

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TALLAHASSEE CORPORATE CENTER,
LLC,

Petitioner,

vs.

Case No. 18-0371BID

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondent,

and

NATHAN LEE HEAD OF TALLAHASSEE,
LLC,

Intervenor.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 19 and 20, 2018, in Tallahassee, Florida, before Yolonda Y. Green, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("Division").

APPEARANCES

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STATEMENT OF THE ISSUES

Whether the Florida Fish and Wildlife Conservation Commission's ("Respondent" or "FWC") determination that Tallahassee Corporate Center, LLC ("Petitioner" or "TCC"), submitted a nonresponsive reply to FWC's Invitation to Negotiate ("ITN") No. 770-0235 is contrary to the Commission's governing statutes, the agency's rules or policies, or the solicitation specifications; and, if so, whether it was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On July 19, 2017, Respondent, FWC, issued ITN No. 770-0235, soliciting replies for leased office space in Tallahassee, Florida, with a lease term to begin November 1, 2019. Between August 15, 2017, and November 2, 2017, FWC issued four addenda to the ITN, which contained amendments, modifications, and explanations to the ITN. On August 10, 2017, FWC issued Addendum No. 1 to the ITN, which contained modifications and explanations to the ITN in response to proposed vendor

questions. On August 15, 2017, FWC issued Addendum No. 2 to the ITN, which contained amended answers and modifications in response to proposed vendor questions. On September 18, 2017, FWC issued Addendum No. 3 to the ITN, which contained an amendment to the revised bid opening location. On November 2, 2017, FWC issued Addendum No. 4 to the ITN, which contained a revised calendar of events.

On December 11, 2017, FWC posted its Notice of Intent to award the contract to Nathan Lee Head, LLC ("NLH"). On December 11, 2017, Petitioner timely submitted its Notice of Intent to protest the Notice of Intent to award the contract. On December 23, 2017, TCC timely filed its Formal Protest and Petition for Formal Administrative Hearing. On January 19, 2018, the Petition was referred to the Division for a final hearing. NLH filed a Petition for Leave to Intervene, which was granted.

On February 5, 2018, Petitioner filed a Motion to Amend the Petition ("Motion to Amend"). On January 23, 2018, the undersigned granted the Motion to Amend and ordered the hearing to go forward based on the amended Petition.

Prior to the hearing, the parties filed a Joint Pre-hearing Statement, which included stipulated findings of fact that have been incorporated into the Findings of Fact found below.

The undersigned issued a Notice of Hearing scheduling this matter for February 19 and 20, 2018, and it commenced as scheduled. At the final hearing, there were no joint exhibits offered. However, each party offered Jon Creamer as a witness. Petitioner's Exhibits 1 through 3, 12, 14, and 15 were admitted without objection; and Exhibits 6 through 8 and 18 were admitted over objection. Petitioner's Exhibit 5 was proffered, but not admitted into evidence. In addition to Mr. Creamer, Petitioner presented the testimony of Todd Hakimi, vice-president of TCC. Respondent's Exhibits 1, 2, and 4 were admitted without objection; and Exhibit 3 was admitted over objection. Intervenor's Exhibit 1(a)-1(e) was admitted over objection.

The three-volume Official Transcript for the final hearing was filed on February 23, 2018. The parties timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The following Findings of Fact are based on exhibits admitted into evidence, testimony offered by witnesses, and admitted facts set forth in the pre-hearing stipulation.

ITN No. 770-0235 and Background

1. FWC is a state agency that seeks office space to be occupied by personnel from six of FWC's divisions. FWC currently leases office space from TCC, which expires in October 2019.

2. On July 19, 2017, FWC issued ITN No. 770-0235, seeking vendors that could provide 53,000 square feet of office space for lease. FWC anticipates occupying the space by November 1, 2019. Between August 15, 2017, and November 2, 2017, FWC issued four addenda to the ITN, which contained amendments, modifications, and explanations to the ITN.

3. There were no bidders that challenged the terms, conditions, or specifications contained in the ITN or its amendments.

4. TCC and NLH were two of the potential lessors that submitted replies in response to the ITN.

5. FWC seeks to lease either a building that already exists or a non-existing building to be constructed in the future. The ITN describes the proposals requested as follows:

Competitive proposals may be submitted for consideration under this Invitation to Negotiate (ITN) for the lease of office space in either an existing building or a non-existing (build-to-suit/turnkey) building. NOTE: All buildings must comply with the Americans with Disabilities Act (ADA) as stated in Attachment A, Agency Specifications, Section 6.D., page 32.

OPTION 1 - an 'existing' building: To be considered an 'existing' building, the facility offered must be enclosed with a roof system and exterior walls must be in place at the time of the submittal of the Reply.

OPTION 2 - a 'non-existing' building:

Offeror agrees to construct a building as a 'build-to-suit' (turnkey) for lease to FWC.

6. Each applicant that submitted a proposal in response to the ITN was required to meet the specification in Attachment A of the ITN. The ITN provides as follows:

FWC is seeking detailed and competitive proposals to provide built-out office facilities and related infrastructure for the occupancy by FWC. As relates to any space that is required to be built-out pursuant to this Invitation to Negotiate in accordance with this Invitation to Negotiate, see Attachment 'A' which includes the FWC Specifications detailing the build-out requirements.

7. The specifications in Attachment A provided the basic requirements for the potential leased space such that proposals offering existing or non-existing building may be compared and evaluated together.

8. The ITN included certain provisions to clarify the rights contemplated by the ITN, and included the following disclaimer:

This ITN is an invitation to negotiate and is for discussion purposes only. It is not an offer, contract or agreement of any kind. Neither FWC nor the Offeror/Lessor shall have any legal rights or obligations whatsoever between them and neither shall take any action or fail to take any action in reliance

upon any part of these discussions until the proposed transaction and a definitive written lease agreement is approved in writing by FWC.

This ITN shall not be considered an offer to lease. The terms of any transaction, if consummated, shall not be final nor binding on either party until a Lease Agreement is executed by all parties. This ITN may be modified or withdrawn by FWC at any time.

9. The ITN also included a provision expressly reserving FWC's "right to negotiate with all responsive and responsible Offerors, serially or concurrently, to determine the best-suited solution." The term "Offeror" was defined by the ITN to mean "the individual submitting a Reply to this Invitation to Negotiate, such person being the owner of the proposed facility or an individual duly authorized to bind the owner of the facility." This reservation of rights placed interested lessors on notice that only responsive lessors could be invited to negotiations.

10. While TCC and NLH were two of the potential lessors that submitted replies in response to the ITN, the bidders submitted different proposals. TCC submitted a proposal for an existing building, and NLH submitted a proposal for a non-existing building.

11. During an initial review of all replies, FWC determined TCC's reply to be nonresponsive based on TCC's response to ITN section IV.G (Tenant Improvements) and a statement titled

"Additional Response" that TCC submitted with its reply. As a result, FWC did not evaluate or score TCC's reply. After TCC's reply was declared nonresponsive, there were no further negotiations with TCC regarding the ITN.

12. NLH's reply passed the initial responsiveness review and was then evaluated and scored by FWC. FWC ultimately issued an intended award of the contract to NLH after conducting negotiations.

Tenant-Improvement Cap

13. The ITN prohibited vendors from proposing conditional or contingent lease rates that included a tenant-improvement cap, or allowance. A tenant-improvement cap reflects the maximum amount the landlord is willing to spend to make improvements to leased space. Mr. Hakimi asserted that the tenant-improvement cap would be an incentive to FWC to enter a lease. However, the tenant-improvement cap would also place a limit on improvements.

14. According to ITN section IV.E, any reply offering a lease rate with a tenant-improvement cap would be deemed nonresponsive:

FULL SERVICE (GROSS) RENTAL RATE

The Offeror shall provide FWC with a Full Service (gross) lease structure. Therefore, the lease rate must include base rent, taxes, all operating expenses (including, but not limited to, janitorial services and supplies, utilities, water, insurance, interior and exterior maintenance, recycling

services, garbage disposal, pest control, security system installation and maintenance, and any amortization of required tenant improvements to the proposed space). There shall be no pass through of additional expenses Offerors must provide their best, firm lease rates. Lease rates that are contingent, involve a basic rate plus "cap" or "range" for such things as tenant improvements will be deemed nonresponsive.

15. The ITN also provided, in section IV.G, that any current lessor must meet all ITN requirements, including those set forth in ITN Attachment A:

TENANT IMPROVEMENTS

The State requires a "turn-key" build-out by the Landlord. Therefore, Offeror shall assume all cost risks associated with delivery in accordance with the required specifications detailed in this ITN, including Attachment A (see pages 28-45).

Additionally, replies for space which is currently under lease with, or occupancy by, the Florida Fish and Wildlife Conservation Commission does not exclude the Offeror from meeting the requirements specified in this ITN document.

Offeror agrees to provide "turn-key" build-out/improvements in accordance with the specifications detailed in this ITN.
(use an X to mark one of the following):
YES _____ or NO _____

16. TCC responded "NO" to the statement "Offeror agrees to provide 'turn-key' build-out/improvements in accordance with the specifications detailed in this ITN."

Additional Response

17. Not only did TCC include a barred tenant-improvement cap, but TCC also attached an addendum to its proposal, which provided the following:

The reality is that as the current Landlord, it would be impossible to ask FFWCC to move out of its existing office space in order to meet the requested Agency Specifications in Attachment A. If this condition makes our response to the Invitation to Negotiate (ITN) "non-responsive", we stand willing to continue further negotiations with FFWCC.

18. There was no provision in the ITN for additional responses outside what was requested in the ITN. More importantly, the addendum indicated TCC could not comply with the ITN, unless certain conditions were met. Mr. Hakimi confirmed the effect of what was written in the addendum when he testified that TCC is unable to meet Attachment A's specifications because it presently has a tenant in place (i.e., FWC) that prevents it from constructing the building improvements necessary to comply with ITN Attachment A.

Proof of Ownership of Property

19. The ITN also provided that to be responsive, each lessor was required to submit certain documentation demonstrating the lessor's control of the property proposed for the leased space:

1. Replies must completely and accurately respond to all requested information, including the following:

(A) Control of Property (Applicable for Replies for Existing and/or Non- Existing Buildings).

For a Reply to be responsive, it must be submitted by one of the entities listed below, and the proposal must include supporting documentation proving control of the property proposed. This requirement applies to:

1. The real property (land);
2. The proposed building(s) (or structure(s));
3. The proposed parking area(s). Control of parking includes the area(s) of ingress and egress to both the real property and the building(s).

- The owner of record of the facility(s) and parking area(s) - Submit a copy of the deed(s) evidencing clear title to the property proposed.

- The authorized agent, broker or legal representative of the owner(s) - Submit a copy of the Special Power of Attorney authorizing submission of the proposal.

20. The Special Power of Attorney form was attached to the ITN as Attachment K. TCC's certification was executed by TCC president, Lyda Hakimi. However, TCC did not execute Attachment K or include an executed power of attorney to demonstrate that TCC has control of the property.

21. The evidence offered at hearing of the property's ownership contained in TCC's reply was a deed showing DRA CRT

Tallahassee Center, LLC to be the property owner. Respondent argued that although TCC owns DRA CRT Tallahassee Center, LLC, the two are different legal entities. Because these were two different legal entities, TCC was required to provide a copy of Attachment K to its response to be deemed responsive.

Broker Commission

22. The ITN required lessors to agree to execute a broker-commission agreement, which was attached to the ITN as Attachment J:

Offeror understands FWC is utilizing the services of a Tenant Broker representative for this lease space requirement and the successful Offeror shall execute a Commission Agreement, in coordination with FWC's Tenant Broker representative, within fifteen (15) business days of notification of Award.

Offeror agrees and acknowledges that a Tenant Broker Commission Agreement is a requirement and the successful Offeror shall be required to execute a Commission Agreement as described above.

(use an X to mark one of the following):

YES _____ or NO _____

23. The ITN included a schedule for the commission rate based on the total aggregate gross base rent that could be paid ranging from 2.50 percent to 3.50 percent. TCC conditioned its reply by agreeing to pay a two-percent broker commission, which is inconsistent with the commission schedule.

24. By offering a lower commission rate, TCC could save money. TCC would then have a competitive advantage over other bidders.

TCC'S Bid was Nonresponsive

25. Based upon the foregoing, TCC's bid submission added a tenant-improvement cap, failed to comply with the broker commission rate, failed to provide supporting documents to demonstrate proof of property ownership, and added additional conditions regarding compliance with the ITN requirements. The information requested and terms of the ITN were required for TCC's bid to be responsive.

26. TCC did not file a challenge to the specifications or any of the requirements of the ITN. It is now too late for such a challenge.

27. TCC's inclusion of a tenant-improvement allowance limits the amount that would pay for improvements. The lower broker commission increases the profit advantage for TCC more than for other bidders, which would be an unfair advantage over other bidders.

28. TCC's failure to comply with the terms of the ITN and failure to provide the required attachment to show proof of ownership were not minor irregularities, which FWC could waive. Therefore, FWC properly determined that TCC's bid submission was nonresponsive.

Standing

29. TCC submitted a bid proposal that did not conform to the requirements of the ITN and it seeks relief that includes setting aside FWC's rejection of its proposal. Therefore, TCC has standing to bring this protest.

30. If it is determined that TCC was nonresponsive, NLH has standing to the extent the procurement process could be deemed contrary to competition.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(3), Florida Statutes (2017).

32. TCC submitted a bid proposal that did not conform to the requirements of the ITN. Because the relief sought by TCC is to set aside its rejection of Petitioner's reply, TCC has standing to bring this protest. Capelletti Bros., Inc. v. Dep't of Gen. Servs., 432 So. 2d 1359 (Fla. 1st DCA 1983).

33. Petitioner, as the party challenging the proposed agency action, has the burden of proof in this proceeding and must show that the agency's proposed action is contrary to the agency's governing statutes, rules or policies, or the bid or proposal specifications. A de novo hearing was conducted to evaluate the action taken by the agency. § 120.57(3)(f), Fla.

Stat.; State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607 (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.

34. 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 & Concrete, Inc. v. Dep't of Transp., 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985); Capeletti Bros., Inc. v. State, Dep't of Gen. Servs., 432 So. 2d at 1363. Section 120.57(3)(f) establishes the standard of proof as to whether the proposed action was clearly erroneous, contrary to competition, arbitrary or capricious.

35. 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. U.S. v. U.S. Gypsum Co., 333 U.S. 354, 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. State

Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding.

See Wester v. Belote, 138 So. 721, 723-24 (1931).

TCC's Bid

36. In this case, TCC submitted a bid as an "existing" building offeror. Its bid, however, is contrary to proposal specifications with respect to the tenant-improvement cap and the broker commission rate.

37. The ITN was issued pursuant to section 255.25, Florida Statutes (2017), which applies to state agencies' procurement of leased building space.

38. Section 255.25(3)(a)3. provides, in pertinent part:

a. If the agency determines in writing that the use of an invitation to bid or a request for proposals will not result in the best leasing value to the state, the agency may procure leased space by competitive sealed replies

b. The agency shall evaluate and rank responsive replies against all evaluation criteria set forth in the invitation to negotiate and select, based on the ranking, one or more lessors with which to commence negotiations. After negotiations are conducted, the agency shall award the contract to the responsible and responsive lessor that the agency determines will provide the best leasing value to the state.

39. Section 255.248 defines "responsive reply," as used in 255.25, as a reply "submitted by a responsive and responsible lessor, which conforms in all material respects to the solicitation." § 225.248(7), Fla. Stat. "Responsive lessor" is defined as "a lessor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation." § 225.248(8), Fla. Stat.

40. A lessor whose reply conforms in all material respects to the ITN may be invited to negotiate. Here, TCC's offer was not responsive in several areas. First, TCC offered lease rates that included a tenant-improvement cap. Second, TCC-offered lease rates were contingent on FWC's acceptance of terms expressly prohibited by the ITN. Third, TCC failed to demonstrate control of the property it offered for lease. Fourth, TCC offered a different broker commission than the ITN required lessors to agree to.

41. TCC argues that because this procurement involves an ITN and not a request for proposals or invitation to bid, lessors are allowed to modify their replies during the negotiation process. TCC is under the impression that the initial ITN replies do not need to conform strictly to the ITN requirements. Although section 255.25 allows FWC and lessors to negotiate to achieve the best value for the State, the reply submitted must be responsive to the ITN.

42. TCC's failure to comply with the terms, conditions, and specifications renders a vendor nonresponsive and ineligible for negotiations. As a nonresponsive lessor, TCC was not eligible to participate in negotiations and was not eligible for the ultimate award under the ITN process.

TCC Failed to Prove that Its Bid Submittal was Responsive

43. The evidence overwhelmingly established that TCC's bid submission did not include all of the documentation and failed to comply with the terms of the ITN specifically required to comply with the ITN. It is for these reasons that FWC determined that TCC's bid submission was nonresponsive.

44. The determination that TCC's bid submission did not include all of the documentation and full compliance as required by the ITN, however, does not end this analysis. Not all irregularities in bid submissions or deviations from the terms of an invitation to bid are considered material enough to require rejection of a bid submittal. Tropabest Foods, Inc. v. Dep't of Gen. Servs., 493 So. 2d 50 (Fla. 1st DCA 1986); see also Fla. Admin. Code R. 60A-1.002(13). A deviation from the requirements of an invitation to bid "is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, 493 So. 2d at 52. See also Robinson Elec. Co. v. Dade Cnty., 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982).

45. In Florida, there are two criteria that are used to determine whether a deviation is material as follows:

(1) whether the effect of waiving the deviation would be to deprive the agency of assurance that the contract will be performed and guaranteed according to its specified requirements; or (2) whether the deviation 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. Id.

46. The First District Court of Appeal has found that, by definition, anything affecting the price of a bid is not a minor irregularity and may not be waived by the agency. Rather, a deviation affecting price is material and may not be waived by the agency. Mercedes Lighting & Elec. Supp., Inc. v. Fla. Dep't of Gen. Servs., 560 So. 2d 272, 278 (Fla. 1st DCA 1990).

47. TCC's deviations from the ITN requirements were material. As stated above, in the findings of fact above, the deviations affected price and afforded TCC a competitive advantage over other bidders.

Waiver to Challenge Specifications

48. TCC also argues that the ITN's terms, conditions, and specifications should have been different to accommodate TCC as the current lessor. To the extent TCC seeks through its

petition to challenge the ITN terms, conditions, and specifications, TCC has waived that opportunity by failing to timely bring such a challenge. See § 120.57(3)(b), Fla. Stat. TCC also accepted the ITN terms, conditions, and specifications as published when TCC submitted its reply. The undersigned is without authority to consider a specifications challenge at this stage of the procurement process.

49. Section 120.57(3)(b) provides as follows:

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 Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter.

50. Similarly, the ITN provided as follows:

With respect to a protest of the terms, conditions and specifications contained in this solicitation, including any provisions governing the methods for ranking Replies, awarding contracts, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours (Saturdays, Sundays, and state holidays excluded) after the posting of the solicitation. For purposes of this provision, the term "the solicitation" includes any addendum, response to written questions, clarification or other document concerning the terms, conditions, or specifications of the solicitation.

51. The purpose of requiring solicitation terms, conditions, and specifications to be challenged within 72 hours of publication "is to allow an agency, in order to save expense to the bidders and to assure fair competition among them, to correct or clarify plans and specifications prior to accepting bids." Capeletti Bros., Inc. v. Dep't of Transp., 499 So. 2d 855, 857 (Fla. 1st DCA 1986).

52. TCC relies on B&L Service, Inc. v. Department of Health and Rehabilitative Services, 624 So. 2d 805 (Fla. 1st DCA 1993), to argue that the ITN's terms, conditions, and specifications may be challenged through a challenge to the award. However, B&L Service does not apply here. B&L Service was decided under the previous version of the statutory provision, which applied only to challenges based on project plans or specifications.^{1/}

53. Regarding a protest of the specifications contained in an invitation to bid or in a request for proposals, the previous version of the statute provide that the notice of protest was to be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an ITN or request for proposals. § 120.53(5) (b), Fla. Stat. (1992) (former version of 120.57(3) (b)).

54. The current version broadens the scope of what must be challenged within 72 hours of the solicitation's specifications to avoid a waiver of rights as follows: "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."

§ 120.57(3)(b), Fla. Stat.

55. In this case, by failing to raise these complaints within 72 hours of the ITN's publication, TCC waived the right to raise the allegations in this proceeding.

56. In summary, FWC's proposed action regarding ITN No. 770-0235 is not contrary to competition, arbitrary, or capricious, and does not contravene FWC's governing statutes, rules, or policies.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Fish and Wildlife Conservation Commission enter a final order dismissing Tallahassee Corporate Center, LLC's Petition.

DONE AND ENTERED this 27th day of March, 2018, in
Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of March, 2018.

ENDNOTE

^{1/} With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for proposals. § 120.53(5)(b), Fla. Stat. (1992) (former version of 120.57(3)(b)).

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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.