

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VE GROUP, LLC,

Petitioner,

vs.

Case No. 17-3663BID

DEPARTMENT OF TRANSPORTATION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 11, 2017, in Tallahassee, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Brant Hargrove, Esquire
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For Respondent: Douglas Dell Dolan, Esquire
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STATEMENT OF THE ISSUE

Whether the Department of Transportation's ("the Department") decision to exclude VE Group, LLC ("VE Group"), from a shortlist of businesses seeking to provide value

engineering professional services to the Department was contrary to competition, clearly erroneous, arbitrary, or capricious.

PRELIMINARY STATEMENT

On December 30, 2016, VE Group filed a "Formal Written Protest and Petition for Formal Administrative Hearing" to contest the Department's decision to exclude VE Group from a shortlist of businesses competing to provide value engineering professional services to the Department.

On June 23, 2017, the Department referred this matter to DOAH for a formal administrative hearing.

After convening a telephonic pre-hearing conference on June 26, 2017, the undersigned learned that the parties were in agreement to waive the requirement in section 120.57(3), Florida Statutes (2016),^{1/} that the final hearing be conducted within 30 days of DOAH receiving the formal written protest. Accordingly, the undersigned issued a Notice of Hearing on June 27, 2017, scheduling the final hearing to occur on August 11, 2017.

The final hearing was held as scheduled on August 11, 2017.

Joint Exhibits 1 through 11 were accepted into evidence.

VE Group's Exhibits 1 and 2 were accepted into evidence subject to a relevancy objection. VE Group's Exhibit 3, a deposition, was only accepted into evidence for the purpose of

reading certain questions and answers by VE Group's attorney during the final hearing.

The Department offered the testimony of James Wolfe, Bobbie Goss, and Carla Murchison Perry.

VE Group offered the testimony of Jon Garner and William F. Ventry. The undersigned accepted Mr. Ventry as an expert witness in value engineering over the Department's objection. However, given that Mr. Ventry founded VE Group, the undersigned stated that Mr. Ventry's potential bias would be taken into account when the undersigned determined the weight that would ultimately be assigned to his testimony.

The Department and VE Group agreed that the deposition of Kurt Lieblong could be accepted in lieu of Mr. Lieblong's live testimony, and the Department filed Mr. Lieblong's deposition on August 11, 2017.

The Transcript was filed on October 4, 2017.

On October 5, 2017, VE Group filed an "Unopposed Motion for Extension of Time" requesting that the due date for the parties' proposed recommended orders be extended from October 16, 2017, to October 18, 2017. The undersigned issued an Order on October 6, 2017, granting the aforementioned Motion.

The parties timely filed their Proposed Recommended Orders, and the undersigned considered those Proposed Recommended Orders in the preparation of this Recommended Order.

FINDINGS OF FACT

The following findings of fact are based on the testimony presented at the final hearing, exhibits accepted into evidence, admitted facts set forth in the pre-hearing stipulation, and matters subject to official recognition.

The Parties and Value Engineering

1. The Department is the state agency tasked with procuring the construction of all roads designated as part of the State Highway System, the State Park Road System, or any roads under the Department's supervision.

2. William F. Ventry founded VE Group (previously known as Ventry Engineering) on September 1, 1988. Since its establishment, VE Group has provided value engineering studies, team member training, and team leader training to transportation agencies in 35 different states and three territories in Canada.

3. Value engineering describes a process to determine whether aspects of a particular project (such as a proposed roadway or bridge) can be modified in order to maximize that project's value.

4. Value engineering utilizes six-steps to analyze a project in order to ensure that only the required functions are being incorporated into the project's design.

5. Value engineering examines whether a project can be done more cost effectively. For example, if a roadway designer

has included features that are not necessary in order to accomplish the project's purpose, then a value engineering analysis would probably lead to a recommendation that those features be eliminated.

6. However, value engineering is not exclusively focused on reducing costs. A value engineering analysis could result in a recommendation that features be added to a project if doing so will meaningfully enhance a project's value.

7. VE Group previously had a contract to provide value engineering services to the Department, but that contract has expired.

The Procurement

8. The Department currently has one value engineering vendor that performs services pursuant to a statewide contract. However, the Department wants to add another vendor so that the Department's districts (i.e., regional offices) have multiple vendors to choose from in the event they elect to utilize the statewide contract to procure value engineering services.

9. In January of 2016, the Department published its Consultant Acquisition Plan ("the CAP") for the 2017 fiscal year. The CAP noted that the Department was planning to procure value engineering services and that this particular procurement would involve a Technical Review Committee ("the TRC").

10. The CAP was available to the public, and prospective vendors could confer with members of the TRC about a procurement.

11. No one objected to the composition of the TRC.

12. On November 7, 2016, the Department published its solicitation for Contract No. 17903 seeking letters of response and written technical proposals from potential vendors of value engineering services by November 21, 2016.

13. The Department utilized the procedures set forth in section 287.055, Florida Statutes, in this solicitation. Section 287.055 pertains to the acquisition of professional services and is not driven exclusively by price.

14. Section 287.055(4) requires an agency to select at least three firms "deemed to be the most highly qualified to perform the required services."

15. Section 287.055(5) provides that the procuring agency "shall negotiate a contract with the most qualified firm for professional services at compensation which the agency determines is fair, competitive, and reasonable."

16. If the agency is unable to reach a satisfactory agreement with the most qualified firm, then the agency can negotiate with the second most qualified firm. If those negotiations are not fruitful, then the agency can negotiate

with the third most qualified firm. See § 287.055(5), Fla. Stat.

17. Contract No. 17903 has a value of up to \$5,000,000.

18. The document describing the scope of services described the objective of this procurement as follows:

The objective of this contract is to provide Value Engineering services related to transportation facilities and to conduct training sessions in the principles of Value Engineering. Two categories of Value Engineering services may be required: A) Value Engineering Studies and B) Value Engineering Training. The Consultant may be required to provide Value Engineering training and/or conduct Statewide as well as District Value Engineering reviews. The nature of the Value Engineering studies may include, but not be limited to studies conducted on the following:

- Transportation Projects
- Department Design Standards
- Department Specifications
- Department Processes

The Consultant will use an approved Value Engineering Job Plan, in providing an independent review, developing reports, and making presentations of findings to Department management.

19. In the simplest terms, the Department was seeking a vendor to provide value engineering studies and value engineering training.

20. The training component consisted of team member training and team leader training.

21. With regard to the training component, the document describing the scope of services specified that the successful vendor will provide a training instructor who "shall be a Certified Value Specialist (CVS) and shall have proficient knowledge and training experience specifically related to Value Engineering."

22. The acronym "SAVE" stands for the Society of American Value Engineers. SAVE established a process by which one can become certified as a value engineering specialist. SAVE's primary functions are to certify value engineering specialists and to promote the practice of value engineering.

23. With regard to team member training, the document specified that "the Consultant shall conduct Value Engineering Team Member Training Workshops. The workshop will be SAVE certified 40 hour Module I. Team Member skills and value engineering concepts shall be taught to Department personnel and consultants."

24. SAVE International offers the SAVE certified Module I workshop referenced directly above.

25. SAVE Module I is team member training.

26. The scope of services document divided the training component into two categories: team member training and team leader training.

27. As for team leader training, the scope of services document stated that "[w]hen required, the Consultant shall conduct Value Engineering Team Leader Training Workshops. Team leadership skills and value engineering concepts shall be taught to Department personnel and consultants."

28. SAVE is not mentioned in the description of the Department's desired team leader training.

29. The TRC reviewed the responses to the solicitation for Contract No. 17903 and created a shortlist of firms to be reviewed by the Selection Committee.

30. The TRC consisted of Kurt Lieblong and two volunteers from within the Department, Jon Garner and Bobbi Goss.

31. Mr. Lieblong manages the Department's value engineering program, and he holds a SAVE certification.

32. During the time period relevant to the instant case, part of Mr. Garner's regular duties included acting as the value engineering administrator for the Department's District 5.

33. Ms. Goss has been responsible for the Department's District 2 value engineering program for the last 17 to 18 years. She has been responsible for hiring value engineering team leaders and/or team members to facilitate value engineering studies. She also contracts with value engineering consultants.

34. Six prospective vendors responded to the Department's solicitation: VE Group; Amec Foster Wheeler; Civil Services,

Inc. ("Civil Services"); Greenman-Pederson, Inc.; Michael Baker International, Inc. ("Michael Baker"); and PMA Consultants, LLC ("PMA").

35. Each prospective vendor responded to the solicitation via a standardized document from the Department entitled "Professional Services Letter of Qualification for Use with Standard Note 1 Advertisements Only" ("letter of qualification").

36. The letter of qualification only gives a prospective vendor approximately two and a half pages to provide the information required by the Department. No additional space is allowed.

37. As noted above, this procurement is proceeding under the procedures set forth in section 287.055. In order to facilitate the implementation of the aforementioned statute, the Department has a procedure, Topic No. 375-030-002-k, entitled "Acquisition of Professional Services."

38. Section 3.2 of Topic No. 375-030-002-k provides that the TRC will consider the following factors in making its shortlist recommendation:

- (A) Past performance grades received by the Consultant on current and previous Department projects, or other performance data included by the Consultant in the LOR or Letter of Qualification.

- (B) The location of the Consultant in relation to the work to be performed, for projects where Consultant proximity to project location is pertinent.
- (C) Any restrictions placed on the Consultant by the prequalification evaluator.
- (D) Volume of work previously awarded.
- (E) Other information contained in the LOR or Letter of Qualification.

(emphasis added).

39. The letter of qualification form utilized in this solicitation requests that prospective vendors provide the following information:

- Proposed approach and understanding of critical issues.
- Relevant project experience - Similar type of work experience; including reference contact information.
- Other content provided by firm.
- Estimate of current workload and available resources.
- Proposed key personnel and their proposed roles (do not include resumes).

(emphasis added).

40. With regard to the requirement that a prospective vendor offer to perform team member training and team leader training, VE Group's letter of qualification stated the following:

The FDOT is also desirous of obtaining a Value Engineering consultant to plan, organize and conduct Team Member Training and Team Leader Training. As former FDOT officials (directing the Bureau of Value Engineering), both William F. Ventry and Jack Trickey are very familiar with the particular expectations of FDOT's Value Engineering program, since they were responsible for planning, organizing and conducting Value Engineering Training Workshops for the Central Office and all of the District offices.

They will serve as the Value Engineering instructors to guide the workshop teams through the Value Engineering job plan, provide agendas and class notebooks, make arrangements for meeting room requirements, if required, insure proper record keeping, and maintain communication with the FDOT Value Engineer. Through valuable experience gained during previous Consultant Contracts with FSOT for Value Engineering Workshops, the 40-hour (SAVE approved) Module I Value Engineering Workshop and Team Leader Workshop has already been tailored to conform to specific FDOT requirements and has been approved by S.A.V.E. International.

VE Group, L.L.C. proposes to use a two-step process to satisfy the requirements for Value Engineering Training Workshops for the FDOT contract. The two steps are: 1) Pre-workshop Activities; 2) Conduct Workshop.

A. Conduct 40-Hour (SAVE approved) Module I Value Engineering Workshop

The 40-Hour Workshop will be managed by William F. Ventry, P.E., C.V.S., who is responsible and accountable to the SAVE Board for the conduct and performance of the workshops. The workshops are oriented toward transportation functions; and the format will cover issues and examples relating to transportation agencies. The

SAVE approval class notebook used in these workshops has been developed by William F. Ventry, P.E., C.V.S. exclusively, for workshops performed for transportation agencies.

B. Conduct Value Engineering Team Leader Workshop

The Team Leader Workshops will also be managed by William F. Ventry, P.E., C.V.S. The VE Group, L.L.C. Value Engineering Team Leader Workshop is designed for the individual who has completed the 40-hour Module I Workshop and his/her supervisor and the District Value Engineer feels would make a good Value Engineering Team Leader on routine Department projects. These workshops not only review the technical aspects of V.E., but also include the responsibilities of the Team Leader and human relations aspects of leadership.

41. The TRC conducted a public meeting via teleconference on December 8, 2016, and selected Civil Services, Michael Baker, and PMA to be on the shortlist.

42. The TRC reached a consensus as to which firms should be on the shortlist. There was no disagreement.

43. The memorandum describing the TRC's recommendation had the following comments regarding the shortlisted vendors:

Civil Services had a good understanding of the scope of work, offered a QA/QC approach to the work, and offered multiple individuals that met both the CVS and Florida PE requirement that had VE experience in the transportation industry. The Project Manager and Lead VE facilitator also had FDOT VE experience. Civil was also able to offer additional elements outside of

the standard VE process within their proposal.

Michael Baker International, Inc. had a good understanding of the scope of work, offered a QA/QC approach to the work, and offered multiple individuals that met both the CVS and Florida PE requirement that had VE experience in the transportation industry. Michael Baker was also able to offer additional elements outside of the standard VE process within their proposal.

PMA Consultants, LLC had a good understanding of the scope of work, offered a QA/QC approach to the work, and offered a Project Manager that met both the CVS and Florida PE requirement that had VE experience in the transportation industry. The Project Manager also had extensive FDOT experience. PMA was also able to offer additional elements outside of the standard VE process within their proposal.

(emphasis added).

44. As for the VE Group, the TRC reported that:

VE Group, LLC had a good understanding of the scope of work, and offered multiple individuals that met both the CVS and Florida PE requirement that had VE experience in the transportation industry. The Project Manager and additional team leaders also had extensive FDOT VE experience.

45. The TRC's memorandum described its ultimate recommendation as follows:

All three firms had a strong understanding of the scope, offered VE facilitators from the prime firm with both the CVS/FL PE requirement and transportation VE experience. All three firms offered a QA/QC

approach to the work and each firm was able to introduce within their proposal other elements outside of the standard VE process that separated them from other firms.

(emphasis added).

46. With regard to "other elements outside of the standard VE process" that Michael Baker proposed to provide, the following excerpt from Michael Baker's letter of qualification describes those "other elements" that impressed the TRC:

As part of the analysis and full vetting process of ideas during the evaluation and development phases, we include risk analysis and assessments, life-cycle costing analysis (LCCA), constructability reviews and impact analysis to the schedule, performance and project costs. We also include AASHTO analysis criteria in the areas of safety, operations, environmental and construction.

47. With regard to "other elements outside of the standard VE process" that Civil Services proposed to provide, Civil Services' letter of qualification stated that "[i]n addition to Life Cycle Cost Analysis, we offer Risk Assessment of projects including CPM techniques."

48. As for additional elements offered by PMA, PMA's letter of qualification stated the following:

Most consultants will follow the same methodology to conduct a VE workshop, or at least they should. The thing that makes PMA unique is that we take pride in the VE study and facilitation as a "people experience" that engages professionals in an atmosphere where they enjoy "thinking outside of the box" and get to interact with

other disciplines and departments so they understand all the different perspectives and aspects of a project that should be considered during its design development. Our goal is to make the workshop an enjoyable experience where the team works as one to arrive at solutions or alternatives that they all support.

49. While VE Group's letter of qualification met the requirements, it did not exceed those requirements. In other words, VE Group did not offer any elements outside of the standard VE process.

50. Because prospective vendors' letters of qualification were limited to two and a half pages, prospective vendors were not expected to describe items (such as the SAVE International process) in great detail. However, the TRC did expect prospective vendors to attempt to separate themselves from their competing vendors.

Findings Regarding the Composition of the TRC

51. VE Group argues that the Department did not follow its own procedures in assembling the TRC.

52. While the composition of the TRC was known to prospective bidders prior to publication of the solicitation for Contract No. 17903, there is no evidence that prospective bidders had a point of entry to challenge the TRC's composition.

53. Topic No. 375-030-002-k contains a section pertaining to the composition of technical review committees and states in pertinent part that:

The members of this Committee will be determined by the appropriate Director, or designee. The TRC shall consist of an odd number of members for professional services procurements. Members of the TRC shall be chosen based on their knowledge and expertise as it relates to the nature of the work requested, the complexity of the project, and the availability of personnel to timely review and evaluate submittals.

54. The greater weight of the evidence demonstrates that the members of the TRC possessed sufficient knowledge and expertise to serve on the TRC.

55. As noted above, Mr. Lieblong manages the Department's value engineering program, and he holds a SAVE certification.

56. While Mr. Garner and Ms. Goss do not have similar certifications, substantial amounts of their responsibilities with the Department pertain to value engineering.

Findings as to Whether the Proposals from the Shortlisted Firms Were Responsive to the Solicitation

57. As noted above, the letter of qualification form utilized in this solicitation requested that prospective vendors provide their "proposed approach and understanding of critical issues."

58. VE Group argues that the three shortlisted firms failed to provide an approach for furnishing team member and team leader training.

59. For instance, Civil Services' letter of qualification merely stated that "the depth of discipline experts offered by [Civil Services] enables us to assemble and offer team members for Value Engineering Workshops as may be required."

60. Civil Services' letter of qualification identifies one employee who is a "SAVE International®-Certified Instructor for Module I training." The letter of qualification identifies another employee who "is a SAVE International®-Certified Instructor for Module I & Module II Workshops."

61. Michael Baker's letter of qualification described its training proposal as follows:

Our team member PMA holds the SAVE-International certified Mod 1 (Cert. No. 201404802) and 2 (Cert. No. 201404900) workshops. Both Mr. Obaranec and Mr. Johnson are CVSS and experienced VE trainers. Our approach will allow the Baker team to customize any training sessions to FDOT's requirements such as size, attendees and workshop duration.

62. PMA's letter of qualification stated that Richard L. Johnson "has demonstrated his understanding of issues regarding value engineering and VE workshops and Module I and Module II VE training. Mr. Johnson is a SAVE International® Certified Trainer for Module I and Module II training."

63. During his testimony, Mr. Ventry took the three shortlisted firms to task for not setting forth an "approach" in their letters of qualification.

64. VE Group clearly went into far greater detail explaining its "approach" to the provision of team member and team leader training.

65. However, Mr. Ventry's criticism of the shortlisted firms' descriptions is exceedingly technical in nature.

66. While not going into great detail, the three shortlisted firms included enough detail to give reasonable assurances to the TRC that they were prepared to meet the explicit training requirements set forth in the scope of services.

67. Given that the prospective vendors only had two and a half pages to detail the key aspects of their proposals, the shortlisted firms reasonably decided to devote less detail than VE Group to explain their training offerings.

68. During his testimony, Mr. Ventry also took issue with the team leader training offered by the shortlisted firms. All three of the shortlisted firms referenced Module II SAVE training, but Mr. Ventry testified that Module II training is not used by the Department. According to Mr. Ventry, Module II does not satisfy the Department's team leader requirements and is not a leadership principles course.

69. However, Mr. Lieblong testified that if a prospective vendor employed someone with SAVE Module I certification, then it was assumed that prospective vendor could deliver team member training or Module I.

70. Moreover, the Department considers SAVE Module II training to be team leader training even though it is not denominated as such. According to Mr. Lieblong, SAVE Module II is more advanced than Module I and delves into how one handles difficult situations within a team environment.

71. Also, Ms. Goss testified that SAVE Module II training satisfies the team leader training requirement in this solicitation. Ms. Goss testified that the Department recognizes Module II as team leader training.

72. The greater weight of the evidence demonstrates that the shortlisted firms provided letters of qualification that were responsive to the Department's solicitation.

Findings as to Whether the TRC Considered Factors Outside the Permissible Scope

73. VE Group argues that the TRC impermissibly considered factors outside the permissible scope of this solicitation.

74. As discussed above, the memorandum describing the TRC's recommendation noted that the shortlisted firms were "able to offer additional elements outside of the standard VE process within their proposal."

75. VE Group asserts that consideration of such elements was improper, but Section 3.2 of Topic No. 375-030-002-k provided that the TRC was to consider other information in the letter of qualification as one of the factors in making its shortlist recommendation.

76. In addition, the letter of qualification form specified that prospective vendors were to provide "other content." VE Group did not challenge either specification when initially posted.

77. The greater weight of the evidence demonstrates that the TRC did not err by considering information that the Department may not have explicitly requested.

CONCLUSIONS OF LAW

78. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes (2017).

79. Section 120.57(3)(f) provides in relevant 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. 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.

80. VE Group, as the party challenging the proposed agency action, has the burden of proof in this proceeding and must show that the Department's proposed action is contrary to its governing statutes, rules or policies, or the bid or proposal specifications. A de novo hearing was conducted to evaluate the action taken by the Department. § 120.57(3)(f), Fla. Stat.; State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). The administrative law judge may receive evidence, as with any hearing held pursuant to section 120.57(1), but the purpose of the proceeding is to evaluate the action taken by the agency based on the information available to the agency at the time it took the action. Id.

81. Agencies enjoy wide discretion when it comes to soliciting and accepting proposals, and an agency's decision, when based upon an honest exercise of such discretion, will not be set aside even where it may appear erroneous or if reasonable persons may disagree. Baxter's Asphalt and Concrete, Inc. v. Dep't of Transp., 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985); Capeletti Brothers, Inc. v. State, Dep't of Gen. Servs.,

432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). Section 120.57(3)(f) establishes the standard of proof as whether the proposed action was clearly erroneous, contrary to competition, arbitrary, or capricious.

82. A decision is considered to be clearly erroneous when, although there is evidence to support it, after review of the entire record the tribunal is left with the definite and firm conviction that a mistake has been committed. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). An agency action is capricious if the agency takes the action without thought or reason or irrationally. Agency action is arbitrary if it is not supported by facts or logic. See Agrico Chem. Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

83. An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding. See Wester v. Belote, 103 Fla. 976, 138 So. 721, 723-24 (1931).

84. As discussed above, the greater weight of the evidence does not demonstrate that the decision to exclude VE Group from the shortlist was contrary to the Department's governing statutes, the agency's rules or policies, or the solicitation specifications. Also, the greater weight of the evidence does not demonstrate that the decision to exclude VE Group from the

shortlist was clearly erroneous, contrary to competition, arbitrary, or capricious.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Transportation enter a final order dismissing the protest of VE Group, LLC.

DONE AND ENTERED this 14th day of November, 2017, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of November, 2017.

ENDNOTE

^{1/} Unless stated otherwise, all statutory references will be to the 2016 version of the Florida Statutes.

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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.