

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

CTS ENGINEERING, INC.,

Petitioner,

vs.

Case No. 21-3573BID

FLORIDA DEPARTMENT OF
TRANSPORTATION,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge (“ALJ”) Darren A. Schwartz, of the Division of Administrative Hearings (“DOAH”), for final hearing on December 22, 2021, by Zoom conference.

APPEARANCES

For Petitioner: William G. Salim, Esquire
Moskowitz, Mandell, Salim
& Simowitz, P.A.
800 Corporate Drive, Suite 500
Fort Lauderdale, Florida 33334

For Respondent: Douglas Dell Dolan, Esquire
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Stop 58
Tallahassee, Florida 32399-0450

STATEMENT OF THE ISSUE

Whether Respondent, Florida Department of Transportation’s (“Department”), intended decision to reject all bids submitted in response to the Department’s Request for Proposal, District One Commuter Services

Program Exhibit, DOT-RFP-22-1121-BT (“the RFP”), is illegal, arbitrary, dishonest, or fraudulent.

PRELIMINARY STATEMENT

On September 7, 2021, the Department issued the RFP, seeking proposals from responsive and responsible bidders to provide “planning, marketing services and technical assistance that supports the management and promotion of the District’s Regional Commuter Assistance Program (CAP), named Commute Connector.” In response, the Department received proposals from three bidders: Petitioner, CTS Engineering, Inc. (“CTS”); AECOM; and TranSystems Corporation, d/b/a TranSystems Corporation Consultants (“TranSystems”). On October 12, 2021, the Department posted its Proposal Tabulation, indicating its intent to award the subject contract to CTS.

On October 15, 2021, TranSystems filed its notice of intent to protest the award. On October 25, 2021, the Department issued a Proposal Tabulation rejecting all bids. On October 28, 2021, CTS timely filed its notice of intent to protest the Department’s rejection of all bids. On November 4, 2021, CTS timely filed its petition for a formal administrative hearing. On November 23, 2021, the Department referred the matter to DOAH to assign an ALJ to conduct the final hearing. On December 2, 2021, the undersigned entered an Order setting the final hearing for December 22, 2021. On December 20, 2021, the parties filed their Joint Pre-hearing Stipulation.

The final hearing was held on December 22, 2021, with all parties present. At the hearing, Joint Exhibits 1 through 15 were received into evidence upon stipulation of the parties. CTS presented the testimony of Deborah Chesna, Elizabeth Ayers, Michelle Peronto, and Sam Yang. CTS’s Exhibits 19 through 21 were received into evidence. The Department presented the testimony of Don Naylor. The Department did not offer any

exhibits into evidence. The one-volume final hearing Transcript was filed at DOAH on January 7, 2022. On January 11, 2022, CTS filed an unopposed motion for extension of time until January 24, 2022, for the parties to file their proposed recommended orders. On January 12, 2022, the undersigned entered an Order granting the motion.

The parties timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order. The stipulated facts in the parties' Joint Pre-hearing Stipulation have been incorporated herein to the extent relevant. Unless otherwise indicated, references to the Florida Statutes are to the 2021 version.

FINDINGS OF FACT

1. The Department previously issued a contract to TranSystems for the services that are the subject of the contract being procured through the RFP. After deciding not to renew TranSystems' contract, the Department issued the RFP on September 7, 2021, seeking proposals from responsive and responsible bidders to provide "planning, marketing services and technical assistance that supports the management and promotion of the District's Regional Commuter Assistance Program (CAP), named Commute Connector." The proposals were due September 29, 2021. In response, the Department received timely proposals from three vendors: CTS, AECOM, and TranSystems.

2. The RFP contains two separate proposal requirements. First, section 22.2 of the RFP requires the submission of a Technical Proposal, which is to be divided into the following three sections: Proposer's Management Plan, Proposer's Technical Plan, and Work Plan. Second, section 22.3 of the RFP requires the submission of a separate Price Proposal.

3. Each of the proposals submitted by CTS, AECOM, and TranSystems were initially determined to be responsive and referred to the Department's

five-member Technical Review Committee (“TRC”) for review of the technical proposals. The TRC members included Department employees Deborah Chesna, Michelle Peronto, Paul Simmons, Wendy Sands, and Doreen Joyner-Howard.

4. As required by the RFP, the TRC members independently evaluated and scored the bidders’ technical proposals with no communications between them. Upon completion of their independent scoring, the TRC members returned their scores to the Department’s procurement office.

5. The TRC was provided with technical evaluation sheets, consistent with the evaluation criteria set forth in the RFP, upon which the TRC members were to record their individual scores.

6. The technical component of the proposals was to be evaluated with 20 points for the Proposer’s Management Plan, 50 points for the Proposer’s Technical Plan, and 30 points for the Work Plan.

7. A technical score of 70 points was required to be found responsive to the RFP, and thus allow consideration of the Price Proposal.

8. CTS, AECOM, and TranSystems each received scores above 70 and were found responsive. Their price proposals were then opened, and the total scores determined.

9. The combined score for CTS was 109.80; AECOM was 101.52; and TranSystems was 100.63. Thus, CTS was the highest-ranked responsive and responsible awardee recommended for the award on October 12, 2021. AECOM was the second-ranked vendor, and TranSystems was the third-ranked vendor.

10. The Department posted its Proposal Tabulation reflecting the vendors’ scores and the proposed award to CTS on October 12, 2021.

11. TranSystems filed its Notice of Intent to Protest on October 15, 2021, arguing, among other things, that Ms. Chesna used an incorrect evaluation sheet to evaluate its Technical Proposal.

12. The Department investigated TranSystems' allegations and found that Ms. Chesna, in fact, employed an incorrect evaluation sheet during her evaluation of AECOM's and TranSystems' technical proposals. The evaluation sheet utilized by Ms. Chesna for TranSystems and AECOM erroneously had 30 points for the Proposer's Management Plan and 20 points for the Work Plan.

13. Ms. Chesna used an incorrect scoring sheet from a prior 2018 procurement for the same services. Ms. Chesna used the correct evaluation sheet in scoring the CTS technical proposal. No other TRC member used an incorrect evaluation sheet. Ms. Chesna submitted her evaluation sheets by email to the Department's procurement office on October 8, 2021.

14. The Department's procurement office incorporated the scores Ms. Chesna had awarded to the proposers' technical proposals in the calculations to determine the vendor to whom the contract would be awarded.

15. Not until TranSystems filed its Notice of Intent to Protest on October 15, 2021, was the Department aware of Ms. Chesna's mistake.

16. TranSystems' deadline to file a formal written protest and pay the required protest bond was October 25, 2021.

17. Following the discovery of Ms. Chesna's error, the Department's District One leadership and counsel met on October 25, 2021. The purpose of the meeting was to discuss Ms. Chesna's error in scoring and consider options available to the Department.

18. At the meeting, the Department considered both options of rescoring the technical proposals and rejecting all proposals. The Department rejected the option of rescoring because it considered the competitive process tainted once the scores had already been released to the public through the Department's vendor bid system, and the TRC members were no longer evaluating technical proposals and prohibited by the RFP from discussing them.

19. As the scores were already public, the potential existed that Ms. Chesna could have seen the other members' scores assigned to other technical proposals, or communicated with others regarding the RFP, which would affect her ability to conduct an independent rescoring. Ultimately, the Department decided that the best approach to preserve the integrity of the competitive process was to reject all bids.

20. Following the meeting, the Department posted its Proposal Tabulation to reject all bids at 12:00 p.m. on October 25, 2021. TranSystems never filed a formal written protest or paid any protest bond.

21. Petitioner contends that the Department's proposed rejection of all bids is arbitrary because it failed to consider rescoring Ms. Chesna's evaluation sheets by awarding AECOM and TranSystems the maximum available points for both the Management Plan and Work Plan components of their proposals. According to Petitioner, had the Department "simply" rescored AECOM's and TranSystems' proposals using the correct evaluation sheets and maximum points available for both the Management Plan and Work Plan, the outcome would not change because CTS would still be the highest ranked bidder.

22. However, the RFP specifically reserves to the Department the right to reject all bids. The RFP does not permit the Department to make an after-the-fact pro rata calculation or recalculation of a TRC member's scores.

23. CTS further contends that the Department's proposed rejection of all bids is arbitrary because it did not consider that AECOM, the second-ranked proposer, had not filed any notice of intent to protest. CTS further contends that the Department did not consider whether TranSystems, as the third-ranked proposer, had standing to pursue a protest, and that TranSystems had indicated it had no intent to proceed with a formal protest.

24. Whether AECOM filed a notice of intent to protest and whether TranSystems had standing or any intention to file a formal written protest is

immaterial to the issue of whether the Department's proposed rejection of all bids is arbitrary.

25. At bottom, the Department became aware of a clear error in its evaluation process by one of its TRC members that tainted the procurement process. Upon learning of this error, the Department considered factors and options to address the error, including rescoring. The Department rationally decided that the best way to address the error and maintain the integrity of the competitive process is to reject all bids.

26. Under the particular facts of this case, the Department's decision to reject all bids is rational, and Petitioner failed to prove by a preponderance of the evidence that the Department's proposed action to reject all bids is illegal, arbitrary, dishonest, or fraudulent.¹

CONCLUSIONS OF LAW

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

28. CTS has standing to challenge the Department's proposed agency action to reject all bids.

29. Pursuant to section 120.57(3)(f), the burden of proof rests with CTS as the party opposing the proposed agency action. *State Contracting & Eng'g*

¹ At the outset of the hearing, CTS's counsel stated that he was proceeding only under the "arbitrary" component of section 120.57(3)(f), Florida Statutes, not the "illegal," "dishonest," or "fraudulent" components. CTS's Proposed Recommended Order is consistent with this representation. Nevertheless, because the petition and Joint Pre-hearing Stipulation alleged, as a disputed issue, that the rejection of all bids also violated section 120.57(3)(f) because it is illegal, dishonest, and fraudulent, the undersigned finds that Petitioner failed to prove by a preponderance of the evidence that the Department's proposed action to reject all bids is illegal, dishonest, or fraudulent.

The petition and Joint Pre-hearing Stipulation also alleged, as a disputed issue, whether TranSystems violated the "cone-of-silence." This issue is not argued in CTS's Proposed Recommended Order. Nevertheless, because the petition and Joint Pre-hearing Stipulation raised it as an issue, the undersigned briefly addresses it here noting that whether or not TranSystems violated the "cone-of-silence" would impact TranSystems' standing and responsiveness, which for the reasons stated above, is irrelevant. *AHF MCO of Fla., Inc. v. Ag. for Health Care Admin.*, 308 So. 3d 1136, 1137 n.1 (Fla. 1st DCA 2020).

Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). CTS must sustain its burden of proof by a preponderance of the evidence. *See Dep't of Transp. v. J.W.C., Inc.*, 396 So. 2d 778, 787 (Fla. 1st DCA 1981). The standard of review applicable to the Department's proposed agency action of rejecting all bids is "whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent." § 120.57(3)(f), Fla. Stat.

30. This legal standard imposes a stringent burden. As the court stated in *Department of Transportation v. Groves-Watkins Constructors*, 530 So. 2d 912, 913 (Fla. 1988), an agency's rejection of all bids must stand, absent a showing that "the purpose or effect of the rejection is to defeat the object and integrity of competitive bidding."

31. Where an agency, in deciding to reject all bids, has engaged in an honest, lawful, and rational exercise of its "wide discretion in soliciting and accepting bids for public improvements," its decisions will not be overturned, even if it may appear erroneous and even if reasonable persons may disagree. *Id.* (quoting *Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982)).

32. As detailed above, CTS's contention is that the Department's decision to reject all bids is arbitrary as defined in section 120.57(3). An action is "arbitrary if it is not supported by logic or the necessary facts." *Hadi v. Lib. Behav. Health Corp.*, 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is not arbitrary. *J.D. v. Fla. Dep't of Child & Fams.*, 114 So. 3d 1127, 1130 (Fla. 1st DCA 2013).

33. An agency's discretion to reject all bids is not unbridled, however. In applying the arbitrary standard of review, it must be determined whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of each of these factors to its final decision. *Adam*

Smith Enters., Inc. v. Dep't of Env't Regul., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

34. Turning to the instant case, CTS failed to prove by a preponderance of the evidence that the Department's proposed agency action to reject all bids is arbitrary. As detailed above, the Department considered both options of rescoring the technical proposals and rejection of all proposals. The Department rejected the option of rescoring because it considered the process tainted once the scores had already been released to the public through the Department's vendor bid system, and the TRC members were no longer evaluating technical proposals and prohibited by the RFP from discussing them.


35. As the scores were already public, the potential existed that Ms. Chesna could have seen the other members' scores assigned to other technical proposals, or communicated with others regarding the RFP, which would affect her ability to conduct an independent rescoring. Ultimately, the Department decided that the best approach to preserve the integrity of the competitive process was to reject all bids.

36. The RFP specifically reserves to the Department the right to reject all bids. The RFP does not permit the Department to make an after-the-fact pro rata calculation or recalculation of a TRC member's scores.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Florida Department of Transportation, enter a final order finding that the intended decision to reject all bids submitted in response to the Department's Request for Proposal, District One Commuter Services Program Exhibit, DOT-RFP-22-1121-BT, is not illegal, arbitrary, dishonest, or fraudulent, and dismissing the petition filed by Petitioner, CTS Engineering, Inc.

DONE AND ENTERED this 21st day of February, 2022, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of February, 2022.

COPIES FURNISHED:

Douglas Dell Dolan, Esquire
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Stop 58
Tallahassee, Florida 32399-0450

Michael W. Moskowitz, Esquire
Moskowitz, Mandell, Salim
& Simowitz, P.A.
800 Corporate Drive, Suite 500
Fort Lauderdale, Florida 33334

William G. Salim, Esquire
Moskowitz, Mandell, Salim
& Simowitz, P.A.
800 Corporate Drive, Suite 500
Fort Lauderdale, Florida 33334

Amber Greene, Clerk of Agency Proceedings
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Stop 58
Tallahassee, Florida 32399-0450

Rebekah Davis, General Counsel
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Stop 58
Tallahassee, Florida 32399-0450

Kevin J. Thibault, P.E., Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Stop 57
Tallahassee, Florida 32399-0450

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.