

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

VAASTU DESIGN ENGG AND )  
CONSTRUCTION SERVICES, INC., )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 13-0414BID  
 )  
DEPARTMENT OF AGRICULTURE AND )  
CONSUMER SERVICES, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on February 27, 2013, in Tallahassee, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stephen M. Donelan, Esquire  
Florida Department of Agriculture  
And Consumer Services  
Room 509, Mayo Building  
407 South Calhoun Street  
Tallahassee, Florida 32399

For Respondent: Sanjeev Mangoli  
VAASTU Design Engineering  
and Construction Services, Inc.  
Post Office Box 222155  
West Palm Beach, Florida 33422

STATEMENT OF THE ISSUE

Whether Respondent's intention to award the contract arising out of Invitation to Bid 12/13-44 (the ITB) to Paragon Construction is contrary to Respondent's governing statutes, Respondent's rules on policies, or the ITB specifications.

PRELIMINARY STATEMENT

On November 16, 2012, the Department of Agriculture and Consumer Services (the Department or the Agency) posted the ITB for demolition and renovation at the Pompano State Farmers' Market. The Solicitation Tabulation Sheet (the tabulation sheet), showing the Department's intention to award a contract to Paragon Construction, was posted on January 7, 2013. Petitioner timely filed a Petition challenging the Agency's intended decision, alleging that the intention to award the bid to Paragon Construction was erroneous because it violated the terms and conditions specified in the ITB in that late bids were opened, and was in violation of section 255.0525, Florida Statutes. The Petition was forwarded to the Division of Administrative Hearings on or about January 28, 2013. A Notice of Hearing was issued on January 29, 2013, scheduling the final hearing for February 27, 2013. The hearing was held as scheduled.

The parties filed a Joint Pre-hearing Stipulation. The parties stipulated to the admission of Joint Exhibits numbered 1 through 12. At hearing, Petitioner and Respondent presented the testimony of Christie Hutchinson and Tina Peacock.

A transcript was not ordered or filed. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order. All citations are to Florida Statutes (2012) unless otherwise indicated.

## FINDINGS OF FACT

### Stipulated Facts

1. On November 16, 2012, the Department posted its ITB for demolition and renovation at the Pompano State Farmers Market.

2. The ITB specified that bids were to be submitted to the Respondent at 407 South Calhoun Street, Mayo Building, Room SB-8, Tallahassee, Florida.

3. The bid opening for the ITB was scheduled for 2:00 p.m. on December 21, 2012.

4. Petitioner's response was received by the Department on December 21, 2012, at 11:07 a.m.

5. Three other responses, from Bi-Tech Construction, Inc., JW Anthony Builders, Inc., and Eagle Enterprises, were received by Respondent prior to 2:00 p.m. on December 21, 2012.

6. Five responses, from Paragon Construction, West Construction, State Contracting and Engineering Corporation, Real Concepts, and Anzco, Inc., were delivered by FedEx to the Department's mailroom at 2:02 p.m. on December 21, 2012. Each was tendered to FedEx on December 20, 2012, for delivery to the Department by 8:30 a.m. on December 21, 2012.

7. The five responses were logged in by the Department's employees on December 21, 2012, between 2:03 p.m. and 2:04 p.m.

8. Petitioner's response and the responses of Bi-Tech Construction, Inc., JW Anthony Builders, Inc., and Eagle Enterprises were opened at approximately 2:10 p.m. by

Tina Peacock, assistant to the Department's purchasing director, Christie Hutchinson.

9. Ms. Hutchinson advised Petitioner at 2:15 p.m. on December 21, 2012, via e-mail that Petitioner had provided the apparent low bid of \$114,500.

10. At 2:30 p.m. on December 21, 2012, the Department's mailroom personnel delivered the five additional responses to the Department's purchasing bureau in room SB-8 and left them unopened on Ms. Peacock's desk. Ms. Peacock had already left for the day.

11. Ms. Hutchinson discovered the responses and opened them at approximately 2:40 p.m. on December 21, 2012.

12. At 2:56 p.m., Ms. Hutchinson advised Petitioner that Petitioner was no longer the apparent low bidder and that the apparent low bidder was Paragon Construction, with a bid of \$98,873.

13. The Department was initially advised by FedEx on January 9, 2013, that the delay in delivering the five responses was due to weather delays in FedEx's Tennessee processing center. FedEx later confirmed that the delay was caused by their internal package sorting network and not due to weather conditions.

14. The tabulation sheet showing the Department's intention to award a contract to Paragon Construction was posted on January 7, 2013.

15. Petitioner timely filed its Petition challenging the Department's intended award.

Findings of Fact Based on the Evidence of the Record

16. Under "Special Terms, Conditions and Specifications," the ITB states in the "Purpose" section that the "project budget is estimated to be \$120,000."

17. All mail and express courier deliveries addressed to the Department are delivered to the Department's central mailroom, which is located in a different part of the building from Ms. Hutchinson's office. Mailroom personnel log in the delivered item, then deliver the mail or item to the room specified on the envelope or package.

18. The normal bid opening procedure used by the Department is for bids to be opened by Ms. Peacock in Ms. Hutchinson's office. In this instance, both Ms. Peacock and Ms. Hutchinson were present for the opening of the first four bids that were received before 2:00 p.m. Bid responders are notified in the ITB that they may, but are not required to, attend the bid opening, which is public.

19. At approximately 2:33 p.m. on December 21, 2012, Ms. Hutchinson received an e-mail from one of the bidders, West Construction, inquiring if the Department received their bid package by the deadline. She sent the tabulation sheet to West Construction.

20. Ms. Hutchinson went to Ms. Peacock's desk at approximately 2:40 p.m. to return the file with the tabulation sheet, and discovered the additional envelopes on Ms. Peacock's desk. She went to the mailroom to find out when the packages were received by the Department, then sought advice from the Department's legal counsel. Upon receiving that advice, Ms. Hutchinson proceeded to open the late arrivals. By that time, Ms. Peacock had gone home, so Ms. Hutchinson personally opened them. There is nothing in the record to indicate that anyone else was in the room with Ms. Hutchinson when she opened the late-arriving bid responses. Between the time of delivery of the responses to the Department, and the opening of the same, the five bid responses remained sealed.

21. Ms. Hutchinson testified that prior to the opening of the five late bids, she did not know what comprised the contents of each bid and had no way of knowing whether the late bids were higher or lower than those already opened. Her testimony in this regard was credible and is accepted.

22. Paragraph 16 of the General Instructions to Respondents reads as follows:

Minor Irregularities - Right to Reject. The buyer reserves the right to accept or reject any and all bids, or separable portions thereof, and to waive any minor irregularity, technicality, or omission if the Buyer determines that doing so will serve the State's best interests. The Buyer may reject any response not submitted in the manner specified in the manner specified by the solicitation documents.

The "Evaluation and Award" section of the ITB also informs the bidders that "[a]s the best interests of the state may require, the right is reserved to reject any and all bids or waive any minor irregularity or technicality in bids received."

23. The ITB contains the following language regarding late bids:

LATE BIDS

Bids received after the bid opening time and date will be rejected as untimely and will not be opened. A late bid notice will be sent to the bidder upon the posting of award notice with instructions for its return. Unclaimed late bids will be destroyed after 45 days. Offers from vendors listed on the Department's posted award notice are the only offers received timely in accordance with the Department's bid opening time and date.

24. After leaving work shortly after 2:00 p.m. on Friday, December 21, 2012, Ms. Peacock did not return to work until January 2, 2013. She then contacted FedEx to inquire about the reason for the delay in the delivery of the late responses. Initially, she was informed that the delay was due to weather. However, by letters dated January 29, 2013, the Department was informed by FedEx that the delay was caused by their package sorting network. Whether the delay was caused by the weather or the package sorting network is of no consequence. In either event, the lateness of the five bids which arrived at the Department two minutes after the posted bid opening time was due to problems of the courier, and was not caused by the bidders.

25. The January 29, 2013, letters also informed the Department that the late packages, including the one containing the bid from Paragon Construction, were tendered to the courier service for morning delivery on December 21, 2012.

#### CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case pursuant to sections 120.569, 120.57(1) and (3), Florida Statutes.

27. Petitioner has challenged the Department's proposed agency action to award the ITB contract to Paragon Construction.

28. The burden of proof resides with the Petitioner. The standard of proof in this proceeding is whether the agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

29. The underlying findings of fact in this case are based on a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

30. This de novo proceeding was conducted for the purpose of evaluating the action that was taken by the Department in an attempt to determine whether that action is contrary to the Department's governing statutes, the Department's rules or policies, or the solicitation specifications.<sup>1/</sup> See § 120.57(3)(f), Fla. Stat., and State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607 (Fla. 1st DCA 1998).

31. Petitioner argues that the Department erroneously



misused the ITB language relating to minor irregularities and the right to reject bids by opening the late-arriving responses after the timely ones were opened and the lowest apparent bidder (Petitioner) had been notified of the tabulation results. Courts have addressed the distinction of major versus minor irregularities. The court in Harry Pepper & Associates v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977), described the test for measuring whether an irregularity is material:

The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by the other bidders.

32. Applying the Harry Pepper rationale to the instant case, the amounts of the late-arriving bids were not affected by the late delivery caused by a third party. See also Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982) (county's waiver of a relatively minor irregularity in the technical bidding requirements upheld).

33. An agency has the discretion to waive the irregularity of a late bid. Hewitt Contracting Co. v. Melbourne Reg'l Airport Auth., 528 So. 2d 122 (Fla. 5th DCA 1988).

34. Accordingly, it is concluded that the acceptance of the bids received by the Department a few minutes after the posted deadline, when the delay was caused by a third party, constitutes a minor irregularity which may be waived at the discretion of the

Department. The bidders whose responses were delivered late had no opportunity to adjust their bid proposals and therefore did not have a competitive advantage over any other proposed vendor. Petitioner's argument that the late bids were not delivered to the purchasing office, the room specified in the ITB, is unpersuasive. All mail and other deliveries are delivered to a central mailroom which then distributes items to the appropriate room.

35. In its Petition, Petitioner asserts that the Department violated section 255.0525, Florida Statutes. Petitioner's reliance on this statute is misplaced. Section 255.0525 requires advertisement in the Florida Administrative Weekly in the solicitation of competitive bids or proposals for any construction project that is projected to cost more than \$200,000. The ITB states in the "Purpose" section that the project budget is estimated to be \$120,000. Petitioner's bid is \$114,500; the bid from Paragon Construction is \$98,873. Thus, section 255.0525 is not applicable in this case.

36. At hearing and in the Joint Pre-hearing Stipulation, Petitioner alleged that the Agency's intent to award the contract to Paragon Construction is also arbitrary and capricious. An agency action is capricious if the agency takes the action without thought, reason, or rationality. An agency decision is arbitrary if it is not supported by facts or logic. Agrico Chem.

Co. v. State Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

37. The Agency's decision to open the late bids was based on the number of late responses received by the Agency at the same time by the same courier, the fact that the lateness of the delivery was not the fault of the bidders, and the fact that the delivery occurred within minutes of the stated time. Petitioner has not shown that the Agency's intended action is arbitrary or capricious.

38. In its Proposed Recommended Order, Petitioner stated that in addition to section 255.0525, the Agency violated sections 255.0518 and 286.111, Florida Statutes.

Section 255.0518 reads as follows:

Public bids; bid opening. Notwithstanding s. 119.07(1)(b), the state or any county or municipality thereof or any department or agency of the state, county, or municipality, or any other public body or institution shall:

- (1) When opening sealed bids or the portion of any sealed bids that include the prices submitted that are received pursuant to a competitive solicitation for construction or repairs on a public building or public work, open the sealed bids at a public meeting conducted in compliance with s. 286.011.
- (2) Announce at that meeting the name of each bidder and the price submitted in the bid.
- (3) Make available upon request the name of each bidder and the price in the bid.

39. Section 255.072(2) defines construction services to include demolition, reconstruction, and any other improvements to

real property. The ITB is for the demolition and renovation of the Pompano State Farmer's Market. The effective date of section 255.0518 was May 4, 2012. Ch. 2012-211, § 3, Laws of Fla. It appears, then, that the provisions of section 255.0518 apply to this bid opening.

40. However, Petitioner did not plead a violation of 255.0518 in its Petition challenging the intended contract award. It was not included in the Joint Pre-hearing Stipulation. See Fla. Admin. Code R. 28-106.201 (requires a statement of the specific rules or statutes Petitioner contends warrant reversal or modification). The Department, therefore, was not on notice that this was one of the grounds of the challenge prior to hearing or that it must prepare to defend any such allegations.

41. Accordingly, Petitioner has not shown that the Department's proposed action is contrary to the Department's governing statutes, rules or policies, or the ITB specifications.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

#### RECOMMENDED:

That the Department of Agriculture and Consumer Services enter a final order dismissing the bid protest filed by Petitioner.

DONE AND ENTERED this 26th day of March, 2013, in  
Tallahassee, Leon County, Florida.

*Barbara J. Staros*

---

BARBARA J. STAROS  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of March, 2013.

ENDNOTE

<sup>1/</sup> The Department's reliance on the standards set forth in Department of Transportation v. Groves-Watkins, 530 So. 2d 912 (Fla. 1988) is misplaced. Since the 1996 amendments to the Administrative Procedures Act, the standard of review is set forth clearly in section 120.57(3)(f), Florida Statutes. Moreover, that section specifies that the standard of review of whether the agency's action is illegal, arbitrary, dishonest, or fraudulent applies to only cases in which the agency's intended action is to reject all bids, which is not the circumstance of the instant case.

COPIES FURNISHED:

Stephen M. Donelan, Esquire  
Florida Department of Agriculture  
and Consumer Services  
Room 509, Mayo Building  
407 South Calhoun Street  
Tallahassee, Florida 32399

Sanjeev Mangoli  
VAASTU Design Engineering  
and Construction Services, Inc.  
Post Office Box 222155  
West Palm Beach, Florida 33422

Lorena Holley, General Counsel  
Department of Agriculture  
and Consumer Services  
407 South Calhoun Street, Suite 520  
Tallahassee, Florida 32399

Honorable Adam Putnam  
Commissioner of Agriculture  
Department of Agriculture  
and Consumer Services  
The Capitol, Plaza Level 10  
Tallahassee, Florida 32399

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit exceptions within 10 days from the date of the Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.