

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACKSONVILLE SOUND AND
COMMUNICATIONS, INC.,

Petitioner,

vs.

Case No. 13-4590BID

DEPARTMENT OF MANAGEMENT
SERVICES,

Respondent,

and

FUTURE COMPUTER SYSTEMS, LLC,

Intervenor.

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 17, 2013, in Jacksonville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott A. Padgett, Esquire
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For Respondent: Ronda L. Moore, Esquire
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For Intervenor: William Nussbaum, Esquire
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STATEMENT OF THE ISSUE

At issue in this proceeding is whether Respondent, Department of Management Services ("DMS"), acted contrary to the agency's governing statutes, rules or policies, or the bid specifications in its proposed decision to award the contract for Invitation to Bid No. MSFM-13002020 (the "ITB") to Intervenor Future Computer Systems, LLC ("FCS").

PRELIMINARY STATEMENT

On October 23, 2013, DMS posted its intended award of the contract pursuant to the ITB for the replacement of existing Edwards Systems Technology ("Edwards") fire alarm main panels in four of its buildings located in the Mary L. Singleton Regional Service Center in Jacksonville. The notice of intent to award reflected that the winning bidder was FCS. Jacksonville Sound and Communications, Inc. ("Jacksonville Sound") submitted the second-low bid. There were only two bidders on the project.

Also on October 23, 2013, Jacksonville Sound filed a formal written protest of the intended award to FCS. The protest was confined to a single issue:

Within the provided scope and specification relating to this bid located in the Design/Build Criteria Documentation, Section

Technical Specifications, Item #7 states the following:

7. Contractors provided with Invitations to Bid have been chosen due to their years in the industry and having a partnered relationship with Edwards Systems Technology. Contractor, upon request, shall provide evidence to support 5 years [sic] experience with performing retrofits with the specific product line as mentioned in the 'Summary.'^[1]

Although FCS may have 5 years [sic] experience in the fire alarm industry, Jacksonville Sound and Communication, Inc. is protesting the organization's experience with the specific product line as the organization has only been approved as an Edwards Systems Technology representative for less than 2 years that would be in non-compliance with the specification.

The case was forwarded to the Division of Administrative Hearings ("DOAH") on November 22, 2013, for assignment of an administrative law judge and the conduct of a formal hearing. On November 27, 2013, FCS filed a Petition to Intervene, which was granted by order dated December 3, 2013. The hearing was scheduled to be held on December 17, 2013, on which date it was convened and completed.

At the final hearing, Jacksonville Sound presented the testimony of Brian K. Lockwood, its Jacksonville branch manager; Tom Milhon, its vice president of operations; and Jere Lahey, the DMS procurement officer and contract manager who drafted the nontechnical specifications of the ITB and oversaw the

procurement. Jacksonville Sound's Exhibits 1 through 3 and 5 through 8 were admitted into evidence. DMS called Mr. Lahey as its own witness and also presented the testimony of Stuart Piccolo, the DMS engineering specialist who drafted the technical specifications for the ITB. DMS offered no exhibits. FCS presented the testimony of its employees Jimmy Ray Garrard, Jr., Randy Kight, and Dean Thomas Grey, and called Mr. Lahey as its witness. FCS offered no exhibits.

A transcript of the proceeding was filed at DOAH on January 15, 2014. The parties timely filed their Proposed Recommended Orders on January 27, 2014.

All references to the Florida Statutes are to the 2013 edition, unless otherwise noted.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of the proceeding, the following findings of fact are made:

1. Jere Lahey, the procurement officer and contract manager for the Jacksonville office of DMS' Division of Real Estate Development and Management, coordinated with Stuart Piccolo, an engineering specialist in the same office, to develop the ITB specifications for the replacement of four existing Edwards fire alarm panels in four buildings at the Mary L. Singleton Regional Service Center in Jacksonville. The

panels, which have been installed in the buildings since their construction approximately 20 years ago, have become obsolete for maintenance purposes. Lacking funding to replace the entire fire alarm system, DMS decided to replace the main control panel in each of the four buildings, retrofitting the systems to work with the updated controls.

2. Mr. Lahey testified that he and Mr. Piccolo decided that the specifications should be for a design-build project.

The General Scope of work identified in the ITB was as follows:

Replace existing Edwards Systems Technology IRC-3 fire alarm panels in four different campus buildings with Edwards Systems Technology EST-3 panels including minor upgrades defined in Design Criteria Documentation.

3. It is understood in the industry that the EST-3 product can only be installed, programmed and operated by a company that is certified by the manufacturer, Edwards. Mr. Lahey identified three EST-certified companies in the Jacksonville area. He testified that DMS relied on Edwards' certification process in the belief that Edwards would not certify a company that lacked the ability to install its products.

4. On September 4, 2013, DMS released the ITB to the three EST certified companies in the Jacksonville area: Jacksonville Sound, FCS, and Milton J. Wood Fire Protection, Inc. ("Wood").^{2/} The ITB listed a construction estimate of \$100,000.00.

5. Jacksonville Sound and FCS submitted bids on the project. Wood withdrew from the solicitation prior to the bid opening, citing a conflict. DMS opened the bids on October 23, 2013, and found both bids responsive to the criteria set forth in the ITB.

6. The ITB specified that DMS would make a single award to the low bidder. FCS was the low bidder, with a bid of \$29,980.00. Jacksonville Sound's bid was \$36,855.00.

7. The ITB provided that "Bids must be submitted in full in accordance with the requirements of the Contract Documents consisting of Technical and Non Technical Design Criteria Specifications."

8. The referenced Design Criteria Specifications were titled, "Design/Build Bid Scope for Replacement of 'Like Kind Equipment'-- Replace Fire Alarm Main Panels in Four Campus Buildings." The specifications consisted of seven pages of written technical and non-technical specifications, four pages of schematic drawings of the buildings, and one page explaining the criminal background checks required of contractors and their employees.

9. The technical specifications contained 27 paragraphs, of which only one, paragraph 7, is directly at issue in this proceeding. Paragraph 7 provided:

Contractors provided with Invitations to Bid have been chosen due to their years in the industry and having a partnered relationship with Edwards Systems Technology.

Contractor, upon request, shall provide evidence to support 5 years [sic] experience with performing retrofits with the specific product line as mentioned in the "Summary."

10. There was no section titled "Summary" in the specifications. However, there was no dispute that the "specific product line" in question was the Edwards EST-3 fire alarm panels that were discussed in the General Scope of work. See Finding of Fact 2, supra.

11. DMS did not request that the bidders provide evidence regarding their experience with performing retrofits with the EST-3 product line. Neither bidder submitted information regarding its experience with performing retrofits with the EST-3 product line.

12. The issue raised by Jacksonville Sound in its formal written protest is whether the second sentence of paragraph 7 required the contracting entity to have been an EST-certified company for five years at the time of bid submission, or whether it was sufficient for the company to have been EST-certified for fewer than five years provided that the company employees actually performing the work on the project have five years' experience with performing retrofits with the EST-3 product line.

13. EST is a controlled line, meaning that Edwards contracts with specific companies to represent the product as "strategic partners" with Edwards. Strategic partners are fully authorized by the manufacturer to sell, install, program and maintain Edwards' products, including the EST-3 product line. An Edwards strategic partner must have its technicians trained and certified in the different systems manufactured by Edwards. To install an EST system, a technician must be certified in that specific product line. Only certified technicians have the ability, via Edwards' proprietary software, to program the installed EST-3 control panel.

14. It is undisputed that Jacksonville Sound has been an Edwards strategic partner for more than five years. It is also undisputed that FCS was a strategic partner at the time it submitted its bid, but that it had been certified for only three and one-half years. It is further undisputed that FCS currently employs individuals who have the requisite five years' experience performing retrofits with the Edwards EST-3 product line. In fact, one of those employees, Randy Kight, gained the bulk of his EST-3 experience as an employee of Jacksonville Sound before moving to FCS.

15. Jacksonville Sound contends that the second sentence of paragraph 7 requires the company bidding on the project to have five years' experience in retrofitting the EST-3 product

line. In order to have such experience, the company would necessarily have to have been an Edwards "strategic partner" for those five years. Under this reading of the ITB, FCS would be considered nonresponsive because it lacks the requisite five years as an Edwards strategic partner.

16. DMS and FCS contend that the second sentence of paragraph 7 is directed at the employees who will actually be working on the EST-3 panels at the job site, and that the length of time a bidder has been a strategic partner is immaterial provided the bidder will be a strategic partner during the life of the contract.

17. To support its contention, Jacksonville Sound observes that paragraph 7 references only the "contractor." Jacksonville Sound points out that various other provisions of the ITB distinguish between the contractor and "employees," "subcontractor employees," "workers," and "individuals who will be performing the work." Jacksonville Sound argues that had DMS intended for the second sentence of paragraph 7 to apply to employees rather than the company, it would have made the distinction found in other provisions of the ITB.

18. Mr. Piccolo, the author of the non-technical specifications, testified at the hearing. While conceding that the second sentence of paragraph 7 might have been drafted more clearly, he testified:

By that statement, I kind of wanted to ensure that any individual that was working on the job site had the confidence and the knowledge to be able to perform these retrofits just because of - of the Duval County Courthouse, you know. And I hate to use that as an example because it's a sore thumb for a lot of people.

But I wanted to make sure that the job went smooth. And if there were any difficulties or trials or tribulations that we could, you know, step back a second and see that the individual that you placed on the property, how much experience does he actually have dealing with this type of work? He could have come from the security systems side, he could have come from the fire alarm side

* * *

Like I say, if there's an observation that an individual doesn't portray himself as being competent to perform the duties or the expectations of delivery, then obviously you would step back a second and say: What are the qualifications of this individual? Was he cutting the grass before he came over here?

19. Supporting Mr. Piccolo's interpretation is the fact that the disputed sentence contains the term, "upon request." Before sending out the ITB, DMS was already aware of the status of the three selected companies as "strategic partners" of Edwards. This was the key piece of information that permitted a company to submit a bid on the project at all. It was immaterial to DMS whether a company had been a strategic partner for one year, three years, or ten years, because DMS was relying

on the certification provided by Edwards that its strategic partners were qualified to install, program and maintain the EST-3 panels regardless of their seniority. "Upon request" indicates that DMS was reserving the right to inquire into the experience of the individuals performing the work on-site, should the need arise. This provision informed the bidders that any employee performing the work is required to have a minimum of five years of experience in retrofitting the EST-3 product line.

20. Jacksonville Sound is unable to point to any material benefit that would accrue to DMS by virtue of its selected vendor having been an Edwards strategic partner for five years or more, as opposed to three and one-half years. The record evidence indicates that all strategic partners have the same rights and duties under their agreements with Edwards, without reference to how long they have been strategic partners.

21. The basis for award of this bid was the lowest price. DMS did not investigate the number of years a company had been a strategic partner of Edwards or the qualifications of the personnel who would perform the on-site work. The ITB's "upon request" provision anticipates that DMS will deal with any personnel problems as they arise during the winning bidder's performance of the contract.

22. By submitting their bids in response to the ITB, Jacksonville Sound and FCS made firm commitments to staffing the project in accordance with DMS' requirements. Both bidders represented that they currently employ technicians who meet the standards set forth in the ITB. If that situation changes during contract performance, the winning bidder will be responsible for securing replacement personnel who satisfy the terms of the contract. In any procurement, there is always a remote potential that the winning vendor will breach or default. DMS' contract provides remedies for such defaults.

23. In summary, it is found that the bids of both Jacksonville Sound and FCS met the requirements of the ITB generally, and of paragraph 7 of the ITB's technical specifications in particular. The reading of paragraph 7 urged by Jacksonville Sound was not unreasonable, but could not be said to add any performance assurances to the contract beyond the given fact that all of the bidders were required to be Edwards-certified strategic partners. DMS' reading of paragraph 7 made practical sense and gave the agency additional assurance that the personnel who work on the project will have at least five years' experience in retrofitting the specified product line.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this cause, pursuant to section 120.569 and subsection 120.57(3), Florida Statutes.

25. Subsection 120.57(3)(f), Florida Statutes, provides in pertinent part:

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

26. Pursuant to subsection 120.57(3)(f), the burden of proof rests with Jacksonville Sound as the party opposing the proposed agency action to prove "a ground for invalidating the award." See State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Jacksonville Sound must prove by a preponderance of the evidence that DMS' proposed award of the contract to FCS is arbitrary, capricious, or beyond the scope of the agency's discretion as a state agency. Dep't of Transp. v. Groves-Watkins Constructors, 530

So. 2d 912, 913-914 (Fla. 1988); Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). See also § 120.57(1)(j), Fla. Stat.

27. The First District Court of Appeal has interpreted the process set forth in subsection 120.57(3)(f), as follows:

A bid protest before a state agency is governed by the Administrative Procedure Act. Section 120.57(3), Florida Statutes (Supp. 1996)^[3/] provides that if a bid protest involves a disputed issue of material fact, the agency shall refer the matter to the Division of Administrative Hearings. The administrative law judge must then conduct a de novo hearing on the protest. See § 120.57(3)(f), Fla. Stat. (Supp. 1996). In this context, the phrase "de novo hearing" is used 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 Intercontinental Properties, Inc. v. Dep't of HRS, 606 So. 2d 380 (Fla. 3d DCA 1992) (interpreting the phrase "de novo hearing" as it was used in bid protest proceedings before the 1996 revision of the Administrative Procedure Act).

State Contracting and Eng'g Corp., 709 So. 2d at 609.

28. As outlined in subsection 120.57(3)(f), the ultimate issue in this proceeding is "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." In addition to proving that DMS breached this statutory standard of conduct, Jacksonville Sound also must

establish that the agency's violation was either clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

29. The First District Court of Appeal has described the "clearly erroneous" standard as meaning that an agency's interpretation of law will be upheld "if the agency's construction falls within the permissible range of interpretations. If, however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004) (citations omitted).

30. An agency decision is "contrary to competition" when it unreasonably interferes with the objectives of competitive bidding. Those objectives have been stated to be:

[T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Harry Pepper & Assoc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977), quoting Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931).

31. An agency action is capricious if the agency takes the action without thought or reason or irrationally. An agency action is arbitrary if is not supported by facts or logic. See Agrico Chemical Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

32. To determine whether an agency acted in an arbitrary or capricious manner, it must be determined "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 these factors to its final decision." Adam Smith Enter. v. Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

33. However, if a decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. Dravco Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, n. 3 (Fla. 2d DCA 1992).

34. Jacksonville Sound failed to meet its burden of proof. The evidence presented at the hearing did not establish that DMS' proposed award of the contract for Invitation to Bid No. MSFM-13002020 to FCS is contrary to the bid solicitation,

contrary to the agency's governing statutes, rules or policies, or that the proposed award is clearly erroneous, contrary to competition, arbitrary or capricious. The preponderance of the evidence established that FCS's proposal was responsive to the requirements of the bid solicitation and that DMS acted well within its governing statutes, rules and policies.

35. The evidence at hearing established that DMS issued a price-driven ITB to three companies, based on their years in the industry and their having a partnered relationship with Edwards. The successful bidder would be responsible for ensuring that its employees have the education and certification required by Edwards, and five years' experience with performing retrofits with the EST-3 product line.

36. Jacksonville Sound read the ITB as requiring the responsive bidder to have been a strategic partner with Edwards for five years at the time of the bid. DMS read the specification in question as requiring the successful bidder's on-site employees to have at least five years' experience in performing retrofits with the EST-3 product line and requiring the successful bidder to provide proof of this experience at DMS' request. DMS' reading of the specification reasonably advanced the agency's interest in having the fire alarm control panels installed and programmed by competent personnel.

37. Both Jacksonville Sound and FCS submitted responsive bids. Both companies were certified strategic partners of Edwards. Price was the only competitive item distinguishing the two bidders. FCS submitted the lower price. DMS' decision to award the contract to FCS was not contrary to the bid specifications, and was not clearly erroneous, contrary to competition, arbitrary, or capricious.

RECOMMENDATION

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

RECOMMENDED that the Department of Management Services enter a final order dismissing Jacksonville Sound and Communications, Inc.'s formal written protest and awarding the contract for Invitation to Bid No. MSFM-13002020 to Future Computer Systems, LLC.

DONE AND ENTERED this 24th day of February, 2014, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of February, 2014.

ENDNOTES

^{1/} The emphasis in the quote was provided by Jacksonville Sound in its formal written protest, not by DMS in the Invitation to Bid.

^{2/} Mr. Lahey testified that a general solicitation by public advertisement was not required because the bidding threshold was below \$200,000. No party contested this proposition.

^{3/} The meaning of the operative language has remained the same since its adoption in 1996:

In a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered. 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. . . .

§ 120.57(3)(f), Fla. Stat. (1997).

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.