

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TAMCO ELECTRIC, INC.,

Petitioner,

vs.

Case No. 13-2152BID

PINELLAS COUNTY SCHOOL BOARD,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in St. Petersburg and Tallahassee, Florida, on September 4, 2013, before the Division of Administrative Hearings by its designated Administrative Law Judge Linzie F. Bogan.

APPEARANCES

For Petitioner: William B. Meacham, Esquire
308 East Plymouth Street
Tampa, Florida 33603

For Respondent: Heather J. Wallace, Esquire
Pinellas County School Board
301 4th Street Southwest
Largo, Florida 33770

STATEMENT OF THE ISSUE

Whether Respondent's action to reject all bids submitted in response to ITB 13-803-205, relating to the removal and replacement of the public address system at Countryside High

School, is illegal, arbitrary, dishonest, or fraudulent, as alleged in the Amended Petition.

PRELIMINARY STATEMENT

Tamco Electric, Inc. (Petitioner), is challenging the decision by the Pinellas County School Board (Respondent), to reject all bids submitted in response to an Invitation to Bid 13-03-205 (ITB) advertised on March 4, 2013. Petitioner was the lowest bidder for the project. However, Respondent rejected Petitioner's bid when it determined that Petitioner's bid was non-responsive. Petitioner filed a protest challenging Respondent's decision to reject its bid and Respondent, based upon grounds enumerated in Petitioner's protest, decided to reject all bids submitted in response to the ITB. Petitioner challenges herein Respondent's decision to reject all bids.

On June 13, 2013, Petitioner's bid protest was referred to the Division of Administrative Hearings for assignment of an Administrative Law Judge. By agreement of the parties, the final hearing took place on September 4, 2013. Also by agreement of the parties, the instant case was consolidated for final hearing purposes with Division of Administrative Hearings Case No. 13-2153BID. As requested by the parties, Recommended Orders will be issued in each case.

At the hearing, Petitioner offered testimony from Keith Thomsen, Linda Balcombe, Michael Hewett, and Alfred Trujillo.

Mr. Trujillo is the vice president of Tamco Electric, Inc. The remaining witnesses are employed by Respondent. Counsel for Respondent examined each witness but did not call any witnesses during its case-in-chief. The parties Joint Exhibits 1 through 7 were admitted into evidence. Petitioner's Exhibits 5 through 8, and 10, were also admitted into evidence.

A Transcript of the proceeding was filed with the Division of Administrative Hearings on September 18, 2013. Respondent timely filed a proposed recommended order, which has been considered in the preparation of this Recommended Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. On March 4, 2013, the ITB was issued by Respondent for work related to the removal and replacement of the public address system at Countryside High School in Clearwater, Florida. According to the Special Conditions portions of the ITB, the "scope" of the project is to "[p]rovide labor and materials to remove and replace the auditorium sound system as per plans and specifications by Keane Acoustics, Inc." The ITB was assigned bid number 13-803-205 by Respondent. Bids for the contract were to be submitted to Respondent by 3:00 p.m., April 11, 2013.

2. Bids for the project were timely received from two companies. The first company, Becker Communications, Inc., d/b/a BCI Integrated Solutions (BCI), submitted a bid in the amount of

\$118,143.27. Petitioner submitted a bid in the amount of \$108,000.00.

3. There is a section of the ITB titled "special conditions." The special conditions provide in part that "[t]his is an ALL or NONE bid [and] [t]he entire contract shall be awarded to the lowest responsive and responsible bidder meeting the specifications." On April 22, 2013, Respondent posted a notice advising of its intent to award the contract to BCI.

4. Although Petitioner submitted the lowest bid, Respondent determined that Petitioner's bid was non-responsive because the bid failed to include "proof of 5 years [of] experience with this type of work" as required by the special conditions of the ITB. Petitioner interpreted this provision as requiring five years of experience as a certain type of general contractor, which Petitioner had, whereas Respondent intended for the ITB to convey that five years of experience related to the removal and installation of audio equipment was the desired type of experience. Petitioner's failure to respond to the ITB in the manner contemplated by Respondent was a technical, nonmaterial irregularity.^{1/}

5. Numbered paragraph six of the General Terms & Conditions of the ITB provides in part that Respondent "expressly reserves the right to reject any bid proposal if it determines that the

. . . experience of the bidder, compared to work proposed, justifies such rejection."

6. On April 24, 2013, Petitioner provided to Respondent a notice advising of its intent to protest the award of the contract to BCI. On May 3, 2013, Petitioner filed its formal protest challenging Respondent's intended action of awarding the contract to BCI.

7. Petitioner's formal protest enumerated several grounds. Of particular concern to Respondent were Petitioner's assertions that the ITB was "inconsistent with Florida law since bidders [were] not required to submit a List of Subcontractors by the time of opening bid"^{2/} and that provisions of the ITB were ambiguous with respect to the type of experience required to qualify for bidding.^{3/} Prior to receiving Petitioner's protest, Respondent was unaware of the fact that its bid specifications governing the disclosure of subcontractors did not comply with Florida law. Upon consideration of Petitioner's grounds for protest, Respondent determined that the ITB, as alleged by Petitioner, failed to comply with section 255.0515, Florida Statutes (2012),^{4/} and that there was ambiguity in the language regarding the experience requirements for bidders.^{5/}

8. Respondent refers to the problems with the ITB as "procedural errors." These procedural errors will be referred to herein as "irregularities" as this term is more in keeping with

the nomenclature of this area of jurisprudence. Given the ITB's irregularities, Respondent decided to reject all bids.

9. In explaining Respondent's rationale for rejecting all bids, Michael Hewett, Respondent's Director of Maintenance,^{6/} testified that "the [irregularities] were such that [they] potentially could give an unfair advantage to one bidder over another." As for the issue related to the requirements of section 255.0515, Mr. Hewett explained that neither of the two bidders submitted a listing of subcontractors. It would have been competitively disadvantageous to BCI if Petitioner were able to successfully argue that BCI should be disqualified for failing to provide a listing of subcontractors when Petitioner also failed to provide such listing.

10. During the same approximate time that the ITB in the present case was issued, Respondent issued an ITB for nearly identical work to be performed at one of its other facilities (Palm Harbor). In all material respects, the Palm Harbor ITB was identical to the one at issue herein. Unlike the present case, BCI was the sole bidder for the Palm Harbor project and this distinguishing fact reasonably explains why Respondent did not reject BCI's bid for the Palm Harbor Project even though the ITB therein was plagued with the same irregularities found in the present case.^{7/}

CONCLUSIONS OF LAW

11. 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.

12. Petitioner demonstrated standing and entitlement to hearing on Respondent's decision to reject all bids.

13. Petitioner 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).

14. 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 is the applicable standard when an agency rejects all bids. § 120.57(3)(f).

15. 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).

16. Petitioner alleges that Respondent's decision to reject all bids was arbitrary because Respondent "changed its story and otherwise refused to provide any specifics or details regarding its rejection of all bids. . . ." ^{8/} Where an agency, in deciding to reject all bids, 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)).

17. An agency's discretion to reject all bids is not unbridled, however. Notwithstanding the fact that Petitioner alleges fraud, illegality, and dishonesty, the essence of Petitioner's case is that Respondent's decision to reject all bids was arbitrary because Respondent allowed a similar project to proceed with the same contractual irregularities. 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).

18. In applying the "arbitrary" 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).

19. The evidence establishes that Respondent's decision to reject all bids was based on concerns about ambiguities in the ITB's verbiage regarding the experience requirements for general contractors and the portion of the ITB governing the disclosure of subcontractors. Petitioner proved that the error in its bid regarding the extent of its professional experience was a technical, nonmaterial irregularity. Had the issue of Petitioner's level of experience been Petitioner's only ground of protest, then Petitioner would have undoubtedly prevailed in its initial protest of Respondent's decision to reject its bid as non-responsive. 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, when Petitioner raised the meritorious issue concerning the ITB's non-compliance with section 255.0515, this cast the ITB in a different light.

20. It has long been established that the policy reasons "implicit in [s]ection 255.0515, [serve to] prevent competitive advantage, insure the quality of the subcontractors, insure

public confidence in the bidding process, and encourage future competition." E.M. Watkins & Co. v. Bd. of Regents, 414 So. 2d 583, 587 (Fla. 1st DCA 1982). These policy objectives were furthered in the present case when Respondent decided to reject all bids. There is nothing fraudulent, arbitrary, illegal or dishonest about Respondent ensuring that its competitive bidding process comports with essential requirements of the law.

21. Petitioner has not met its burden of proving that the rejection of all bids by Respondent is illegal, arbitrary, dishonest, or fraudulent.

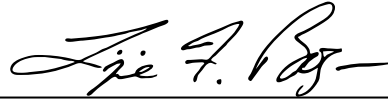
RECOMMENDATION

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

RECOMMENDED:

That the Pinellas County School Board enter a final order finding that the rejection of all bids submitted in response to ITB 13-803-205 was not illegal, arbitrary, dishonest, or fraudulent, and dismissing Tamco Electric, Inc.'s instant protest.

DONE AND ENTERED this 16th day of October, 2013, in
Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of October, 2013.

ENDNOTES

^{1/} An irregularity is nonmaterial when a bidder does not, as a result of the irregularity, receive an economic benefit or advantage over other bidders. Harry Pepper & Assoc.'s, Inc. v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2d DCA 1978). See also Liberty Cnty. v. Baxter's Asphalt & Concrete, 421 So. 2d 505 (Fla. 1982).

^{2/} Section 255.0515, Florida Statutes, provides that "[w]ith respect to state contracts let pursuant to competitive bidding, whether under chapter 1013, relating to educational facilities, or this chapter, relating to public buildings, the contractor shall not remove or replace subcontractors listed in the bid subsequent to the lists being made public at the bid opening, except upon good cause shown." The "special conditions" of the ITB provide that the list of all subcontractors that will provide services for the project may be submitted after the award of the contract. Neither Petitioner nor BCI submitted a list of subcontractors with their respective bid proposals.

^{3/} As previously noted, the "special conditions" of the ITB provide, in part, that in order for bids to be considered responsive, documentation should be provided by the bidder establishing "proof of 5 years [of] experience with this type of

work." The portion of the "special conditions" where this language appears enumerates three items dealing generally with the type of contractors' license that a bidder should possess. By comparison, the "general conditions" of the ITB provide that "[i]t is mandatory that contractors bidding as prime contractors on projects . . . be currently qualified on the date of opening of bids [as] an ET, ES, EF or EG contractor by providing a copy of their contractor's license, a business license for this type of work, and a [sic] proof of at least five (5) years [of] experience in installing Auditorium sound reinforcement systems." When these respective provisions of the ITB are read together, the most reasonable interpretation of the language would lead one to conclude that a bidder should have at least five years of experience in installing auditorium sound reinforcement systems as a licensed contractor. However, the respective provisions are not a model of clarity and it was not unreasonable for Petitioner to have misinterpreted the same nor was it irrational for Respondent to acknowledge the inherent ambiguity as one of the grounds for rejecting all bids.

^{4/} All references to Florida Statutes are to the 2012 edition unless otherwise indicated.

^{5/} The fact that Petitioner did not timely file a notice of protest to the terms, conditions, or specifications contained in the solicitation meant that bidders waived protest on this ground. Consultech of Jacksonville v. Dep't of Health, 876 So. 2d 731, 734 (Fla. 1st DCA 2004). The fact that Petitioner waived its right to protest the specifications does not itself preclude Respondent from considering ambiguities in the specifications as a factor when deciding to reject all bids on the ground that the ITB was flawed. See Caber Systems, Inc. v. Dep't of Gen. Servs., 530 So. 2d 325 (Fla. 1st DCA 1988).

^{6/} Mr. Hewett serves as a member of the supervisory staff responsible for technical specifications, licensing requirements, and award recommendations related to the project.

^{7/} Petitioner contends that because the irregularities did not justify rejection of the bid for the Palm Harbor project, that those same irregularities should therefore not justify the rejection of all bids in the present case. Petitioner presumes that Respondent's decision to not rebid the Palm Harbor project was correct. The undersigned states no opinion with respect to the correctness of Respondent's decision not to rebid the Palm Harbor project as this is not at issue in the present case. Nevertheless, the fact that the Palm Harbor project was allowed

to proceed and the project in the instant case was not, does not, ipso facto, establish that Respondent's decision to reject all bids was arbitrary, illegal, dishonest, or fraudulent.

^{8/} Petitioner offered no credible evidence establishing that Respondent "changed its story."

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.