

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BLUE SKY EMERGENCY MANAGEMENT,
D/B/A THE INTEGRITY GROUP,

Petitioner,

vs.

Case No. 20-5570BID

DEPARTMENT OF MANAGEMENT
SERVICES,

Respondent,

and

MGT OF AMERICA CONSULTING, LLC;
AND FCMC, LLC,

Intervenors.

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RECOMMENDED ORDER OF DISMISSAL

A motion hearing was conducted in this case via Zoom on January 13, 2021, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH). The hearing was convened to consider the Department of Management Services' Motion to Dismiss; Intervenor, MGT of America Consulting, LLC's, Motion to Dismiss; Intervenor, FCMC, LLC's, Motion to Strike (collectively, the Motions); and Petitioner, Blue Sky Emergency Management Services d/b/a The Integrity Group's response to the Motions (Response).

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Petitioner waived its right to protest the Supplemental Notice of Intent to Award issued by the Department on December 1, 2020.

PRELIMINARY STATEMENT

On December 14, 2020, Petitioner filed a Formal Written Protest Petition & Request for Formal Administrative Hearing (Petitioner's Protest) related to the Department's Supplemental Notice of Intent to Award dated December 1, 2020, challenging the Department's entire procurement process and Supplemental Intent to Award decision. The Department forwarded Petitioner's Protest to DOAH on December 29, 2020.

Following assignment of the case, the undersigned conducted a telephonic status conference on January 6, 2021, following which a final hearing was scheduled for January 25, 2021, and an Order of Pre-hearing Instructions with expedited discovery was entered. In addition, a schedule for filing the Motions challenging Petitioner's Protest and the Response thereto was established. Prior to the hearing on the Motions, another telephonic status conference was held on January 8, 2021, during which the parties requested a continuance of the final hearing and waived the statutory timeframes for conducting a final hearing. The final hearing was rescheduled to be held February 25 and 26, 2021.

The Findings of Fact set forth below are based on the undisputed facts set forth in Petitioner's Protest, attachments, the Motions, Response, and applicable law.

FINDINGS OF FACT

1. On March 17, 2020, the Department issued Request for Proposals Number 06-80101500-J (the RFP) seeking vendors to provide services through state term contracts in two categories (Service Categories): (1) management consulting services (MCS) and (2) financial and performance audit services (FPA). The awarding of state term contracts resulting from the RFP does not guarantee the awarded vendors business; instead, being selected for award under a state term contract merely allows the awarded vendors to further compete for business from state agencies and certain defined eligible users who require the services offered under the contract.

2. After vendors are selected for a state term contract, a state agency or eligible user who requires the services issues a request for quotes from the state term contract vendors. The vendors decide whether they want to compete for the specific services solicited by submitting a quote, and the procuring agency or user then selects from the contracted vendors the vendor that can best fit its unique needs based on the quotes.

3. Accordingly, the purpose of the RFP is simply to pre-qualify the vendors for the future possibility of obtaining work from state agencies and eligible users. Consequently, the Department's award to multiple vendors for each Service increases competition and gives the users significant choice in selecting a vendor, with each additional award having the effect of increasing the competition and choice available to state agencies and other eligible users who utilize the state term contract.

4. The Department separately evaluated proposals submitted in the two Service Categories and made separate awards for each Service Category. Integrity Group submitted proposals for both Service Categories.

5. Petitioner's Protest concerns only the actions of the Department in conducting the procurement for the MCS Service Category and does not implicate the FPA Service Category.

6. As part of the evaluation for the MCS Service Category, each vendor submitted a summary of its experience and a separate proposal for each individual Service (Services a through l) within the MCS Service Category. Integrity Group submitted a response summarizing its experience and an individual proposal for each of the MCS Services (Services a through l).

7. Five evaluators appointed by the Department were tasked with scoring each vendor's response with respect to experience, as well as separately evaluating and scoring each Service proposal submitted for Services a through l. The vendor with the highest score for each Service was awarded a state term contract for such Service, and the RFP reserved to the Department the right to make additional awards to vendors that scored within 25% of the highest score for each Service.

8. The Department initially posted its Notice of Intent to Award and a list of the vendors that were awarded contracts in each Service on September 29, 2020. While the Department awarded Integrity Group state term contracts for the FPA Service Category, it did not make any awards to Integrity Group for the MCS Service Category.

9. The Notice of Intent to Award for the MCS category posted by the Department on September 29, 2020, stated:

State of Florida
Notice of Intent to Award
Management Consulting Services

RFP No: 06-801 01500-J
Date: September 29, 2020

As to the Management Consulting Services (MCS) category of the above-mentioned Request for Proposals, pursuant to sections 287.057(1)(b) and 120.57(3), Florida Statutes, the Department of Management Services hereby posts its Notice of Intent to Award

a contract to the vendors listed in the MCS Award List attachment. Vendors who submitted proposals but were not awarded a Contract are listed in the MCS No Award attachment. Vendors who have submitted proposals deemed non-responsive are listed in the MCS Non-responsive attachment.

Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes.

Any protest concerning this agency decision or intended decision must be timely filed with the Agency Clerk. Protests may be filed by courier, hand delivery, or U.S. mail at Department of Management Services, Office of the General Counsel, Attention: Agency Clerk, 4050 Esplanade Way, Suite 160, Tallahassee, FL 32399-0950. Protests may also be filed by fax at 850-922-6312 or by email at agencyclerk@dms.fl.gov. It is the filing party's responsibility to meet all filing deadlines.

10. From October 9 to 12, 2020, the Department received formal protests from four vendors not initially selected for award: Intervenor, MGT; TEK Systems Global Services, LLC; Slalom, LLC; and Tidal Basin Government Consulting, LLC.

11. Integrity Group did not file a notice of protest within 72 hours of the Department's posting of its September 29, 2020, Notice of Intent to Award, and did not file a formal written protest within ten calendar days from the filing of a notice of protest.

12. On December 1, 2020, and after having engaged in resolution conferences with each of the protesting vendors, the Department issued a Supplemental Notice of Intent to Award, which awarded contracts to the four protesting vendors.

13. Thereafter, on December 4, 2020, Integrity Group filed a notice of intent to protest related to the Department's Supplemental Notice of Intent to Award, and on December 14, 2020, filed Petitioner's Protest.

14. Petitioner's Protest alleges that "the Integrity Group is substantially and adversely affected by the Department's improper and fundamentally flawed procurement process and erroneous decision to exclude the Integrity Group from receiving any awards."

15. However, as explained in the Conclusions of Law below, Petitioner's Protest is untimely, has been waived, and should be dismissed.

CONCLUSIONS OF LAW

16. The Department is the state agency responsible for procuring state term contracts. *See* §§ 287.012(28), 287.042(2)(a), 287.056, and 287.057, Fla. Stat.¹ A state term contract is a contract competitively procured by the Department pursuant to section 287.057, Florida Statutes, which is used by agencies and eligible users pursuant to section 287.056. § 287.012(28), Fla. Stat.

17. DOAH's jurisdiction in this case was invoked when the Department forwarded Petitioner's Protest to DOAH. *See* § 120.57(3), Fla. Stat.

18. With regard to contract solicitations or awards, section 120.57(3)(a), Florida Statutes, provides:

The agency shall provide notice of a decision or intended decision concerning a solicitation, contract award, or exceptional purchase by electronic posting. This notice shall contain the following statement: "Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes."

19. In this case, the Department's Notice of Intent to Award a contract to the winning vendors on September 29, 2020, contained the language required by section 120.57(3)(a), which provided Integrity Group a clear point of entry

¹ Unless otherwise indicated, all references to Florida Statutes are to the current version.

and put Integrity Group on notice that the failure to file a protest within the proscribed time would constitute a waiver of a proceeding under chapter 120. By failing to timely file a protest, Integrity Group waived its right to challenge the procurement process. *See Xerox Corp. v. Fla. Dep't of Prof'l Reg.*, 489 So. 2d 1230 (Fla. 1st DCA 1986)(affirming DPR's determination that appellant waived its right to a chapter 120 proceeding by failing to timely file a formal written protest); *Universal Network, Inc. v. Alachua Cty. Sch. Bd.*, Case No. 91-5356BID (Fla. DOAH Sep. 19, 1991) (“... statutory timeliness is jurisdictional in bid cases.”).

20. This present case is similar to *Tallahassee Associates, Ltd. v. Department of State*, Case No. 91-1306BID (Fla. DOAH Mar. 22, 1991). In *Tallahassee Associates*, the Department of State sought proposals for lease space. *Id.* at ¶ 1. The Department posted a standard bid tabulation form with chapter 120 rights. *Id.* at ¶ 3, 7. One bidder, T.C.S., whose proposal had been deemed nonresponsive, filed a timely protest; while another bidder, Tallahassee Associates, did not file a protest. *Id.* at ¶ 8-9. In settlement of T.C.S.'s protest, the Department of State decided to deem T.C.S.'s proposal responsive and score it. The Department of State subsequently notified all bidders of the rescore process and provided chapter 120 rights. *Id.* at ¶ 12. In response to the rescore notice, Tallahassee Associates filed a notice of protest and a formal written protest. *Id.* at ¶ 13. In concluding that Tallahassee Associates waived its right to challenge the Department of State's proposed award, the Hearing Officer observed:

Admitting that it missed the January 2, 1991, point of entry to challenge the Respondent's proposed contract award, the Petitioner has argued that the Respondent gave the Petitioner another point of entry to challenge the Respondent's action when it posted the February 4, 1991, Bid Tabulation. This argument is rejected. Once the Petitioner waived its right to proceedings under Section 120.53(5), Florida Statutes, by failing to challenge the Respondent's proposed award, it lost its standing to challenge subsequent actions by the Respondent concerning the proposed contract award. T.C.S.'s timely

challenge to the Respondent's proposed award did not revive the Petitioner's rights. Nor did the action of the Respondent in concluding that T.C.S.'s proposal was responsive and in evaluating T.C.S.'s proposal substantially affect the Petitioner.

Id. at ¶ 28.

21. Just as Tallahassee Associates had waived its rights, Integrity Group waived its right to challenge the Department's intended award decision. The Department's Supplemental Notice of Intent did not give Integrity Group additional rights to protest the intended award because it had already been decided that Integrity Group is not entitled to an award of a contract under the RFP, and Integrity Group waived its right to challenge that decision. Integrity Group otherwise fails to have standing to support its Petition.

22. In an administrative proceeding, standing is a jurisdictional threshold issue equivalent to assessing subject matter jurisdiction. *See Abbott Lab. v. Mylan Pharm., Inc.*, 15 So. 3d 642 (Fla. 1st DCA 2009); *Grande Dunes. Ltd. v. Walton Cty.*, 714 So. 2d 473, 475 (Fla. 1st DCA 1998). DOAH lacks jurisdiction to consider the merits of a petition unless, and until, a petitioner affirmatively establishes standing. *Westinghouse Elec. Corp. v. Jacksonville Transp. Auth.*, 491 So. 2d 1238, 1240-41 (Fla. 1st DCA 1986).

23. Pursuant to section 120.57(3), to have standing for a bid protest, a petitioner must establish that the agency's intended decision "adversely affected" the petitioner's substantial interests. *See Madison Highlands, LLC v. Fla. Hous. Fin. Corp.*, 220 So. 3d 467, 473 (Fla. 5th DCA 2017)(citing *Preston Carroll Co., v. Fla. Keys Aqueduct Auth.*, 400 So. 2d 524, 525 (Fla. 3d DCA 1981)). To establish a substantial interest, the protesting entity must meet the two-prong "substantial interest" test as set forth in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). *See Madison Highlands, LLC*, 220 So. 3d at 473.

24. Agrico requires a challenging party to show: "(1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section

120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.” *Agrico*, 406 So. 2d at 482. “The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.” *Id.*

25. An injury-in-fact must result from the challenged agency action and be real and immediate, not conjectural or hypothetical. Abstract injury is insufficient to establish standing. *See Fla. Dep’t of Rehab. v. Jerry*, 353 So. 2d 1230 (Fla. 1st DCA 1978); *Madison Highlands*, 220 So. 3d at 473 (“Under the first prong of *Agrico*, the injury must be actual and immediate, and not based on a hypothetical scenario.”).

26. Integrity Group fails to satisfy the first prong of the *Agrico* test. Nothing in the Supplemental Notice of Intent to Award affects Integrity Group’s substantial interests. Whether or not the Department settled with the four challenging protesters could not affect the substantial interests of Integrity Group because Integrity Group had already waived its rights to an award under the RFP by not filing a timely notice of protest challenging the Department’s September 29, 2020, Notice of Intent to Award, which determined that Integrity Group was not entitled to an award. Having waived its rights to challenge the Department’s decision to deny it an award of a contract, Integrity Group has no rights implicated by the Department’s Supplemental Notice of Intent to Award.

27. The authorities cited by Integrity Group in its Response in support of its argument that Integrity Group has standing are inapposite.

28. Moreover, in addition to supporting a recommendation of dismissal, as the undisputed facts demonstrate that there are no material disputed issues of fact on the threshold issue of standing, relinquishment of jurisdiction for the entry of a final order dismissing this case is also justified by those undisputed facts. *See* § 120.57(1)(i), Fla. Stat.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Petitioner lacks standing and dismissing Petitioner's Protest with prejudice.

DONE AND ENTERED this 22nd day of January, 2021, in Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
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Filed with the Clerk of the
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this 22nd day of January, 2021.

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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.