

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE MIDDLESEX CORPORATION,

Petitioner,

vs.

Case No. 15-3082BID

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

PRINCE CONTRACTING, L.L.C.,

Intervenor.

_____ /

RECOMMENDED ORDER

On September 28 through October 1, 2015, an administrative hearing in this case was conducted in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Transportation's (DOT) proposed award of a "design-build" contract to Prince Contracting, LLC (Prince), is contrary to the agency's governing statutes, rules or policies, or the specifications of the Request for Proposals (RFP).

PRELIMINARY STATEMENT

DOT is seeking to award a contract pursuant to an RFP issued in September 2014 for the design and construction of highway improvements referenced herein.

On April 14, 2015, DOT issued notice of its intent to award the contract to Prince. The Middlesex Corporation (Middlesex) filed a protest challenging the proposed award and requesting a hearing.

On May 28, 2015, DOT forwarded the challenge to the Division of Administrative Hearings (DOAH). DOT also forwarded a Notice of Intervention filed with DOT by Prince, which was granted. Based upon the information set forth in the referral, DOAH scheduled the hearing for August 5 through 7, 2015. The hearing

was subsequently rescheduled for September 28 through October 2, 2015.

On September 17, 2015, Middlesex filed an Unopposed Motion for Leave to File First Amended Petition, which was granted at the commencement of the hearing.

On September 18, 2015, the parties filed a Joint Pre-hearing Stipulation that included a statement of admitted facts which have been adopted and incorporated herein as necessary.

At the hearing, Middlesex presented the testimony of four witnesses and had Exhibits 1 through 7, 9 through 11, 13 through 16, 18, 19, 22, 24, 27 through 39, and 41 admitted into evidence. DOT presented the testimony of one witness. Prince presented the testimony of three witnesses and had Exhibits 1, 2, 4 through 6, 8 through 11, 15, 19 through 21, 23 through 30, 32, and 46 through 48 admitted into evidence. Joint Exhibits 1 through 30 were admitted by stipulation of the parties.

A Transcript of the hearing was filed on October 27, 2015. All parties filed proposed recommended orders that have been reviewed in the preparation of this Recommended Order.

FINDINGS OF FACT

1. DOT is seeking to award a "design-build" contract pursuant to RFP E7K24 for design and construction of additional lanes on I-75/SR 93 (I-75) in Hernando County from south of US 98/Cortez Boulevard to north of US 98/SR 50/Cortez Boulevard,

and from north of US 98/SR 50/Cortez Boulevard to the Hernando/Sumter County line. The project also includes reconstruction and rehabilitation of existing I-75 lanes, replacement of the I-75 bridges over US 98/SR 50, various improvements to the interchange and its ramps, added lanes and resurfacing of a portion of US 98/SR 50 in Hernando County, and other work as described in the RFP.

2. Middlesex and Prince are qualified design-build firms capable of performing the project tasks required by the RFP. DOT employed a two-phase process in seeking to award the contract.

3. Phase One began with the solicitation of Expanded Letters of Interest (ELOIs) from design-build firms. The ELOIs were evaluated and scored by DOT to develop a "shortlist" of four qualified firms.

4. Phase Two commenced with the release of the formal RFP to the four firms on the shortlist. In response to the RFP, the shortlisted firms were to submit "Technical Proposals" and "Price Proposals" to DOT. The Technical Proposals were to be scored by DOT, after which DOT was to calculate an "adjusted score" based on a formula that referenced the ELOI and Technical Proposal scores and the Price Proposals.

5. On July 7, 2014, DOT posted an advertisement of the ELOI solicitation. The deadline for submission of ELOIs was August 1,

2014. DOT received timely ELOI submissions from seven firms. DOT scored the submissions and developed the shortlist of the four firms. Prince and Middlesex were included on the shortlist and were invited to submit responses to the RFP.

6. According to the RFP, the DOT "Concept Plan" for the project was for the construction of a "Single Point Diamond Interchange" (also known as a Single Point Urban Interchange" and referred to herein as a "SPUI") at the intersection of I-75 and US 98/SR 50.

7. The SPUI concept plan was developed by an engineering firm retained by DOT that issued an "Interchange Operational Analysis Report" (IOAR) for the project. The IOAR was part of a "Project Development and Environmental" (PD&E) study, apparently required to obtain federal approval and funding of the project.

8. The RFP included an "Alternative Technical Concept" (ATC) process which allowed a firm to submit an alternative concept to DOT for review and approval (or disapproval) prior to the deadline for submission of responses to the RFP. Upon receiving DOT approval of the alternative concept, the firm could prepare a Technical Proposal based on the ATC. The RFP provided that DOT would not disclose a proposed ATC to other bidders prior to the submission of Technical Proposals. The RFP also required DOT to issue an addendum to the RFP if an approved ATC had the effect of altering the RFP specifications.

9. The RFP specifically addressed the process governing approval of an ATC, in relevant part, as follows:

B. Innovative Aspects:

All innovative aspects shall be identified separately as such in the technical proposal.

An innovative aspect does not include revisions to specifications, standards or established Department policies.

Innovation should be limited to Design-Build Firm's means and methods, roadway alignments, approach to project, etc.

1. Alternative Technical Concept (ATC) Proposals

The ATC process allows innovation, flexibility, time and cost savings on the design and construction of Design-Build Projects while providing the best value for the public. Any deviation from the RFP for which the Design-Build Firms seeks [sic] to obtain approval to utilize prior to Technical Proposal submission is, by definition, an ATC and therefore must be submitted to the Department for consideration through the ATC process. Any proposed material or technology not addressed by the RFP is considered an ATC and therefore must be submitted to the Department for consideration through the ATC process. The proposed ATC shall provide an approach that is equal to or better than the requirements of the RFP, as determined by the Department. ATC Proposals which reduce the scope, quality, performance, or reliability should not be proposed. A proposed concept does not meet the definition of an ATC if the concept is contemplated by the RFP.

The Department will keep all ATC submissions confidential prior to the Final Selection of the Proposer to the fullest extent allowed by law, with few exceptions. Although the Department will issue an addendum for all ATC proposals contained in the list below, the Department will endeavor to maintain confidentiality of the Design-Build Firms specific ATC proposal. Prior to approving ATC's which would result in the issuance of an Addendum as a result of the item being listed below, the Design-Build Firm will be given the option to withdraw previously submitted ATC proposals

* * *

2. One-on-One ATC Proposal Discussion Meetings

One-on-One ATC discussion meetings may be held in order for the Design-Build Firm to describe proposed changes to supplied basic configurations, Project scope, design criteria, and/or construction criteria. Each Design-Build Firm with proposed changes may request a One-on-One ATC discussion meeting to describe the proposed changes. The Design-Build Firm shall provide, by the deadline shown in the Schedule of Events of this RFP, a preliminary list of ATC proposals to be reviewed and discussed during the One-on-One ATC discussion meetings. This list may not be inclusive of all ATC's to be discussed but it should be sufficiently comprehensive to allow the Department to identify appropriate personnel to participate in the One-on-One ATC discussion meetings. The purpose of the One-on-One ATC discussion meeting is to discuss the ATC proposals, answer questions that the Department may have related to the ATC proposal, review other relevant information and when possible

establish whether the proposal meets the definition of an ATC thereby requiring the submittal of a formal ATC submittal. The meeting should be between representatives of the Design-Build Firm and/or the Design-Build Engineer of Record and District/Central Office staff as needed to provide feedback on the ATC proposal. Immediately prior to the conclusion of the One-on-One ATC discussion meeting, the Department will advise the Design-Build Firm as to the following related to the ATC proposals which were discussed:

- The Proposal meets the criteria established herein as a qualifying ATC Proposal; therefore an ATC Proposal submission IS required, or
- The Proposal does not meet the criteria established herein as a qualifying ATC proposal since the Proposal is already allowed or contemplated by the original RFP; therefore an ATC Proposal submission is NOT required.

3. Submittal of ATC Proposals.

All ATC submittals must be in writing and may be submitted at any time following the Shortlist Posting but shall be submitted prior to the deadline shown in the Schedule of Events of this RFP.

* * *

4. Review and Approval of ATC Submittals

* * *

Approved Design Exceptions or Design Variations required as part of an approved ATC submittal will result in the issuance of an addendum to the RFP notifying all Shortlisted Design-Build

Firms of the approved Design Exceptions or Design Variation(s). Such a change will be approved by the FHWA, as applicable. Prior to approving ATC's which would result in the issuance of an Addendum as a result of the Design Exceptions and/or Design Variation, the Design-Build Firm will be given the option to withdraw previously submitted ATC proposals. (Emphasis added).

The FHWA is the Federal Highway Administration.

10. RFP also established requirements that were not to be changed other than by amendment or addenda issued by DOT. In relevant part, the RFP provided as follows:

Any changes to requirements of the RFP by a Design-Build Firm must be approved by the Department through the Alternative Technical Concept (ATC) Proposal process, as described herein, prior to the information cut-off date. For this Project, the Department considers the following to be requirements of the Project that shall not be changed by the Design-Build Firms except as specifically modified by the RFP and associated addenda:

* * *

Provide a clear ten foot mowing strip adjacent to the right of way.

* * *

A Diverging Diamond Interchange will not be accepted.

A Compressed/Tight Urban Design Interchange will not be accepted. The northbound exit ramp from I-75 to SR 50 shall not be shortened to exclude the portion for the future flyover.

SR 50 shall consist of Concrete Pavement.

* * *

The SR 50 median shall be designed to and accommodate the future flyover.

* * *

SR 50 shall be designed with seven (7) foot Buffered Bicycle Lanes, including but not limited to, minimum twelve (12) foot wide thru and turn lanes. The median width shall not be reduced to accommodate the seven (7) foot Buffered Bicycle Lanes The concrete pavement shall be placed full width incorporating the four 12-foot thru lanes, twelve (12) foot turn lanes, seven foot Buffered Bicycle Lanes and offsets to any islands from the furthest point of the begin and end of the curb returns of the ramps east and west of SR 50 (Emphasis added).

11. Despite the RFP's clear declaration that "Tight Urban Interchange Designs" (TUDI) would not be accepted, both Middlesex and Prince proposed ATCs for construction of TUDIs during the ATC review period. DOT rejected the TUDI proposals.

12. Prince also submitted an ATC proposing construction of a "Partial Cloverleaf" (PARCLO) interchange design. DOT approved Prince's request to proceed with the PARCLO ATC.

13. DOT issued nine addenda to the RFP prior to the deadline for submission of Technical Proposals.

14. The deadline for submission of Technical Proposals was December 19, 2014. Prince proposed construction of the PARCLO

concept in its Technical Proposal. The Technical Proposal submitted by Middlesex proposed to construct a SPUI concept referenced in the RFP.

15. On January 29, 2015, DOT conducted a question and answer session with each firm that submitted a Technical Proposal. DOT issued three more addenda (#10, #11, and #12) to the RFP after the Technical Proposal submission deadline and allowed each firm to submit an Addendum to its Technical Proposal by March 10, 2015.

16. On March 19, 2015, DOT conducted a second question and answer session with each firm that submitted a Technical Proposal and an Addendum to its Technical Proposal.

17. DOT's Technical Review Committee (TRC) evaluated and scored all of the submitted Technical Proposals.

18. The RFP prohibits DOT from scoring a non-responsive proposal. The RFP specifically provided as follows:

Non-Responsive Proposals

Proposals found to be non-responsive shall not be considered. Proposals may be rejected if found to be in nonconformance with the requirements and instructions herein contained. A proposal may be found to be non-responsive by reasons, including, but not limited to, failure to utilize or complete prescribed forms, conditional proposals, incomplete proposals, indefinite or ambiguous proposals, failure to meet deadlines and improper

and/or undated signatures. (Emphasis added).

19. The Prince PARCLO design has not been approved by the FHWA. Both Prince and DOT concede that construction of the PARCLO design is conditional on approval by the FHWA.

20. Although the RFP allowed for the waiver of minor irregularities in a proposal, the RPF precluded DOT from waiving irregularities that affect the price of a proposal to the disadvantage of other bidders. The RPF provided as follows:

Waiver of Irregularities

The Department may waive minor informalities or irregularities in proposals received when such is merely a matter of form and not substance, and the correction or waiver of which is not prejudicial to other Proposers. Minor irregularities are defined as those that will not have an adverse effect on the Department's interest and will not affect the price of the Proposals by giving a Proposer an advantage or benefit not enjoyed by other Proposers.

1. Any design submittals that are part of a proposal shall be deemed preliminary only.
2. Preliminary design submittals may vary from the requirements of the Design and Construction Criteria. The Department, at their discretion, may elect to consider those variations in awarding points to the proposal rather than rejecting the entire proposal.
3. In no event will any such elections by the Department be deemed to be a

waiving of the Design and Construction Criteria.

4. The Proposer who is selected for the Project will be required to fully comply with the Design and Construction Criteria for the price bid, regardless that the proposal may have been based on a variation from the Design and Construction Criteria.

5. Proposers shall identify separately all innovative aspects as such in the Technical Proposal. An innovative aspect does not include revisions to specifications or established Department policies. Innovations should be limited to Design-Build Firm's means and methods, roadway alignments, approach to Project, use of new products, new uses for established products, etc.

6. The Proposer shall obtain any necessary permits or permit modifications not already provided.

7. Those changes to the Design Concept may be considered together with innovative construction techniques, as well as other areas, as the basis for grading the Technical Proposals in the area of innovative measures.

21. The TRC's technical scores were publicly announced on April 9, 2015, which was also the deadline for submission of sealed Price Proposals. After the technical scores were announced, the sealed Price Proposals were opened.

22. Prince submitted the lowest Price Proposal with a bid of \$84,937,900. Middlesex submitted the second lowest Price Proposal of \$94,664,000.

23. As provided in the RFP, the contract was to be awarded to the firm with the lowest adjusted score. The adjusted scores were calculated pursuant to the formula set forth in the RFP, and the proposals were ranked.

24. Prince had the lowest adjusted score of 1,069,746.851. Middlesex had the next lowest adjusted score of 1,083,112.128.

25. DOT posted the Notice of Intent to award the contract to Prince on April 14, 2015.

26. Middlesex timely complied with all requirements to protest the contract award in this proceeding.

27. Middlesex correctly asserts that the Prince PARCLO proposal is non-responsive to various requirements of the RFP.

28. Middlesex asserts that the Prince PARCLO proposal fails to comply with the RFP requirements regarding northbound exit lanes from I-75 onto SR 50. The evidence supports the assertion.

Addendum #10 to the RFP required as follows:

The north and southbound I-75 exit ramps to west and eastbound SR 50 shall consist of triple lefts and shall provide for two (2) WB62FL semi-trucks in the outside two (2) lanes, turning left parallel to each other at the same time through the entire turn at a minimum, with at least four (4) foot separation between those vehicles and at least 10 feet of separation between the outermost vehicles in the opposing left turn movements. (Emphasis added).

29. The Prince proposal does not comply with this requirement. During a pre-submittal meeting, Prince initially proposed a variation from the "triple left" requirement for the northbound exit ramp that included dual left and dual right turn lanes with a shared left-right fifth lane. After DOT expressed concern with the shared lane proposal, Prince revised the plan to include only dual right and dual left turn lanes.

30. Prince asserts that DOT approved its deviation from the triple left turn lane requirement, essentially by silent acquiescence during the meeting. Although Prince and DOT discussed the issue, there is no evidence that DOT affirmatively approved Prince's deviation from the RFP triple-left requirement.

31. At the hearing, Prince stated that it will comply with the triple-left requirement at the proposed price, if DOT and/or the FHWA insist.

32. Middlesex asserts that the Prince proposal fails to comply with RFP requirements regarding placement of "stop bars" on exit lanes from I-75 onto SR 50. The evidence supports the assertion.

Addendum #10 to the RFP required as follows:

It is acceptable to utilize parallel cross walks across the ramps terminals along SR 50, although adjustments should be made to accommodate drainage structures. However, for all interchange types, the lead vehicles (at a minimum)

at the stop bar, shall be in front of the bridge retaining wall and have no sight obstructions at SR 50. (Emphasis added).

33. The Prince proposal does not comply with this requirement. The requirement that the stop bar be placed in front of a bridge retaining wall is for purposes of safety. The Prince proposal results in a stop bar being located behind the bridge retaining wall, creating a sight obstruction at SR 50. Such a sight obstruction poses a safety hazard to drivers, especially to drivers who fail to comply with traffic signals. The failure to comply with this requirement also creates a potential safety problem for pedestrians, because a driver must proceed into the pedestrian crosswalk in order to clear the sight obstruction.

34. Prince suggested that the stop bar placement in its proposal is preliminary and subject to change. However, compliance with this requirement would require lengthening the I-75 bridges to provide additional space between bridge retaining walls. Increasing the length of the bridges increases the expense of constructing the project. Allowing a firm to deviate from this requirement provides a substantial financial advantage over other firms that complied with the requirement.

35. At the hearing, Prince stated that it would comply with the stop bar placement requirement at the proposed price, if required to do so.

36. Middlesex asserts that the Prince proposal fails to comply with the RFP requirements regarding "thru-lanes" on SR 50. The evidence supports the assertion.

37. In regards to SR 50 thru-lanes, Addendum 7 of the RFP provided as follows:

The concrete pavement shall be placed full width incorporating the four 12-foot thru lanes, twelve (12) foot turn lanes, seven (7) foot Buffered Bicycle Lanes and offsets to any islands from the furthest point of the begin and end of the curb returns of the ramps east and west of SR 50. (Emphasis added).

38. Although only three thru-lanes on each side are intended to be used for traffic when this project is completed, the RFP clearly required installation of concrete pavement for the full width of four thru-lanes traveling on SR 50 in both east and west directions through the interchange. The unused lanes are intended to accommodate future expansion of SR 50.

39. The Prince proposal fails to include four concrete thru-lanes in each direction on SR 50. The Prince proposal includes only three westbound thru-lanes on SR 50. The Middlesex proposal includes concrete pavement of all lanes required by the RFP.

40. Prince asserts that DOT's acceptance of the Prince ATC concept included approval of its deviation from the thru-lane

requirement. There is no evidence that DOT affirmatively approved the deviation.

41. The RFP requires that DOT issue an addendum to notify firms of ATC-proposed deviations from the RFP that result in modification or abandonment of RFP requirements. DOT did not issue an addendum that modified or abandoned the referenced thru-lane requirement.

42. The number of thru-lanes impacts the cost of the project through both materials and construction expenses. Allowing a firm to deviate from the thru-lane requirement provides a substantial financial advantage over firms that comply with the requirement.

43. Middlesex asserts that the Prince ATC proposal fails to comply with the traffic analysis requirements set forth in the RFP. According to the RFP, any proposed modification from the SPUI Concept Plan must be supported by a traffic analysis demonstrating a "Level-of-Service and reduction in delay throughout the year that is better than or equal to the Concept Plan configuration." The RFP further required that the traffic analysis demonstrate that the concept is equal to or better than the SPUI Concept Plan for "all movements" as measured by the criteria set forth therein.

44. During the ATC review period, the DOT employees responsible for determining whether the Prince ATC proposal

complied with the traffic analysis requirement on a "movement-by-movement" basis failed to do so prior to allowing Prince to proceed with the ATC.

45. At the hearing, Prince and Middlesex presented "movement-by-movement" traffic evaluations of both proposals. The evidence failed to establish that either the SPUI or the PARCLO proposal was superior in terms of concept design or specific application to this project, or that either proposal should have been rejected on the basis of a traffic analysis.

46. Middlesex asserts that the Prince proposal should have been rejected because of certain safety concerns observed by members of the TRC during the scoring process. The evidence was insufficient to establish that the remedy for such concerns was rejection of the Prince proposal, or that the TRC scores should be revised.

47. Both Middlesex and Prince assert opposing violations of proposal page number limitations. There is no evidence that the content of excess pages provided either party with any significant advantage over another; therefore, the deviation is deemed to be a minor irregularity.

48. Prince asserts that for various reasons, the Middlesex proposal was not responsive to the RFP.

49. Although Prince asserts that Middlesex failed to obtain approval of an ATC related to traffic signalization, Middlesex

was not required by the RFP to seek ATC approval from DOT for traffic signalization in a SPUI concept proposal.

50. Prince asserts that the Middlesex proposal failed to meet stormwater management system requirements included in Addendum #10. Specifically, Prince asserts that the Middlesex proposal failed to reflect a closed storm sewer system for stormwater conveyance, and failed to reflect the installation of any stormwater system in one specific location on its plan.

51. The RFP does not specifically require that a submitted proposal include a complete stormwater system plan for the entire project area. Final design of the actual stormwater system, including sewer design and pipe sizes, is dependent on as-yet-undetermined variables, including the speed limits of adjacent roadways. Highway speeds impact stormwater system design because curb and gutter installation is excluded where speed limits exceed 45 miles per hour. The evidence is insufficient to establish that the Middlesex proposal does not meet the stormwater requirements of the RFP.

52. Prince asserts that the Middlesex proposal failed to comply, in particular locations, with RFP requirements related to border width and mowing strips.

53. The RFP set minimum requirements for border width, which is essentially an open area along the shoulder of the road.

The Middlesex proposal failed to comply with the border width requirements. The Prince proposal included a similar deficiency.

54. The RFP also required a minimum 10-foot mowing strip between the right-of-way and the edge of the shoulder of the road or retaining wall. The Middlesex proposal failed to comply with the mowing strip requirement. Both the Prince proposal and the RFP's SPUI concept plan exhibits the same deficiency.

55. The evidence failed to establish that the border width or mowing strip deficiencies warranted rejection of either proposal as non-responsive.

56. Prince has asserted that the Middlesex Traffic Control Plan includes a diagram that displays a "cross slope break" condition in the vehicle wheel path that would exist during a temporary traffic control situation. Such a condition could present a safety hazard to drivers. The sole diagram upon which the assertion relies lacks scale and is insufficient to establish that the Middlesex proposal will result in such a condition at any time during the actual construction process.

57. Prince has suggested that the Middlesex design fails to comply with the RFP requirements related to accommodation of a future flyover. The RFP required that the proposed interchange "accommodate to the maximum extent possible the future design and construction by others of a new directional flyover ramp" connecting northbound I-75/SR 50 to westbound US 98/SR 50/Cortez

Boulevard "so as to maximize the salvaging of the then-existing facilities, in order to reduce future probable costs." The Middlesex proposal was principally based on the future flyover included in the RFP's SPUI Concept Plan, and, accordingly, the Middlesex proposal complies with the RFP.

CONCLUSIONS OF LAW

58. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.57(1) and 120.57(3), Fla. Stat. (2015).^{1/}

59. Although the "design-build" contract at issue in this proceeding is being awarded under the provisions of section 337.11, Florida Statutes, and Florida Administrative Code Rule 14-91.007, the procurement is still governed by section 120.57(3)(f), which provides in relevant part as follows:

In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply 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, 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. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent. (Emphasis added).

60. The proposed award of the contract to Prince is contrary to the solicitation specifications. The Prince proposal fails to comply with RFP specifications related to I-75 exit ramp turn lanes, the location of stop bars at exit lanes onto SR 50, and the full concrete pavement of four thru-lanes in each direction on SR 50 through the I-75 junction.

61. The proposed award of the contract by DOT to Prince is clearly erroneous. A decision is clearly erroneous when it is based on substantial error in proceedings. Black's Law Dictionary, (Rev. 4th Ed. (1968)). An agency's decision or intended decision will be found to be "clearly erroneous" if it is without rational support and, consequently, the Administrative Law Judge has a "definite and firm conviction that a mistake has been committed." See U.S. v. U.S. Gypsum Co. 68 S. Ct. 525

(1948). The award of a contract to a proposal that fails to meet the requirements of the RFP is clearly erroneous.

62. Prince has suggested that such requirements are inapplicable to the Prince PARCLO design, or that the approval by DOT of Prince's request to submit the PARCLO released Prince from complying with the cited requirements of the RFP. The evidence fails to establish that, in allowing Prince to proceed with an alternative design in lieu of the SPUI, DOT exempted Prince from complying with the requirements of the RFP.

63. Notwithstanding Prince's assertion that the referenced requirements are inapplicable to its proposal, Prince offered during the hearing to cure the deficiencies after receiving the contract, if required to do so. Section 120.57(3)(f) prohibits consideration of submissions made after the proposal opening which amend or supplement the proposal. Accordingly, Prince's offer to remedy the deficiencies in its proposal by complying with the requirements of the RFP has been disregarded.

64. The proposed award of the contract by DOT to Prince is contrary to competition. As to whether the RFP process is "contrary to competition," the phrase is best understood by its plain and obvious meaning--i.e., against or in opposition to competition. "The purpose of the competitive bidding process is to secure fair competition on equal terms to all bidders by affording an opportunity for an exact comparison of bids." Harry

Pepper and Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2d DCA 1977).

65. While not every deviation from the specifications of an RFP requires disqualification of a bid, a deviation from the specifications is material, "if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. Dept. of Gen. Servs., 493 So. 2d 50 (Fla. 1st DCA 1986); Robinson Elec. Co., Inc. v. Dade Cnty., 417 So. 2d 1032 (Fla. 3d DCA 1982).

66. The deficiencies in the Prince proposal were not minor irregularities that could be addressed through the evaluative process because they precluded an appropriate comparison of proposals. They were material deviations that, through the omission of materials and construction costs related to the deficiencies, provided Prince with an economic advantage over other firms because the adjusted score calculations incorporated each firm's Price Proposal.

67. Finally, the RFP specifically provided that a conditional proposal may found to be non-responsive, and that non-responsive proposals "shall not be considered." The PARCLO ATC design has not been approved by the FHWA, and both DOT and Prince concede that the FHWA may not approve the Prince ATC PARCLO design. While the ATC process is apparently intended to reward a creative response from potential bidders, nothing in the

RFP suggests that the ATC process permits DOT to award a contract to a conditional proposal that fails, on its face, to comply with the requirements of the RFP.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Transportation enter a final order awarding the contract issued pursuant to RFP E7K24 to the Middlesex Corporation.

DONE AND ENTERED this 7th day of December, 2015, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of December, 2015.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2015).

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605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0450
(eServed)

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.