

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NATIONAL WATER MAIN CLEANING CO,

Petitioner,

vs.

Case No. 17-0589BID

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

VACVISION ENVIRONMENTAL, LLC,

Intervenor.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 3, 2017, in Tallahassee, Florida, before Suzanne Van Wyk, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Geoffrey D. Smith, Esquire
Smith & Associates
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Melbourne, Florida 32901

For Respondent: Douglas Dell Dolan, Esquire
Department of Transportation
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For Intervenor: Megan M. Warren, Esquire
McRae & Metcalf, P.A.
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STATEMENT OF THE ISSUE

Whether Respondent's intended action to award Contract No. E3Q37 to VacVision Environmental, LLC, for "Milton Operations Routine Maintenance," is contrary to Respondent's solicitation specifications.

PRELIMINARY STATEMENT

On October 11, 2016, Respondent, the Department of Transportation (the Department), issued an Invitation to Bid (ITB) on Contract No. E3Q37 (the Contract), a project to rehabilitate existing underground sewer pipes located in Santa Rosa County, Florida. Both Petitioner and Intervenor timely submitted bids for the projects, which were opened by the Department on November 10, 2016. The Department posted its Notice of Intent to award the Contract to Intervenor on December 7, 2016.

Petitioner timely filed a notice of intent to protest the award on December 12, 2016, and filed its Formal Petition challenging the Department's award of the Contract on December 22, 2016. The Department referred the matter to the Division of Administrative Hearings on January 24, 2017, for assignment of an administrative law judge.

The final hearing was scheduled for, and commenced on, March 3, 2017. The parties' Joint Exhibits 1 through 4, 4a, and 5 through 7 were admitted in evidence.

Petitioner presented the testimony of its President, Salvatori F. Perri, and Petitioner's Exhibits 1 through 4 were admitted in evidence. The Department presented the testimony of Richard Norris, District 3 Transportation Support Manager; Amanda Mauldin, Contract Analyst III; Jared Kirkland, Estimates Specialist; and Marilyn Durrance, Contract Specialist. The Department's Exhibits 1 through 10 were admitted in evidence, as well as Exhibit 11, pages 1 through 114.

Intervenor offered the testimony of its representative, Wesley A. Kingery, and introduced Intervenor's Exhibits 1 through 4, which were admitted in evidence.

The one-volume Transcript of the proceedings was filed on March 17, 2017. The parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is an agency of the State of Florida tasked with procuring the construction of all roads designated as part of the State Highway System or the State Park Road System, or of any roads placed under the Department's supervision by law. See § 334.044, Fla. Stat. (2016).^{1/}

2. Further, the Department has the duty to ensure that maintenance of sewers within the right-of-way of the roadways within its jurisdiction does not degrade the integrity of its facilities. See § 337.401, Fla. Stat.

3. Petitioner, National Water Main Cleaning Co., is a full-service maintenance and rehabilitation pipe contracting business based in New Jersey. The company has been in business since 1949 and primarily contracts with government entities to perform storm and sanitary sewer inspection, cleaning, and repair.

4. On October 11, 2016, the Department published a bid solicitation notice for the Contract, seeking contractors to desilt, remove blockages from, and install liners in existing underground sewer pipe on a specified state road in Santa Rosa County. The ITB included specifications, plans, and a proposal form with specific work items.

5. The ITB contained the following relevant language requiring a bid bond for proposals over \$150,000:

For bids over \$150,000.00, the standard proposal guaranty of 5% of the bid will be required. A Proposal Guaranty of not less than five percent (5%) of the total actual bid in the form of either a certified check, cashier's check, trust company treasurer's check, bank draft of any National or state bank, or a Surety Bid Bond made payable to the Florida Department of Transportation must accompany each bid in excess of \$150,000.00.

* * *

Bid Bonds shall substantially conform to DOT Form 375-020-09 furnished with the Proposal. Surety2000 or SurePath electronic Bid Bond submittal may be used in conjunction with Bid Express internet bid submittal. For more information please visit <https://www.surety2000.com> [f]or Surety2000 or <https://www.insurevision.com> for SurePath. Paper Bid Bonds will also be accepted for bids submitted through Bid Express provided they are received prior to the deadline for receiving bids, by the locations(s) identified in the Bid Solicitation Notice for receiving bids for the advertised project(s). If an electronic bid bond is not being submitted, the bidder must submit an original bid bond. (A fax or copy sent as an attachment will not be accepted.)

(emphasis added).

6. The deadline for submission of bids was Thursday, November 10, 2016, at 2:00 p.m.

7. On November 10, 2016, the Department received and opened bids from both Petitioner and Intervenor, as well as two other vendors.

8. Petitioner's bid for the project was the lowest at \$504,380.70. Intervenor's bid was the next lowest at \$899,842.

9. Petitioner submitted its bid for the project through Bid Express, the Department's electronic bid submission website.

10. Along with its bid, Petitioner submitted several attachments in a .zip file, including a .pdf copy of a bid bond from Traveler's Casualty and Surety Company in the amount of 5 percent of the total amount of the bid.

11. Petitioner did not submit an electronic bid bond through either Surety2000 or SurePath, nor did it submit the original paper bid bond prior to the deadline for submission of bids.

12. The original paper bid bond remained in the possession of Petitioner's President, Salvatore Perri, on the date of the final hearing.

13. Petitioner's bid was reviewed by employees of the Department's District 3 Contracts Administration Office and deemed "non-responsive" because the bid bond submission did not comply with the bid specifications.

14. On December 7, 2016, the Department posted its notice of intent to award the Contract to Intervenor.

15. The .pdf copy of the bid bond Petitioner attached to its bid for the project was on Department form 375-020-09, Bid or Proposal Bond.

16. Form 375-020-09 contains the following note: "Power of Attorney showing authority of Florida Licensed Insurance Agent to sign on behalf of, and bind, surety must be furnished with this form. Affix Corporate Seal of Surety."

17. The Power of Attorney accompanying Petitioner's bid bond contains the following language: "Warning: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER."

18. The attached Power of Attorney is a copy in black-and-white, rather than an original with the red border.

Waiver

19. Pursuant to the ITB, and by operation of section 120.57, Florida Statutes, the deadline to file a protest to the bid specifications was October 14, 2016, 72 hours after posting of the ITB.

20. Petitioner did not file a protest to the specifications of the ITB.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. See §§ 120.569 and 120.57(3), Fla. Stat.

22. Section 120.57(3)(f) provides that:

[T]he 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.

23. The nature of the de novo review in a bid protest proceeding has been established as follows:

[T]he 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. State Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3d DCA 1992).

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

24. The standard of review of the agency's proposed action in a bid protest proceeding has been generally described as follows:

[A] 'public body has wide discretion' in the bidding process and 'its decision, when based on an honest exercise' of the discretion, should not be overturned 'even if it may appear erroneous and even if reasonable persons may disagree.' Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988) (quoting Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982)) (emphasis in original). 'The hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.' Groves-Watkins, 530 So. 2d at 914.

Scientific Games, Inc. v. Dittler Bros., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991).

25. Petitioner has the burden to establish that the Department's intended award of the Contract to Intervenor is clearly erroneous, contrary to competition, arbitrary, or

capricious. § 120.57(3)(f), Fla. Stat.; Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

26. Agency action 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." U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); see also Pershing Indus., Inc. v. Dep't of Banking & Fin., 591 So. 2d 991, 993 (Fla. 1st DCA 1991). Agency action may also be found to be "clearly erroneous" if the agency's interpretation of the applicable law conflicts with its plain meaning and intent. Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004). In such a case, "judicial deference need not be given" to the agency's interpretation. Id.

27. Petitioner first argues that it complied with the ITB specifications by timely submitting a bid bond electronically prior to the October 11, 2016, submission deadline. As such, Petitioner claims that it was the lowest responsible, responsive bidder for the project, thus awarding the Contract to Intervenor is clearly erroneous.

28. Petitioner's first argument is not persuasive. Petitioner chose not to utilize either the Surety2000 or SurePath electronic bid systems, which provide verification of bid bonds. Petitioner attached a copy of a bid bond to its electronic bid.

Doing so did not convert the paper bid bond into an electronic bid bond.

29. Having chosen not to use either of the electronic bid bond services, the plain language of the ITB limited Petitioner to only one other alternative--submittal of a paper bid bond to the location identified in the ITB for receipt of bids prior to the deadline for receipt of bids. Further, the ITB specified that if an electronic bid bond is not being submitted, "the bidder must submit an original bid bond." Petitioner did not submit the original bid bond, but rather submitted a copy--a method expressly prohibited by the specifications. It matters not that the copy came as an attachment to its electronic bid submission, rather than a fax or copy by U.S. Mail or delivery service. A copy is a copy and the original was required since an electronic bid bond was not submitted.

30. Petitioner argues, alternately, that failure to submit the original paper bid bond was a minor irregularity in its bid which should be waived by the Department.

31. Irregularities in a bid proposal can be waived if they are minor or technical and if they do not give a bidder a competitive advantage. See Liberty Cnty. v. Baxter's Asphalt & Concrete, 421 So. 2d 505 (Fla. 1982); Overstreet Paving Co. v. Dep't of Transp., 608 So. 2d 851, 853 (Fla. 2d DCA 1992); and

Intercontinental Properties, Inc. v. Dep't of Health, 606 So. 2d 380 (Fla. 3d DCA 1992).

32. In determining whether a bidder's failure to conform to the specifications of the bid package constitutes a material, rather than minor irregularity, two criteria are applicable:

[F]irst, whether the effect of the waiver would be to deprive the [governmental entity] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

Robinson Elec. Co. v. Dade Cnty., 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982) (citing Glastein v. City of Miami, 399 So. 2d 1005 (Fla. 2d DCA 1981)).

33. The purpose of requiring a bid bond is to ensure that the successful bidder will enter into the contract for the project.^{2/} See City of Wildwood v. Gibbs & Register, Inc., 694 So. 2d 763, 766 (Fla. 5th DCA 1997); § 334.187, Fla. Stat. Without a bond, the Department has no assurance that a contract will be formed. If no contract is formed, the project would have to be rebid, which would cost the Department both in delay and administrative expense.

34. The court in Wildwood further explained:

[A bid bond] provides that a certain amount of money will be paid in the event that a successful bidder on a public project fails to enter into a formal contract; it is a type of liquidated damages and it represents an added incentive to discourage the withdrawal of bids.

Id. (quoting John Alan Appleman, Insurance Law and Practice § 5831 (1st ed. 1941)).

35. In the case at hand, Petitioner submitted a copy of a bid bond, rather than the original. As noted in Respondent's Proposed Recommended Order, the evidence code provides that a duplicate of a negotiable instrument is not admissible to the same extent as an original. See § 90.953(1), Fla. Stat. In cases for payment, the original must be brought forward both to demonstrate the right to payment and to preclude the possibility that the instrument has already been negotiated. See Pennsylvania Blue Shield v. Wolfe, 575 So. 2d 1361, 1363 (Fla. 3d DCA 1991). In short, a copy of Petitioner's bid bond is unenforceable.

36. It was not arbitrary for the Department to conclude that Petitioner's submission of an unenforceable bid bond was not a minor irregularity that could be waived. See Phoenix Mowing and Landscaping, Inc. v. Dep't of Transp., Case No. 01-0371BID (Fla. DOAH Apr. 25, 2001); Quinn Constr., Inc. v. Dep't of Transp., Case No. 95-0564 (Fla. DOAH Apr. 26, 1995). Submitting

a copy alone deprived the Department of assurance that the Contract would be entered into, performed, and guaranteed according to the specifications.

37. Finally, submitting an unenforceable bid bond gives Petitioner the competitive advantage of escaping the requirement to perform the Contract at the low bid, if advantageous to Petitioner, without being liable under the bid bond.^{3/} See Id.

38. Petitioner's submission of a copy of its bid bond, rather than either the original or an electronic copy verified through Surety2000 or Surepath, was a material irregularity which could not be waived by the Department.

39. Petitioner did not establish that the Department's intended award of the Contract to Intervenor was contrary to the solicitation specifications.

Specifications Challenge

40. Finally, to the extent that Petitioner takes issue with the ITB specification requiring either an electronic bid bond or an original paper bid bond,^{4/} Petitioner has waived that argument by failing to timely challenge the bid specifications.

41. Subsection 120.57(3)(b) provides in part:

With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the

notice of protest shall be filed in writing within 72 hours after the posting of the solicitation. The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter.

42. The policy expressed by subsection 120.57(3)(b) is that vendors must complain early if they are unhappy with the procurement method the agency chooses, or their right to complain will be waived. See *Tex. Aquatic Harvesting, Inc. v. Dep't Env'tl. Prot.*, Case No. 06-4217BID (Fla. DOAH Feb. 27, 2007), *mod. in part*, Case No. 06-2223 (Fla. DEP March 29, 2007) (concluding that bidder who did not challenge the RFP within 72 hours of issuance waived the right to challenge agency's use of the ITB without written findings that an RFP was not practicable).

43. As explained by Administrative Law Judge Cave in *Correctional Services Corporation v. Department of Juvenile Justice*, Case Nos. 02-2966BID and 02-2967BID (Fla. DOAH Oct. 29, 2002):

The policy underlying this requirement and the waiver provision is obvious: If a would-be offeror takes issue with the State's proposed method of procurement, it should challenge that method at the inception, so that any legal or other element of the state's request can be remedied in a timely fashion, rather than at the end of the process.

44. In the case at hand, the Department issued the ITB on October 11, 2016, and Petitioner never filed a challenge to the ITB specifications. As such, Petitioner has waived the right to challenge the agency's method of procurement.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that:

Respondent, Department of Transportation, enter a final order adopting the Findings of Fact and Conclusions of Law set forth herein, and award Contract E3Q37 for Milton Operations Routine Maintenance, to Intervenor, VacVision Environmental, LLC.

DONE AND ENTERED this 19th day of April, 2017, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 2017.

ENDNOTES

1/ Unless otherwise specific herein, all references to the Florida Statutes are to the 2016 version.

2/ Section 3-4 of the Department's Standard Specifications for Road and Bridge Construction provides that the "Department will immediately release the Proposal Guaranty of the two lowest responsible Bidders after the successful Bidder delivers the executed Contract . . . to the Department"

3/ It is not beyond comprehension that Petitioner might have walked away from its bid, after opening, when it discovered that its bid was almost \$400,000 less than the next lowest bid, and perhaps, considered that it had underestimated the work involved.

4/ In the Prehearing Stipulation, the parties stipulated to the following issue of law to be determined by the undersigned: "Whether National's protest of the provisions of the ITB relating to submission of the bid bond is untimely because it failed to comply with the requirements of section 120.57(3) (b)."

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.