

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

E.R. REEVES CORP., d/b/a ALL
SEASONS AIR CONDITIONING,

Petitioner,

vs.

Case No. 17-3184BID

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

BLUE RAY'Z HEATING AND AIR
CONDITIONING, LLC,

Intervenor.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings for final hearing on June 27, 2017, in Orlando, Florida.

APPEARANCES

For Petitioner: Mark H. Jamieson, Esquire
MHJ Law PLLC
425 West Colonial Drive, Suite 400
Orlando, Florida 32804

For Respondent: Douglas Dell Dolan, Esquire
Department of Transportation
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0458

For Intervenor: James W. Markel, Esquire
J.W. Markel, P.A.
Post Office Drawer 2006
Winter Park, Florida 32790-2006

Benjamin Shane Boutty, Esquire
The Boutty Law Firm, P.A.
1150 Louisiana Avenue, Suite 5
Winter Park, Florida 32789

STATEMENT OF THE ISSUES

Whether Respondent, Department of Transportation's ("DOT"), notice of intent to award a contract to Intervenor, Blue Ray'z Heating and Air Conditioning, LLC ("Blue"), for maintenance, repair, installation, and replacement of heating, ventilation, and air conditioning ("HVAC") equipment and components located at various facilities along Florida's Turnpike System, is contrary to DOT's governing statutes, rules, or the bid specifications, and contrary to competition, clearly erroneous, or arbitrary and capricious.

PRELIMINARY STATEMENT

On March 10, 2017, DOT published its bid solicitation for ITB-DOT-16/17-8017-AC, seeking bids from contractors for maintenance, repair, installation, and replacement of HVAC equipment and components at various facilities along Florida's Turnpike System. DOT received bids from four proposers on or before April 4, 2017. On April 11, 2017, DOT posted a notice of intent to award the contract to Blue.

On April 13, 2017, Petitioner, E.R. Reeves Corp., d/b/a All Seasons Air Conditioning ("All Seasons"), timely filed a notice of intent to protest the award. On April 19, 2017, All Seasons timely filed a separate formal written protest and protest bond. On May 10, 2017, DOT entered an Order of Dismissal without Prejudice, requiring All Seasons to file an amended petition within ten days. On May, 19, 2017, All Seasons filed its Amended Petition.

On May 31, 2017, DOT referred the matter to the Division of Administrative Hearings ("DOAH"), to assign an Administrative Law Judge to conduct the final hearing. On June 7, 2017, Blue filed a motion to intervene. On June 7, 2017, the undersigned entered an Order setting this matter for final hearing on June 27, 2017. On June 8, 2017, the undersigned entered an Order granting the motion to intervene. On June 23, 2017, the parties filed their Joint Pre-hearing Statement. On June 23, 2017, All Seasons filed a motion to amend the petition, which DOT opposed. On June 26, 2017, a telephonic hearing on the motion was held, with counsel for the parties participating in the hearing. On June 26, 2017, the undersigned entered an Order granting the motion.

The final hearing commenced as scheduled on June 27, 2017, with all parties present. At the hearing, Joint Exhibits 1 through 17 were received in evidence upon stipulation of the parties. All Seasons presented the in-person testimony of

Leonard Robinson, Alan Chua, Trisa Thomas, Santiago Alvarez, Anthony Davis, and Lee-Ann Reeves. All Seasons' Exhibits 1, 5, 6, 10, and 11 were received in evidence.^{1/} DOT presented the in-person testimony of Leonard Robinson, Alan Chua, Trisa Thomas, Santiago Alvarez, and Sheree Merting. Blue presented the in-person testimony of Anthony Davis.

The two-volume final hearing Transcript was filed at DOAH on July 27, 2017. On August 7, 2017, All Seasons and DOT timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order. Blue did not file a proposed recommended order.

The stipulated facts in the parties' Joint Pre-hearing Statement have been incorporated herein as indicated below. Unless otherwise indicated, all statutory references refer to the 2016 Florida Statutes.

FINDINGS OF FACT

1. DOT is an agency of the state of Florida tasked with procuring the construction of all roads designated as part of the State Highway System, the State Park Road System, or any roads placed under DOT's supervision by law.

2. On March 10, 2017, DOT published its bid solicitation for ITB-DOT-16/17-8017-AC (the "ITB"), seeking bids from contractors for maintenance, repair, installation, and replacement of HVAC equipment and components at various

facilities along Florida's Turnpike (SR 91) milepost 172.0 to milepost 312.0; Southern Connector (SR 417) milepost 0.0 to milepost 6.5; Beachline Expressway (SR 528) milepost 0.0 to milepost 8.4; Seminole Expressway (SR 417) milepost 37.7 to milepost 55.0; and Daniel Webster Western Beltway (SR 429) milepost 0.9 to milepost 11.0.

3. The scope of work of the ITB requires all labor, materials, and incidentals necessary to provide maintenance and repair of 232 HVAC units located at 65 facilities along Florida's Turnpike System. The contract is for one year, with three one-year renewal periods.

4. The 65 facilities span the distance from Wildwood in the north at milepost 304 to past Yeehaw Junction in the south to milepost 172, and from a westernmost point on State Road 429 at milepost 11 (Orlando area) to the easternmost section of State Road 417.

5. Under the ITB, the vendor is required to conduct bimonthly preventative maintenance services on each HVAC unit; a total of five visits per site, per year. The vendor is also required during the first month of the contract and any subsequent annual renewal periods to conduct one annual preventative maintenance service. The annual maintenance is typically more extensive than the 60-day maintenance. However,

the bi-monthly and annual maintenance services require, on average, 30 minutes for each of the 232 HVAC units.

6. The vendor is also required to provide unscheduled, emergency services to diagnose problems and make necessary repairs of units that are not operating properly. An unscheduled repair could take several hours to complete, and there have been occasions where more than one unit needed a repair at the same time.

7. The vendor must be available 24 hours a day, seven days a week, 52 weeks a year, to provide unscheduled, emergency services. Most air conditioning work is treated as an emergency, which requires the vendor to respond within three hours.

8. The ITB includes specifications, schedules, a list of facilities, and other materials.

9. Section 9.1 of the ITB requires bidders to meet certain minimum qualifications, including demonstrating the experience necessary to satisfactorily perform the services within the scope of work. Of particular relevance to the instant case is the following language on page 12 of the ITB:

- Certification of Experience

The organized business enterprise (e.g. corporation, LLC or sole proprietorship) shall have been licensed and actively involved in the type of business requested for a minimum of three (3) years. Prior experience shall specifically be related to HVAC maintenance, repair, installation and

replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the Scope of Work for this Contract. Submit documentation of the work experience with the bid package.

10. Pursuant to section 9.2, "[f]ailure by the bidder to provide the above item(s) will constitute a non-responsive determination. Bids found to be non-responsive will not be considered."

11. The Certification of Experience requirement is also referenced on page 2 of the ITB, followed by this statement: "The Department will review carefully to determine if the Vendor is responsive, responsible and qualified in the area of work contemplated by this Contract."

12. A two-page "Certification of Experience Documentation" form is located on pages 23 and 24 of the ITB. The form reiterates, in pertinent part:

Prior experience shall specifically be related to the technical scope and volume of work to that specified in the scope of work for this Contract. Submit documentation of the work experience with the bid package.

The Department will review carefully to determine if the Vendor(s) is responsive, responsible and qualified in the area of work contemplated by this Contract.

Describe your work experience in detail for the minimum period required, beginning with your current or most recent project. Use a separate block to describe each project. (Print out additional copies of the form or attach additional sheets as necessary.)

13. The form includes many lines, spaces, and separate blocks for bidders to provide the client names, addresses, and telephone numbers; dates of service; dollar value of each project; client project manager for each project; and a description of each project. The form includes enough lines and spaces for bidders to provide the required information for up to seven clients. The bidders are directed to attach additional sheets as necessary.

14. The deadline for submission of bids was Tuesday, April 4, 2017, at 2:30 p.m.

15. On April 4, 2017, DOT received and opened bids from four vendors in response to the ITB, which revealed the following bid tabulation prices: (1) All Seasons (\$158,446.00); (2) Blue (\$128,630.00); (3) Kenyon & Partners, LLC (\$279,183.00); and (4) Florida Drawbridges, Inc. (\$331,183.00).

16. On April 4, 2017, DOT posted a notice of intent to award the contract for the work described in the ITB to Blue.

17. Notwithstanding the requirement for each bidder to demonstrate prior experience "specifically . . . related to HVAC maintenance, repair, installation and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the Scope of Work for this Contract," Blue failed to demonstrate such experience in the Certification of Experience Documentation form.

18. The first client listed on Blue's Certification of Experience Documentation form is the Florida Department of Juvenile Justice ("DJJ"). With regard to this client, Blue indicated service dates of June 2015 to present and a project dollar value of \$5,000.00 per year. As to the project description, Blue stated: "Provide HVAC Maintenance, Repair & Service @ Orange Regional Juvenile Detention Center."

19. At hearing, Mr. Davis, the sole owner and operator of Blue, conceded the work involved a total of only 12 HVAC units, in two DJJ buildings, and at the same location.

20. The second client listed is Florida Environmental Compliance Corp. ("FECC"). With regard to this client, Blue indicated service dates of 2012 to present and no dollar value for the project was provided. As to the project description, Blue stated: "HVAC Maintenance, Repair & Service. Installation."

21. At hearing, Mr. Davis conceded the work for FECC involved a total of only eight HVAC units at two locations (Polk County-two units, and Orlando-six units).

22. The third client listed is DOT. With regard to this client, Blue indicated service dates of July through August 2015, and the dollar value of the project was \$21,300.00. As to the project description, Blue stated: "Installation of Recorder Room Ductless split system."

23. At hearing, Mr. Davis conceded the work for DOT involved the installation of only three HVAC units in three locations at a cost of \$7,100.00 each.

24. The fourth client listed is CVS. With regard to this client, Blue indicated service dates of July through August 2014, and the dollar value of the project was \$17,000.00. As to the project description, Blue stated: "Installation of Mini split system in CVS store clinics."

25. At hearing, Mr. Davis conceded the work for CVS involved the installation of only two HVAC units at one store location.^{2/}

26. DOT did not review Blue's Certification of Experience Documentation form to determine whether Blue demonstrated the necessary qualifications and experience required by the ITB.

27. At hearing, none of the witnesses presented by DOT could testify as to Blue's demonstration of prior experience, specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work.

28. Leonard Robinson, a contract manager for Jacobs Engineering, the consultant for the project, testified he was involved only "to a very small extent" in the review of Blue's bid. Mr. Robinson testified that "the only thing I had to do was

to award the bid per the lowest bidder as written in the contract and state the reason why I'm doing so and also sign the Conflict of Interest form. That is it." Mr. Robinson did not review Blue's qualifications or past experience, and he could not say that Blue could perform the work described in the ITB.

29. Alan Chua is the capital improvement procurement administrator for Jacobs Engineering. Mr. Chua evaluated Blue's bid to determine whether it corresponded to the engineer's estimate. He testified he reviewed the Certification of Experience Documentation form, but only as to the dates and to the limited extent necessary to determine whether the projects listed by Blue satisfied the three years of experience required by the contract. Mr. Chua conceded he did not review the project descriptions for the four referenced clients identified on the form, and he could not say whether any of the four projects identified on the form were similar in volume or technical scope to that specified in the ITB.

30. Trisa Thomas is a contracts development manager for Jacobs Engineering. Ms. Thomas testified she reviewed the Certification Experience Documentation form. Ms. Thomas testified she reviewed the dates to determine whether the projects listed by Blue satisfied the three years or more of experience required by the contract. She further testified she reviewed the dates, project manager, and project descriptions.

As to the project descriptions, Ms. Thomas testified she reviewed the type of work Blue did for the company to see if it was related to the work specified in the ITB. However, she did not consider the volume of Blue's work.

31. Significantly, Ms. Thomas testified:

Q: Okay. All right. Do you know why the dollar value of the project is on the Certification of Experience Documentation?

A: Just to get an idea what they--how much they probably performed.

Q: So would that help you get an idea of the volume of work that they performed for that client?

A: I'm not even really sure if that played a factor.

Q: And when you say, I'm not sure if that played a factor, what--what are you referring to?

A: Well I guess what I'm saying is, I'm--that's really not where my concentration is. I'm looking at the years, the project description, what they--the type of work they performed for the--for that agency, and if the references are credible or, you know, satisfactory.

Q: Okay. And when you say they're satisfactory, what do you look at to determine if they're satisfactory?

A: Based on the service that they provided to them, the vendor will let us know how pleased they were with the work that they provided to their agency.

Q: All right. Looking at this Joint Exhibit 5, pages 5 and 6, which places did

Blue Ray'z perform HVAC maintenance, repair, installation and repair services that were of the same technical scope as the Invitation to Bid?

A: I see on the Certification of Experience where they provided HVAC repair and service installation. Also I see where they provided installation of a recorder room. But the volume, there's--I don't--I wouldn't be able to determine that.

Q: And let me ask my question again. So which places did Blue Ray'z perform HVAC maintenance, repair, installation and replacement services that were of the similar technical scope?

A: I don't know.

Q: What maintenance, repair and installation or replacement services did Blue Ray'z provide to another vendor that was similar to the volume of work specified in the Invitation to Bid?

A: The volume work? I don't know.

Q: Do you know if the bid by Blue Ray'z was reviewed by anybody to determine if the experience was similar in size, technical scope and volume of work specified in the Scope of Work?

A: I don't know.

Tr., Vol. I, pp. 121-123.

32. Santiago Alvarez is the facilities and telecommunications administrator for the Turnpike Enterprise, which is part of DOT. Mr. Alvarez testified he did not review the Certification of Experience Documentation form in any detail.

He just looked to confirm the documents were included in the bid package.

33. Sheree Merting is the contract services administrator for DOT's Turnpike Enterprise. Ms. Merting testified she was not involved in the evaluation of Blue's bid.

34. Amanda Cruz is a contract analyst for DOT. She did not review Blue's bid to determine whether Blue was qualified by having the experience required by the ITB.

35. DOT established specific requirements for the ITB to determine responsiveness and then failed to determine if Blue had prior work experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work.

36. DOT awarded the bid to Blue because it was the lowest bidder, without considering whether Blue demonstrated prior experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work.

37. DOT awarded the bid to Blue because it was the lowest bidder, even though Blue failed to demonstrate in the Certification of Experience Documentation form that it had prior experience specifically related to HVAC maintenance, repair,

installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work.

38. In sum, Blue is not a responsive and responsible vendor, and DOT's proposed action is contrary to the bid specifications, clearly erroneous, contrary to competition, arbitrary and capricious.^{3/}

CONCLUSIONS OF LAW

39. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(3), Florida Statutes.

40. Pursuant to section 120.57(3)(f), the burden of proof rests with All Seasons as the party opposing the proposed agency action. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). All Seasons must sustain its burden of proof by a preponderance of the evidence. See Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

41. Section 120.57(3)(f) provides in part as follows:

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.

42. The phrase "de novo proceeding," as used in section 120.57(3)(f), describes 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." State Contracting, 709 So. 2d at 609.

43. A bid protest proceeding is not simply a record review of the information that was before the agency. Rather, a new evidentiary record based upon the facts established at DOAH is developed. J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127, 1132-33 (Fla. 1st DCA 2013).

44. While facts are determined based upon new evidence, applicants are not permitted to retroactively submit information required by the ITB, but omitted from their response. Section 120.57(3) provides that "no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered." The application must therefore stand on its own, as originally submitted, in light of determined facts. § 120.57(3), Fla. Stat.

45. After determining the relevant facts based on the evidence presented at hearing, the agency's intended action will be upheld unless it is contrary to the governing statutes, the agency's rules, or the bid specifications. The agency's intended action must also remain undisturbed unless it is clearly erroneous, contrary to competition, arbitrary, or capricious.

46. The Florida Supreme Court explained the clearly erroneous standard as follows:

A finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. Such a mistake will be found to have occurred where findings are not supported by substantial evidence, are contrary to the clear weight of the evidence, or are based on an erroneous view of the law. Similarly, it has been held that a finding is clearly erroneous where it bears no rational relationship to the supporting evidentiary data, where it is based on a mistake as to the effect of the evidence, or where, although there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces the court that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.

Dorsey v. State, 868 So. 2d 1192, 1209 n.16 (Fla. 2003).

47. The contrary to competition standard precludes actions which, at a minimum: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. Phil's Expert Tree Serv., Inc. v. Broward Cnty. Sch. Bd., Case No. 06-4499BID, 2007 Fla. Div. Admin. Hear. LEXIS 161, at *23 (Fla. DOAH Mar. 19, 2007); Care Access PSN, LLC v. Ag. for Health Care Admin., Case No. 13-4113BID, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *54 (Fla. DOAH Jan. 2, 2014).

48. An action is "arbitrary if it is not supported by logic or the necessary facts," and "capricious if it is adopted without thought or reason or is irrational." Hadi v. Lib. Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). If agency action 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. J.D., 114 So. 3d at 1130. Thus, under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." Adam Smith Enters., Inc. v. Dep't of

Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

Nevertheless,

the reviewing court must consider 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 each of these factors to its final decision.

Id.

49. Turning to the merits of the instant case, DOT's proposed action in awarding the bid to Blue is contrary to the bid specifications, clearly erroneous, contrary to competition, and arbitrary and capricious.

50. As detailed above, Blue's bid was nonresponsive and deviated materially from bid specifications of the ITB. The plain language of the ITB required Blue to demonstrate in the Certificate of Experience Documentation form, as a condition of responsiveness, that it had prior experience specifically "related to HVAC maintenance, repair, installation and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the Scope of Work for this Contract." Blue failed to comply with the plain and ordinary language of the ITB to demonstrate such experience. Manor v. Redding Dev., Case No. 1D16-2553, 2017 Fla. App. LEXIS 11944, at *7 (Fla. 1st DCA Aug. 21, 2017) ("Florida

Housing was required to interpret the RFA consistently with its plain and unambiguous language.").^{4/}

51. DOT does not contend that the language within the experience requirement of the ITB or form is ambiguous. Instead, DOT argues that Blue met the experience requirement or, in the alternative, the requirement constituted a minor irregularity that DOT could waive.

52. It has long been recognized that "[a]lthough a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. State Dep't of Gen. Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

53. In addition, courts have considered the following criteria in determining whether a variance is material and thus non-waivable:

[F]irst, whether the effect of a waiver would be to deprive the municipality 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.

[S]ometimes it is said that a bid may be rejected or disregarded if there is a material variance between the bid and the advertisement. A minor variance, however, will not invalidate the bid. In this context a variance is material if it gives the bidder a substantial advantage over the other bidders, and thereby restricts or stifles competition.

Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *33 (quoting Robinson Elec. Co. v. Dade Cnty., 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982)).

54. In the present case, Blue's failure to demonstrate in the Certificate of Experience Documentation form prior experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work, is material.

55. The experience requirement, which was designed to winnow the field, should rarely, if ever, be waived as immaterial. This is because an experience requirement acts as a barrier to access into the competition, discouraging some would-be bidders who lack a required characteristic, from submitting a bid. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *34.

56. The experience specification prescribes an attribute that the successful bidder must possess: three years of experience specifically related to HVAC maintenance, repair,

installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work. The obvious intent of this provision is to weed out unwanted potential bidders who lack such experience. Id.

57. To waive this experience requirement lowers the bar for the low bidder, giving the appearance of preferential treatment which compromises the integrity of the competitive bidding process. Id.^{5/}

58. Moreover, as detailed above, DOT's failure to consider whether Blue's prior experience is specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work, is arbitrary and capricious. DOT simply cannot ignore the experience criteria it put in the ITB, which was required as a condition of responsiveness, and which DOT stated it would carefully review as part of its responsiveness determination.

59. DOT purports to justify its intended action based on testimony at hearing indicating that the specifications in the current ITB were boiler-plate and simply borrowed from language in other project bid specifications. The fact that DOT may have used boiler-plate language from other project bid specifications

does not excuse DOT's failure to consider the criteria required to be met and reviewed in response to the ITB.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Department of Transportation, enter a final order rescinding the proposed award to Intervenor, Blue Ray'z Heating and Air Conditioning, LLC.

DONE AND ENTERED this 28th day of August, 2017, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of August, 2017.

ENDNOTES

^{1/} All Seasons' Exhibit 11 is the transcript of the deposition of Amanda Cruz and accompanying exhibits to the deposition. At the hearing, the parties offered the deposition of Ms. Cruz in lieu of her in-person testimony.

^{2/} At hearing, Mr. Davis conceded that Blue has no employees. Blue operates out of two vehicles, one of which is a van owned by Mr. Davis, individually. All of Blue's equipment and supplies are stored in these two vehicles.

All Seasons was the vendor for DOT for four years under the prior contract before its expiration and the subject rebid. All Seasons had seven employees and seven vehicles dedicated to performing services for DOT.

^{3/} In paragraph 11 of its Proposed Recommended Order, DOT states that the "vendor to which this contract is awarded is permitted to subcontract up to 40% of the work to another entity qualified to perform the work, including emergencies which demand a three-hour response time." DOT also contends that Blue is a "Class B air conditioning contractor." That a vendor holds a certain license that allows it to do certain work and might be permitted to subcontract up to 40 percent of the work after receiving the award does not excuse the requirement of the ITB that a bidder demonstrate its minimum experience in its response to the bid as required by the ITB.

In other sections of its Proposed Recommended Order, DOT attempts to bolster Blue's lack of experience in response to the ITB by referring to the following testimony of Mr. Davis presented at the hearing that: (1) "Blue plans on hiring at least one additional full-time employee and one additional part-time employee if it is awarded the contract. . . ." (paragraph 45); (2) "Blue owns or has access to all equipment necessary to fulfill the terms of the contract" (paragraph 46); (3) "Blue routinely maintains over 500 units simultaneously, with multiple customers" (paragraph 48); and (4) "Blue's dollar value in receipts in 2016 was approximately \$180,000.00" (paragraph 50).

The undersigned finds Mr. Davis's testimony unpersuasive, and it is not credited. In determining whether Blue's bid is responsive to the ITB, DOT and Blue are bound by the information Blue submitted to DOT in the Certificate of Experience Documentation form in response to the ITB before the bids were opened. To allow the aforementioned information to be considered once the bids are opened would violate section 120.57(3)(f), Florida Statutes, which specifically provides, that "[i]n 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"

^{4/} In Manor, the First District Court of Appeal recently addressed the Florida Housing Finance Corporation's reversal of its prior determination that Brownsville was eligible for federal low-income tax credits following an evidentiary hearing before an Administrative Law Judge ("ALJ") at DOAH. The court held that

Brownsville's application for affordable housing credits "clearly complied with all of the RFA requirements at the application stage by submitting the required forms, providing a DLP, and providing the appropriate assurances that it intended to comply with all of the RFA terms." The court found the ALJ erred in focusing on the fact that Brownsville had not commenced the "clustering process" at the time of application, and there was no guarantee that clustering would be approved. In reaching this conclusion, Judge Roberts found:

However, nothing in the RFA required Brownsville to begin the clustering process or guarantee approval as of the application stage. This is underscored by the fact that an applicant was not required to submit a costly site plan at the application stage. Instead, the configuration of a proposed development would be fleshed out in the final site plan approval process, which occurs after the application stage during the credit underwriting. The RFA's plain language clearly recognized the distinct stages in the process by providing that a scattered site applicant must demonstrate compliance with the RFA "during the credit underwriting process."

Manor, 2017 Fla. App. LEXIS 11944, at *8-10.

Thus, central to the Manor court's holding was that the RFA did not require the information the ALJ determined was non-responsive to the RFA. In fact, the plain language of the RFA in Manor recognized that the information could be provided during the credit underwriting process after the response to the RFA. In the instant case, Blue was required, as a condition of responsiveness, to demonstrate its prior experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work in the Certification of Experience Documentation form submitted to DOT in response to the ITB. Blue's failure to demonstrate the required experience, required by the plain language of the ITB, makes its bid nonresponsive and a material deviation.

^{5/} In its amended petition, All Seasons contends that Blue's bid is also nonresponsive because Blue failed to submit with its bid

Addendum #2. Addendum #2 was merely an acknowledgement of receipt of notice of a non-mandatory site visit and served as a mechanism to assure potential bidders were notified that a site visit would be available, should those bidders later claim they were not notified of the option. All Seasons' argument in this regard is rejected.

COPIES FURNISHED:

Douglas Dell Dolan, Esquire
Department of Transportation
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0458
(eServed)

Mark H. Jamieson, Esquire
MHJ Law PLLC
425 West Colonial Drive, Suite 400
Orlando, Florida 32804
(eServed)

James W. Markel, Esquire
J.W. Markel, P.A.
Post Office Drawer 2006
Winter Park, Florida 32790-2006

Benjamin Shane Boutty, Esquire
The Boutty Law Firm, P.A.
1150 Louisiana Avenue, Suite 5
Winter Park, Florida 32789
(eServed)

Micheal J. Dew, Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Station 57
Tallahassee, Florida 32399-0450
(eServed)

Tom Thomas, General Counsel
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0450
(eServed)

Andrea Shulthiess, Clerk of
Agency Proceedings
Department of Transportation
Haydon Burns Building
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.