

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HELICOPTER APPLICATORS, INC.,

Petitioner,

vs.

Case No. 18-4498BID

COASTAL AIR SERVICE, INC.,^{1/} AND
SOUTH FLORIDA WATER MANAGEMENT
DISTRICT,

Respondents.

_____ /

RECOMMENDED ORDER

A final hearing was held in this case on September 28, 2018, in West Palm Beach, Florida, before Suzanne Van Wyk, Administrative Law Judge for the Division of Administrative Hearings ("Division").

APPEARANCES

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STATEMENT OF THE ISSUES

Whether the South Florida Water Management District's ("District") intended award of a contract for aerial spraying services, granular application services, and aerial transport services, to Coastal Air Services, Inc. ("Coastal"), is contrary to the District's governing statutes, rules, policies, or the bid specifications; and, if so, whether the decision was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On February 7, 2018, the District issued Request for Bids Number 6000000880 (the "RFB"), seeking bids from contractors to provide spraying of aquatic, ditch bank, and invasive vegetation by helicopter, aerial flight services for site inspection and plant surveys, and related services, including spot spraying. The District received timely bids from both Coastal and Helicopter Applicators, Inc. ("Petitioner" or "HAI"). The District deemed both bids responsive and responsible under the terms of the RFB. The District deemed Coastal the lowest responsive and responsible bidder for aerial spraying, granular application, and aerial transport services. The District deemed HAI the lowest responsive and responsible bidder for spot spraying services. On May 11, 2018, the District posted its

Notice of Intent to Award the respective contracts to Coastal and HAI.

HAI timely protested the award to Coastal for aerial spraying, granular application, and aerial transport. On August 27, 2018,^{2/} the District referred HAI's Formal Written Protest ("Petition") to the Division, which was originally assigned to Administrative Law Judge Francine Ffolkes. The case was transferred to the undersigned on September 4, 2018.

The undersigned conducted a telephonic scheduling conference with the parties on September 6, 2018, and the final hearing was scheduled for September 28, 2018, in West Palm Beach, Florida.

The final hearing commenced as scheduled. The parties' Joint Exhibits 1, 2, and 3, were admitted in evidence. Petitioner presented the testimony of its co-owner, Michael Page; Dorothy Bradshaw, District Director of Administrative Services; Johanna Labrada, District Bureau Chief of Procurement; and Gary Hansen, District Chief Pilot. Coastal presented the testimony of its owner, Greg Clubbs. The District did not present any witness testimony.

The one-volume Transcript of the final hearing was filed on October 15, 2018. The parties timely-filed Proposed Recommended Orders on October 25, 2018, which have been considered in the preparation of this Recommended Order.

Except as otherwise provided, all Florida Statutes references herein are to the 2017 version.

FINDINGS OF FACT

The Parties

1. The District is an independent taxing authority created pursuant to section 373.069, Florida Statutes, with the authority to contract with private entities to maintain real property controlled by the District. See § 373.1401, Fla. Stat.

2. HAI is a Florida corporation duly authorized to do business in the State of Florida with a business address of 1090 Airglades Boulevard in Clewiston, Florida.

3. Coastal is a Florida corporation duly authorized to do business in the State of Florida with a business address of 7424 Coastal Drive in Panama City, Florida.

The RFB

4. On February 7, 2018, the District issued the RFB, soliciting bids for qualified respondents to provide the following:

[F]urnish all labor, equipment, perform data entry and perform all operations for spraying of aquatic, ditchbank and invasive vegetation by helicopter and provide aerial flight services for site inspection and plant surveys.

5. Both HAI and Coastal submitted timely bids, which the District deemed responsive and responsible under the terms of the RFB.

6. The District deemed Coastal the lowest responsive and responsible bidder for aerial spraying, granular application, and aerial transport services. The District deemed HAI the lowest responsive and responsible bidder for spot spraying services.

7. On May 11, 2018, the District posted its Notice of Intent to Award the respective contracts to Coastal and HAI.

8. HAI challenges the award to Coastal because it is not a responsible bidder under the terms of the RFB. HAI's challenge focuses on two items required to document the bidder's responsibility to perform the requested services.

9. First, the RFB requires the bidder to provide at least two helicopters certified pursuant to 14 CFR Part 133, Rotocraft External-Load Operations; and 14 CFR Part 137, Agricultural Aircraft Operations (Part 137 Certificate).

10. Second, the RFB requires the bidder to demonstrate its ability to obtain required insurance coverage.

Part 137 Certificate

11. HAI contends that Coastal's bid does not meet the responsibility provisions of the RFB because it did not include sufficient Part 137 Certificates for its subcontractor, HMC

Helicopters ("HMC"). HAI contends the Part 137 Certificates are required to expressly state that aircraft are certified to dispense economic poisons.

12. Petitioner's argument fails for three reasons.

13. First, the RFB does not require the bidder's Part 137 Certificate to expressly endorse aircraft to dispense economic poisons.^{3/}

14. Second, assuming the express endorsement was required, the requirement does not apply to HMC.

15. The RFB defines the term "Bidder" and "Respondent" as "[a]ll contractors, consultants, organizations, firms or other entities submitting a Response to this RFB as a prime contractor." (emphasis added).

16. In its bid, Coastal is listed as the prime contractor, and HMC as a subcontractor.

17. The RFB requires each Respondent to list at least two aircraft which are Part 133 and 137 certified. The requirement applies to Coastal as the primary contractor, not to its subcontractor.

18. Coastal's bid listed five aircraft with both Part 133 and 137 Certificates, actually exceeding the requirement for two such certified aircraft.

19. Third, assuming an express endorsement for dispensing economic poisons was required, and that the requirement applied

to HMC, HMC's Part 137 Certificate documents HMC's authority to dispense economic poisons.

20. Pursuant to 14 CFR 137.3, "Agricultural aircraft operation" is defined as follows:

[T]he operation of an aircraft for the purpose of (1) dispensing any economic poison, (2) dispensing any other substance intended for plant nourishment, soil treatment, propagation of plant life, or pest control, or (3) engaging in dispensing activities directly affecting agriculture, horticulture, or forest preservation, but not including the dispensing of live insects.

21. To obtain a Part 137 Certificate, the operator must pass a knowledge and skills test, which includes the safe handling of economic poisons and disposal of used containers for those poisons; the general effects of those poisons on plants, animals, and persons and precautions to be observed in using those poisons; as well as the primary symptoms of poisoning in persons, appropriate emergency measures in the case of poisoning, and the location of poison control centers. See 14 CFR § 137.19.

22. However, if the operator applies for a Part 137 Certificate which prohibits dispensing of economic poisons, the applicant is not required to demonstrate the knowledge and skills listed above. See Id.

23. HMCs' certificates do not contain an express prohibition against dispensing economic poisons.

24. The authorization for HMC's aircraft to dispense economic poisons is inherent in its Part 137 Certificate.

25. Coastal's bid meets the solicitation requirement for at least two aircraft with Part 137 Certificates.

Insurance Requirements

26. The RFB requires each Respondent to "provide evidence of the ability to obtain appropriate insurance coverage." Respondents may meet the insurability requirement by having their insurance agent either (1) complete and sign an insurance certificate which meets all of the requirements of Exhibit H to the RFB; or (2) issue a letter on the insurance agency's letterhead stating that the Respondent qualifies for the required insurance coverage levels and that an insurance certificate meeting the District's requirements will be submitted prior to the execution of the contract.

27. In response to this requirement, Coastal submitted a letter from Sterlingrisk Aviation, dated March 6, 2018, stating, "All required coverage amounts are available to Coastal Air Service, Inc. to fulfill the requirements of this contract." In the Re: line, the letter refers to the specific RFB at issue in this case.

28. Coastal also submitted a certificate of insurance from Sterlingrisk Aviation demonstrating the levels of insurance coverage in effect at the time the bid was submitted, although the coverages are less than the amounts required under the RFB.^{4/}

29. HAI takes issue with Coastal's evidence of ability to obtain the required coverage because the letter from Sterlingrisk does not state "an insurance certificate reflecting the required coverage will be provided prior to the contract execution."

30. Based on the totality of the evidence, the undersigned infers that Sterlingrisk's letter omits the language that a certificate "will be provided" prior to contract execution, because Sterlingrisk will issue an insurance certificate only when Coastal applies, and pays the premium, for the increased coverage limitations.

31. The letter from Sterlingrisk substantially complies with the insurance requirements of the RFB, and constitutes competent, substantial evidence of Coastal's ability to obtain the required insurance coverage.

32. HAI introduced no evidence that Coastal obtained an economic advantage over HAI by failing to include language from its insurance agent that "an insurance certificate reflecting the required coverage will be provided prior to the contract execution."

33. Instead, HAI argued that by failing to enforce that provision of the RFB, the District cannot ensure the winning bidder will be responsible to undertake the contract. HAI argued that the District's failure to adhere to this RFB requirement may create inefficiencies that "would result in the event that Coastal were unable to obtain the required insurance coverage" before execution of the contract.

34. Coastal's bid documents its eligibility for insurance coverage in the amounts required by the RFB. If Coastal does not provide said certificates, it will not be qualified for final execution or issuance of the contract.

CONCLUSIONS OF LAW

35. The Division has jurisdiction over the subject matter and the parties to this action. §§ 120.569 and 120.57(3), Fla. Stat. (2018).

36. Petitioner has the burden to prove, by a preponderance of the evidence, the District's intended award of the RFB to Coastal is contrary to the District's governing statutes, rules, or policies; or the RFB specifications. § 120.57(3)(f), Fla. Stat. (2018).

37. Although section 120.57(3) provides that this is a de novo proceeding, it is not a "de novo" proceeding in the traditional sense. See State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). That is,

this is not a forward-looking proceeding to formulate agency action, and the Division may not substitute its judgment for that of the District. See Intercont'l Props., Inc. v. State Dep't of HRS, 606 So. 2d 380, 386 (Fla. 3d DCA 1992); R.N. Expertise, Inc. v. Miami-Dade Cnty. Sch. Bd., Case No. 01-2663BID (Fla. DOAH Feb. 4, 2002; MDCSB Mar. 13, 2002) (explaining the Division's role in procurement-protest proceedings). Instead, the Division engages in a form of "inter-agency review" in which the ALJ makes findings of fact about the action already taken by the District. See State Contracting, 709 So. 2d at 609. The Division does not evaluate the District's decision anew; instead the Division looks to see if the District followed its governing statutes, its rules, and the RFP specifications during the procurement process. See R.N. Expertise, DOAH Case No. 01-2663BID.

38. 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 1359, 1363 (Fla. 1st DCA 1983). Section 120.57(3)(f) establishes the standard of proof: whether the proposed action

is clearly erroneous, contrary to competition, arbitrary or capricious.

Part 137 Certificate

39. The District's approval of Coastal's bid, without express language that its subcontractor's aircraft was approved to dispense economic poisons, was neither clearly erroneous, arbitrary, capricious, nor contrary to competition.

40. 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).

41. No mistake was made in this case. The RFB did not require the bidder's Part 137 Certificate to contain the express statement that the aircraft was approved to dispense economic poisons. The District's reliance on the certificate was not clearly erroneous. Coastal listed five aircraft which were each Part 133 and 137 certified, which exceeded the RFB requirements.

42. 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). HAI submits that the District did not engage in meaningful review of the Part 137 Certificates

included with Coastal's bid, in part because Mr. Hansen, the District's pilot, had not previously reviewed District bids and was not previously familiar with Part 137 Certificates. However, the evidence demonstrated that Mr. Hansen checked both bidders' responses for listed aircraft with the required certifications, and double-checked that information by accessing a website which utilizes FAA data.

43. Far from being taken without thought or reason, the District's acceptance of Coastal's, and its subcontractor's, Part 137 Certificates was based on review of the submitted documents and an independent review to verify the aircraft were Part 137 certified. The District's action is supported by the facts contained in the documents submitted with Coastal's bid. Further, the District's action is supported by the logical conclusion, based on a review of the federal regulations, that HMC's aircraft are authorized to dispense economic poisons because the certificates do not include any prohibition to that effect.

Insurance Requirements

44. Finally, HAI argues that the District's award of the bid to Coastal is contrary to competition because its insurance agency letter does not contain the specific language that "an insurance certificate meeting the District's requirements will

be submitted before final execution or issuance of the contract."

45. 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).

46. 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).

47. In Florida, the following two criteria are applied to determine whether a deviation is material:

[1] whether the effect of a waiver would be to deprive the [District] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and [2] whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

Robinson Electric, 417 So. 2d at 1034.

48. HAI asserts that the omission in Coastal's bid falls within the first prong of the Robinson Electric inquiry--an irregularity that would deprive the District of its assurance that the contract will be entered into, performed, and guaranteed according to its specified requirements.

49. In its Proposed Recommended Order, HAI cites to Syslogic Technology Services, Inc. v. South Florida Water Management District, Case No. 01-4385 (Fla. DOAH Jan. 18, 2002; SFWMD Feb. 14, 2002). In Syslogic, the District awarded a contract despite the bidder's failure to include independently-audited financial statements in its proposal, as required by the relevant request for proposals. In that case, Administrative Law Judge John Van Laningham found that the requirement for audited financial statements was rendered meaningless by awarding the contract to a bidder who did not submit independently-audited financial statements.

50. HAI argues that the facts are "precisely the same here," and that the District rendered meaningless the instant phrase, "an insurance certificate meeting the District's requirements will be submitted before final execution or issuance of the contract."

51. In reality, the facts are distinguishable. In Syslogic, the water management district was seeking proposals for a single qualified information systems/technology contracting

firm. Proposers were required to demonstrate financial stability by submitting audited financial statements for the previous two years and the district reserved the right to perform its own detailed review of financial information to determine whether or not the respondent is financially stable for successful performance of any ensuing contract award. Proposers had sole responsibility to have their financial statements audited by a third party and to submit those audited statements with their response.

52. Here, the RFB requires a bidder to submit evidence of its "ability to obtain appropriate insurance coverage" if its existing coverage does not meet the amounts required by the RFB. The RFB requires a statement from the bidder's insurer that a certificate of insurance will be issued prior to execution of the contract. The insurer does not have sole control over whether such a certificate will be issued.^{5/} Unless the bidder applies, and pays the premium, for said coverage, the insurer will not issue the certificate. It is understandable that an insurer may not be comfortable including a blanket statement that it will issue a certificate of insurance without any further prerequisite.

53. In Syslogic, without audited financial statements, the district had no assurance that its contractor had the financial wherewithal to perform the contract. By waiving the requirement

for audited financial statements, the district assumed the risk of entering into a contract for complex technology services with a company that might not be around to complete the term of the contract. Here, Coastal's insurer provided evidence that Coastal not only has an existing policy with the insurer, but also is eligible for the required coverage amounts. Coastal owns the equipment, has the certifications, and the past history with its insurer to determine it is eligible for increased coverage. The insurer's letter verifies Coastal's ability to obtain appropriate insurance coverage. Coastal needs to do little more than execute the paperwork and pay for the coverage. By the terms of the RFB, the District is not required to enter into a contract with Coastal unless, and until, it presents the required certificate of insurance.

54. Coastal's bid does not deprive the District of assurance that the contract will be entered into, performed, or guaranteed according to the terms of the RFB. Thus, the award is not contrary to competition.

55. In summary, HAI did not prove that the District's intended action to award the contract for aerial spraying services, granular application services, and aerial transport services to Coastal was contrary to the RFB specifications or was otherwise 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 Southwest Florida Water Management District enter a final order dismissing Helicopter Applicator, Inc.'s Petition.

DONE AND ENTERED this 15th day of November, 2018, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of November, 2018.

ENDNOTES

^{1/} During the final hearing, counsel for Coastal moved to amend the case style to use the correct name of the business, Coastal Air Service, Inc., rather than Coastal Helicopters, Inc., as it had been improperly identified by Petitioner. That motion was repeated in Coastal's Proposed Recommended Order, is granted, and the case style is amended to reflect the entity's correct name.

^{2/} The District dismissed HAI's original timely Petition on May 23, 2018, with leave to amend. HAI requested, and was granted, an extension of time to file an Amended Petition, which it did on June 11, 2018. Between June 25 and August 24, 2018, the parties engaged in settlement negotiations, waiving the 15-

day timeframe, pursuant to section 120.569(2)(a), Florida Statutes, to transmit HAI's Amended Petition to the Division.

^{3/} HAI points to Coastal's certificates, which expressly state, "Dispensing of Economic Poisons Allowed," to support its argument that HMC's certificates are invalid since they do not contain that express language.

^{4/} The evidence suggests this certificate was included to document that Sterlingrisk is Coastal's current insurance agent.

^{5/} To accomplish the District's intention, the RFB should have been structured to require a statement from the insurer that the bidder qualifies for the insurance coverages, and from the bidder that it will submit a certificate of insurance meeting those requirements prior to execution of the contract.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.