no discussion about whether or not the Department's failure to provide it made the competition more difficult for Quest.

42. Prior to rejecting all bids, the Department made no effort to determine whether the information provided in response to Quest's public records request dated January 26, 2012, would have had any impact on Quest's ability to submit a competitive bid in response to the ITB had that information been provided earlier, in response to the pre-bid questions.

43. A failure, or perceived failure, to comply with the public records law is a collateral issue. A violation of the public records law, or concern that the Department might suffer legal consequences for that violation, could only provide a rational basis to support a decision regarding the solicitation to the extent it was relevant to the solicitation. Documents that were not provided in response to pre-bid questions might be relevant to the solicitation whether or not there was a violation of the public records law.



44. A failure to provide documents to Quest could be rationally related to the solicitation only if the failure was rationally related to Quest's ability to submit a competitive bid.

45. A failure to even consider whether there is any rational connection between facts that are found and the choice that is then made is illogical and arbitrary.

46. Had Respondent considered no other factors relevant to the solicitation, but decided to reject all bids solely because of its failure to provide documents to Quest, without even considering if that failure was rationally connected to the solicitation, the decision would have been arbitrary.

47. The "quality" of the ITB, specifically including the missing sentence in the Basis of Award and the ambiguity in the Bid Price Page, was another topic discussed at the meeting. The Department made no effort to determine whether, or to what degree, the Balance of Line testing prices that Quest and LabCorp offered in their respective bids would have affected the total cost of their respective bids. Analysis of legal counsel indicated that the Department had failed to post a high quality bid document that clearly explained the criteria that would be used in awarding the contract. Prior to the meeting, Dr. Salfinger had reviewed documents relating to the drafts of the ITB before it was published, and he also relied upon legal

counsel's analysis. Dr. Salfinger was aware that what he considered to be the "major sentence" in the Basis of Award provision had been inadvertently omitted. He had concern with "the overall message we [were] sending" in the solicitation.

48. The language in the Basis of Award and the structure of the Bid Price Page made it unclear that the Department intended to award a single contract solely on the basis of the grand total bid for providing the core tests and would not be awarding separate contracts for individual core tests. While there was language in other portions of the ITB that suggested that only a single contract would be awarded, taken as a whole the ITB was not entirely clear on this point because of the omitted sentence. The ITB similarly was unclear as to how the percentage discount for Balance of Line tests or the hourly rate for phlebotomy services would be considered in the award of the contract, if at all.

49. There was no discussion as to whether the alleged flaws in the ITB had actually harmed Quest's ability to provide a competitive bid.

50. However, a reasonable person could conclude that the language in the Basis of Award and the structure of the Bid Price Page could have been a source of confusion to potential bidders even if it did not affect the bids of either LabCorp or Quest. Potential bidders may not have bid due to these

uncertainties, which could have affected the solicitation. Petitioner did not prove that these factors were not considered by the Department.

51. During the meeting, there was some discussion about whether the Department should reject all bids. There was no discussion regarding whether LabCorp would be harmed in any re-solicitation if all bids were rejected. There was no discussion as to what the impact on competition generally would be in any re-solicitation. Dr. Salfinger made the decision to reject all bids.

52. The Department did not act arbitrarily in its decision to reject all bids.

53. As stipulated, Respondent did not act dishonestly or fraudulently in rejecting all bids in response to the ITB. Aside from its contentions that Respondent acted arbitrarily, Petitioner did not allege that the Department's action in rejecting all bids was otherwise illegal, and Petitioner provided no evidence indicating that it was.

54. LabCorp would likely be harmed in any re-solicitation of bids relative to its position in the first ITB, because potential competitors would have detailed information about LabCorp's earlier bid that was unavailable to them during the first ITB.

55. The State of Florida would likely benefit in any re-solicitation of bids, because all new bidders would be aware of the bids that were submitted in response to the first ITB, and would probably try to lower their bids from these levels to improve their chances of being awarded the contract.

56. On February 13, 2012, the Department, as required by section 120.57(3)(d), Florida Statutes, convened a meeting of the parties to the Quest Bid Protest proceeding.

57. At the beginning of the meeting of the parties, Department counsel announced the Department intended to reject all bids unless Quest and LabCorp could reach a voluntary, amicable resolution of the issues raised by Quest.

58. At the meeting of the parties, counsel for LabCorp expressed concerns over the possibility of the Department rejecting all bids due to the unduly prejudicial effect of the disclosure of LabCorp's pricing on its ability to compete in any future re-solicitation of bids for the contract.

59. At the same meeting, LabCorp's counsel also expressed concern that Quest's Bid Protest had raised non-meritorious arguments hoping that the Department would reject LabCorp's bid or would reject all bids.

60. In the absence of an agreed-upon resolution of Quest's bid protest between Quest and LabCorp, on February 14, 2012, the Department noticed its intent to reject all bids and to

re-solicit bids for the relevant contract at a later date. Quest's protest, which remained pending, had not been referred to DOAH for a formal hearing.

61. As the bidder initially notified that it would be awarded the contract, Petitioner's substantial interests were affected by the Department's subsequent decision to reject all bids.

62. On February 16, 2012, LabCorp filed a Notice of Protest of the Department's decision to reject all bids, and filed its formal Bid Protest on February 24, 2012.

#### CONCLUSIONS OF LAW

63. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in this case under sections 120.569 and 120.57(1), Florida Statutes.

64. LabCorp's Bid Protest was timely filed, and Petitioner has otherwise complied with all rules and laws relating to the filing of its Bid Protest, including the timely posting of a protest bond in the appropriate form and amount.

65. Petitioner demonstrated standing and entitlement to hearing on Respondent's decision to reject all bids. LabCorp had been initially notified that it would be awarded the contract, and its substantial interests were affected by the Department's subsequent change of action.

66. LabCorp bears the burden of proof, which rests with the party protesting the proposed agency action.

§ 120.57(3) (f); State Contracting and Eng. Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

67. In a proceeding brought to protest the intended rejection of all competitive proposals, the applicable standard of review is that developed in Dep't of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 914 (Fla. 1988), a case in which the Florida Supreme Court held that the administrative law judge's "responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally or dishonestly." The statute was subsequently amended to reflect that this was the applicable standard when an agency rejects all bids.

§ 120.57(3) (f).

68. This is a stringent burden. As the First District has stated, "an agency's rejection of all bids must stand, absent a showing that the 'purpose or effect of the rejection is to defeat the object and integrity of competitive bidding.'" Gulf Real Props., Inc. v. Dep't of Health and Rehab. Servs., 687 So. 2d 1336, 1338 (Fla. 1st DCA 1997).

69. The parties here have stipulated that the Department did not act fraudulently or dishonestly, leaving only the question of whether the Department's intended decision is illegal or arbitrary.

70. Petitioner did not allege that the Department's action in rejecting all bids was illegal, apart from its contention that Respondent's action in rejecting all bids was arbitrary, and did not prove it was otherwise illegal.

71. An arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chem. Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

72. Where an agency, in deciding to reject all replies, has engaged in an honest, lawful, and rational exercise of its "wide discretion in soliciting and accepting bids for public improvements" its decision will not be overturned, even if it may appear erroneous and even if reasonable persons may disagree. Dep't of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988) (quoting from Liberty Co. v. Baxter's Asphalt and Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982)).

73. An agency's discretion to reject all bids is not unbridled, however. In applying the "arbitrary or capricious" standard of review, it must be determined whether the agency has: (1) considered all the relevant factors; (2) given actual, good faith consideration to those factors; and (3) used reason rather than whim to progress from consideration of each of these factors to its final decision. Adam Smith Enterprises, Inc. v. State Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

74. Petitioner demonstrated that Respondent's decision to reject all bids was not based on any factors other than: LabCorp's failure to submit a staffing plan; the failure of the Department to provide information to Quest in response to its pre-bid questions; and perceived flaws in the Basis of Award and Bid Price Page of the ITB. Petitioner can prove the Department's action arbitrary only if it proves that these factors were irrelevant, that good faith consideration was not given to them, or that the Department did not use reason in progressing from these factors to its decision.

Lack of Staffing Plan

75. Although Quest's assertion that LabCorp's bid was not responsive because it failed to include the required staffing plan was discussed at the Department's meeting, scant evidence was introduced regarding this factor.

76. Had Petitioner proved that the omission in its bid package was a minor irregularity, and that the Department relied upon this minor irregularity as its sole reason for rejecting all bids, it might have proved that the Department's decision was arbitrary. Cf. Overstreet Paving Co. v. Dep't of Transp., 608 So. 2d 851 (Fla. 2d DCA 1992) (no public benefit derives from rejecting low bidder for technical deficiency in the absence of unfair competitive advantage). However, Petitioner only presented evidence that the Department discussed Quest's



allegation. There was no testimony or other evidence that the omission was a minor irregularity. There was no evidence that a minor irregularity was irrelevant to the decision to reject all bids. There was no testimony or other evidence that the absence of a staffing plan formed even a partial basis of the Department's decision. There was, in fact, evidence that the Department's decision was based on other factors.

#### Pre-Bid Questions and Public Records

77. Testimony indicated that Respondent's action in rejecting all bids was predicated in significant part upon its conclusion that it may have violated Florida's public records law, chapter 119, Florida Statutes. Section 119.10 provides for penalties against public officers who violate its provisions.

78. The fact that records were requested as part of a public procurement process would not shield an agency from compliance with the public records law. The motivation of a requester or the intended use of the public records is immaterial to the agency's obligation to produce the records. Microdecisions, Inc. v. Skinner, 889 So. 2d 871, 875 (Fla. 2d DCA 2004).

79. Assuming that Respondent's failure to provide the Excel document in response to Quest's pre-bid questions was in fact a violation of the public records law,<sup>1/</sup> it by no means follows that this alone would provide a basis for the rejection

of all bids. It would be arbitrary to reject all bids because of a public records law violation if that violation did not affect the solicitation in any way. Unlike a failure to follow the noticing requirements of Florida's Sunshine Law, which may itself render government action taken at those meetings void,<sup>2/</sup> violations of the public records law have no such direct effect on the validity of government action. It would similarly be arbitrary to reject all bids simply in an effort to avoid litigation on the public records violation. Cf. Couch Const. Co. v. Dep't of Transp., 361 So. 2d 172, 175 (Fla. 1st DCA 1978).

80. However, regardless of whether or not the failure to provide the Excel document was a violation of either the public records law or of Department policy regarding its responses to pre-bid questions generally, if the Department, in an honest exercise of its discretion, could reasonably have concluded that the failure to provide the information did affect the solicitation, its rejection of all bids must stand. A decision that failure to provide the requested information affected the solicitation should not be second-guessed, or overturned simply because other reasonable and well-informed persons might have reached a contrary result. Scientific Games, Inc. v. Dittler Bros., Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991).

81. The Department concluded that there may have been a violation of the public records law, and that the Department had failed to provide all of the information Quest had asked for in its pre-bid questions. The issue, then, is whether the Department subsequently used reason to arrive at its conclusion that these Department failures had affected the solicitation process, so that all bids should be rejected. It is Petitioner's burden to prove that such reasoned consideration did not take place.

82. Petitioner met that burden by proving that prior to rejecting all bids, Respondent made no effort to determine whether its failure to provide Quest the Excel document prior to bid submission would have any effect on Quest's ability to submit a competitive bid. Had the Department given good faith consideration to this, and then reasonably concluded that its failure did have some impact on the solicitation, even if others might disagree, its decision would not be arbitrary. However, Respondent's failure to even determine whether there was any rational connection between the facts it found and the conclusion it reached was illogical and arbitrary.

83. Respondent's action in rejecting all bids would be arbitrary if it had been based solely on the conclusion that there had been a violation of the public records law or of Department policies without even considering if such violations

had any effect on the solicitation. The Department also based its decision on another factor, however.

Basis of Award and Bid Price Page

84. Another concern of the Department, which appeared to be secondary in nature, concerned the specifications of the ITB. The evidence showed that at the time the decision to reject all bids was made, the Department was aware that a critical sentence had been left out of the Basis of Award provision and that the Bid Price Page may have been confusing.

85. While Petitioner proved that the Department made no effort to determine whether, or to what degree, the "Balance of Line" testing prices Quest and LabCorp offered in their respective bids would have affected the total cost of their respective bids, this was not sufficient to prove that the decision to reject all bids based upon the flawed solicitation was arbitrary.

86. Even had Petitioner proved more broadly that Respondent had made no effort to determine whether any aspect of the flawed ITB could have affected the bids of either LabCorp or Quest in any way, the flaws in the ITB might have had the effect of discouraging other bidders. The Department might therefore reasonably have concluded that the errors in the Basis of Award and lack of clarity in the Bid Price Page did not accurately convey the award criteria to potential bidders.

87. The fact that neither Quest nor any other bidder timely filed a notice of protest to the terms, conditions, or specifications contained in the solicitation meant that bidders waived protest on this ground.<sup>3/</sup> Consultech of Jacksonville v. Dep't of Health, 876 So. 2d 731, 734 (Fla. 1st DCA 2004). The fact that bidders may have waived their right to protest the specifications does not itself preclude Department action to reject all bids on the ground that the ITB was flawed.

88. The Department generally considered the effect of the flaws in the ITB on the solicitation. Dr. Salfinger reviewed documents showing earlier drafts of the ITB as it read before it was published. He relied upon legal counsel's analysis in concluding that the Department failed to post a high-quality bid document. He was aware that what he considered to be the "major sentence" in the Basis of Award provision had been inadvertently omitted. Dr. Salfinger had concern with "the overall message we [were] sending" in the solicitation. That message was sent to all potential bidders, not simply to LabCorp and Quest.

89. Caber Systems, Inc. v. Dep't of Gen. Servs., 530 So. 2d 325 (Fla. 1st DCA 1988), is similar to the instant case in several respects. In that case, as here, the agency decided to reject all bids after a disappointed bidder had protested the intended awards. In Caber, too, the agency had determined that the invitation to bid was flawed and did not clearly reflect the

agency's award criteria only after the original protests were filed. The court held that the agency's rejection of all bids based upon the inherent ambiguity of the ITB was founded on a rational basis and could not be characterized as arbitrary or capricious.

90. The decision to reject all bids after a notice of award has already been announced and bids have been made public harms the bidder who would otherwise have received the contract.<sup>4/</sup> However, the authority for a public agency to do so, unless it acts in an arbitrary fashion, was established in Caber, supra.

91. Rejection of all bids solely on the basis that there could be a benefit to the State of Florida in the form of lower bids in a re-solicitation would defeat the object and integrity of competitive bidding, and would be arbitrary. Although there was some evidence that the Department may have considered possible benefits to the public, there was no evidence that this constituted the sole reason.

92. Petitioner has not met its burden to show that the rejection of all bids is illegal, arbitrary, dishonest, or fraudulent.

RECOMMENDATION

Upon consideration of the above findings of fact and conclusions of law, it is

RECOMMENDED:

That the Department of Health enter a final order finding that the rejection of all bids submitted in response to ITB DOH 11-004 was not illegal, arbitrary, dishonest, or fraudulent, and dismissing LabCorp's protest.

DONE AND ENTERED this 7th day of May, 2012, in Tallahassee, Leon County, Florida.

*F. Scott Boyd*

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 7th day of May, 2012.

ENDNOTES

<sup>1/</sup> Although there was testimony that the Department treats pre-bid questions that can be responded to with documents as public records requests, it is not entirely clear that this is always required by the public records law. While any request for documents or records should be liberally construed, chapter 119 does not impose any statutory duty on an agency to simply "correspond" with a questioner in response to inquiries or requests for information unless they constitute requests for

documents or records. See Wootton v. Cook, 590 So. 2d 1039 (Fla. 1st DCA 1991); Op. Atty. Gen. Fla. 80-57 (1980). As discussed in the text, this is not an issue that must be decided here.

<sup>2/</sup> Silver Express Co. v. Dist. Bd. of Trustees of Miami-Dade Comm. College, 691 So. 2d 1099 (Fla. 3rd DCA 1997) (granting injunction to prohibit the award of a two-year contract based upon the College's violation of section 286.011 in the procurement process).

<sup>3/</sup> Quest's protest had not alleged any deficiency in the bid specifications, but had instead alleged that the Department did not follow the basis of award in evaluating the bids.

<sup>4/</sup> The Legislature has determined that in general it is good public policy to continue to exempt bids submitted to an agency from the public records law when an agency rejects all bids and announces an intention to reissue a competitive solicitation. See sec. 119.071(1)(b)3., Fla. Stat. But when an agency first announces an award, and only afterwards announces a rejection of all bids, the bids have already become public under (1)(b)2., and the "extension" of the exemption is ineffectual.

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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.