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Division of Administrative Hearings

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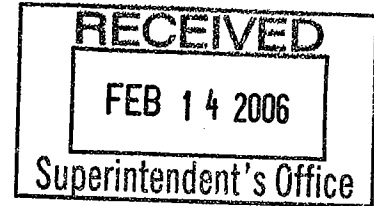


Harry L. Hooper
Deputy Chief
Administrative Law Judge

Steven Scott Stephens
Deputy Chief Judge
Judges of Compensation Claims

February 10, 2006

Dr. Arthur C. Johnson, Superintendent
Palm Beach County School Board
3340 Forest Hill Boulevard, C316
West Palm Beach, Florida 33406-5869



*Amended as to Addressee

Re: COPYCO, INC., d/b/a TOSHIBA ENTERPRISES BUSINESS SOLUTIONS
vs. PALM BEACH COUNTY SCHOOL BOARD AND IKON OFFICE
SOLUTIONS, INC., DOAH Case No. 05-3982BID

*Dear Dr. Johnson:

I am enclosing my Recommended Order in the referenced case. The three-volume transcript, together with the Petitioner's Exhibits numbered 1-8, the Respondent's (School Board's) Exhibits numbered 1-2, the Respondent's (Ikon's) Exhibits numbered 17, 18, and 19, and Joint Exhibits numbered 1-10 were erroneously forwarded to the Miami-Dade County School Board on February 9, 2006.

I apologize for this inconvenience and I have notified the Miami-Dade County School Board of this error and will forward the hearing record and exhibits to your attention as soon as possible.

As required by Subsection 120.57(1)(k), Florida Statutes, you are requested to furnish the Division of Administrative Hearings with a copy of the Final Order within 15 days of its rendition.

Sincerely,

J. D. PARRISH
Administrative Law Judge

JDP/jal

Enclosures

cc: Daniel J. Woodring, General Counsel
Michael J. Glazer, Esquire
James F. Johnston
Michael E. Riley, Esquire
Steven A. Stinson, Esquire

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COPYCO, INC., d/b/a TOSHIBA)
BUSINESS SOLUTIONS FLORIDA,)
)
Petitioner,)
)
vs.)
)
SCHOOL BOARD OF PALM BEACH)
COUNTY, FLORIDA and IKON)
OFFICE SOLUTIONS, INC.,)
)
Respondents.)
_____)

Case No. 05-3982BID

RECOMMENDED ORDER

Pursuant to notice a formal hearing was held in this case on December 19, 2005, in West Palm Beach, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael J. Glazer, Esquire
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Tallahassee, Florida 32302

For Respondent School Board of Palm Beach County:

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School Board of Palm Beach
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For Respondent Ikon Office Solutions, Inc.:

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Gray Robinson, P. A.
301 South Bronough Street
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

Whether the Respondent, School Board of West Palm Beach County, Florida, (School Board) should reject the bid of the Petitioner, Copyco, Inc. d/b/a Toshiba Business Solutions Florida (Copyco or Petitioner), and approve a contract with the Respondent, Ikon Office Solutions, Inc. (Ikon), should reject the bid of Ikon and approve a contract with Copyco, or should reject all bids and re-bid the contract.

PRELIMINARY STATEMENT

This is a challenge to the School Board's decision to award a "Term Contract for Copier on a Fixed Cost-Per Copy" (Contract) to Ikon. In reaching its preliminary decision to award the contract to Ikon, the School Board determined that the Petitioner had failed to comply with requirements of the bid and should be disqualified from consideration. Additionally, the School Board determined that Ikon's failure to disclose information regarding its debarment difficulties with Hillsborough County was not sufficiently egregious to disqualify Ikon from the contract.

The Petitioner maintains it is entitled to the contract as the lowest qualified bidder. Copyco maintains that the Ikon bid was at a higher cost to the School Board. Therefore, since price was the determining criterion in the matter, the Petitioner

should receive the award. Alternatively, the Petitioner believes that if its bid is rejected as non-responsive, then all bids should be similarly rejected and the Contract should be re-bid.

The School Board and Ikon argue that the Petitioner's bid was rejected as non-responsive to the bid and that, as the sole responsive bidder, Ikon is entitled to the Contract. The School Board has rejected as immaterial to the instant award the difficulties Ikon has encountered with a debarment issued by Hillsborough County. The Respondents do not agree that the Contract should be re-bid.

The Petition for Formal Administrative Hearing and Formal Written Protest was filed with the Division of Administrative Hearings on October 21, 2005. By agreement of the Petitioner and the School Board, the case was scheduled for hearing on December 19, 2005. The parties then proceeded with discovery and submitted a Joint Pre-Hearing Stipulation that has been utilized in the preparation of this Recommended Order.

At the hearing, the parties presented Joint Exhibits 1 through 10, which were admitted into evidence. Copyco presented testimony from John Gans, Karen Brazier, and Sharon Swan. Petitioner's Exhibits 1-8 were admitted into evidence. The School Board and Ikon presented testimony from Karen Brazier and Joseph Vazzana. The Respondents' Exhibits 1 and 2 have also been received in evidence. Ikon's Exhibits 17, 18, and 19A were admitted into evidence.

As to the DVD attachment to the Petitioner's Exhibit 8, the objection to the admissibility of that item is sustained. Further, the objection to the deposition testimony of Sharon Swan is sustained. There is insufficient evidence to support a conclusion that the deposition in lieu of the live testimony was admissible in that the witness was available, was not identified as an expert witness, and was not the designated agent of the Respondent for the purpose of discovery in the matter. Additionally, based upon the record of this case, the deposition cannot be considered an admission of a party.

At the conclusion of the hearing, the parties agreed that Proposed Recommended Orders would be filed no later than January 13, 2006. Such proposals have been considered in the preparation of this Recommended Order. The three-volume transcript of the proceeding was filed with the Division of Administrative Hearings on January 3, 2006.

FINDINGS OF FACT

1. On August 5, 2005, the School Board issued an Invitation to Bid (ITB) Number 06C-10B entitled "Term Contract for Copier on a Fixed Cost-Per-Copy." The School Board sought to award the Contract to the lowest responsive bidder. The School Board sought several different copiers with different copying rates. All rates were for copies per minute. The School Board did not guarantee any level of use for the copiers.

2. Ikon is the current vendor for copiers provided to the

School Board. Ikon and the School Board have enjoyed an amicable and successful working relationship.

3. The subject ITB was available to vendors in an electronic format through a company known in this record as "RFP Depot, LLC." RFP Depot, LLC is a private company located outside the State of Florida that posts invitations to bid, receives responses from vendors, and transmits information to entities seeking vendors. In this case, they contracted with the School Board to electronically present and respond to the instant ITB.

4. No potential vendor timely protested the terms or specifications of the ITB when it was posted. That is to say, all of the terms of the ITB were accepted by the parties to this action.

5. To prepare the ITB specifications, the School Board utilized information submitted by Ikon for the copiers it provides (manufactured by Canon) to draft the ITB. Karen Brazier exchanged e-mails with Ikon to obtain specifications and used information available from Buyers Laboratory, Inc. (BLI) to complete the ITB. Ms. Brazier did not ask any other vendor or manufacturer to submit data regarding its copiers before completing the ITB.

6. Vendors and manufacturers other than Ikon and Cannon do produce copiers that can meet or exceed the copier requirements of the ITB.

7. Ikon did not draft the instant ITB. Ms. Brazier was solely responsible for the terms of the ITB.

8. The original due date for responses to the ITB was extended from August 29, 2005 to August 31, 2005, due to Hurricane Katrina.

9. Vendors interested in the Contract submitted questions regarding the ITB to RFP Depot, LLC, which then transmitted the inquiries to the School Board.

10. All questions with the answers were posted by RFP Depot, LLC so that all vendors were privy to the information posted for this ITB.

11. Only three bidders timely submitted responses for this ITB: Axsa Document Solutions, Inc. (Axsa); Copyco; and Ikon.

12. The Axsa bid is not at issue in this proceeding. Although it was the lowest bid received, it was disqualified and was not considered for the award. Axsa did not protest that finding.

13. Copyco was the second lowest bidder.

14. John Gans, a major account executive with Copyco, was the primary author of the bid submitted by the Petitioner. Mr. Gans had never used the RFP Depot, LLC system before but personally completed the information for the ITB and submitted it for consideration in a timely manner.

15. The ITB included a chart entitled "Bid Summary Document." That chart required the vendors to list the copiers

proposed for each category by manufacturer and model number. All of the "Group 1" copiers were required to meet certain specifications.

16. The "Estimated Yearly Total" was derived by multiplying the cost-per-copy for each of the Group 1 copiers times 400,000,000 (the number of estimated copies per year). For purposes of computing a cost the estimate for the number of copies was fixed but not guaranteed.

17. In an attached section to the ITB, vendors were required to include additional information regarding the copiers proposed in the Group 1 categories. That information noted the copier proposed with a separate cost-per-copy rate for each of the three different Group 1 categories. Although the price computed for the award was based on the aggregate cost of the copiers, the ITB required that the individual copier breakdown costs be disclosed in the addendum material.

18. When he submitted the bid proposal to RFP Depot, LLC, Mr. Gans believed he had listed a Toshiba e600 copy machine for the category 3 machine of Group 1. In fact, the information attached in the separate information required by the ITB identified the Toshiba e600 and noted its cost per copy in the individual copier breakdown. The Toshiba e600 meets or exceeds all specifications for Group 1, category 3 of the ITB.

19. Group 1, category 3 of the ITB required a machine

capable of producing 55 copies per minute. The Toshiba e520 copier is rated at 52 copies per minute.

20. When Copyco's proposal for this ITB was transmitted by RFP Depot, LLC to the School Board, the proposal identified the Toshiba e520 as the copier listed under the Group 1, category 3 chart.

21. Without considering the attached information provided in the addendum to the proposal, the School Board determined that Copyco's bid must be disqualified since the Toshiba e520 is not rated to produce 55 copies per minute.

22. Accordingly, the Copyco bid was disqualified and Ikon (the highest bidder of the three submitted) was deemed the only responsive bidder to the ITB. All of the Ikon copiers bid met the specifications of the ITB.

23. At the time the School Board determined to award the bid to Ikon, it did not deem material to the instant award Ikon's debarment by Hillsborough County, Florida.

24. In April 2005, Ikon was awarded a contract in Hillsborough County to provide copiers and related services based upon another bid solicitation. In that bid, Ikon failed or refused to execute an agreement for the copiers. As a result, the Board of County Commissioners for Hillsborough County, Florida decided to debar Ikon for a period of two years. The debarment precludes Ikon from doing business with Hillsborough County for a two-year term.

25. On August 31, 2005, the date the proposals were due in this case, Ikon knew or should have known that Hillsborough County had decided to debar it from doing business with Hillsborough County.

26. The instant ITB required every bidder to certify that "neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any State or Federal department/agency." It is undisputed that Ikon did not notify the School Board that it was debarred by Hillsborough County.

27. Ikon has challenged Hillsborough County and filed suit against it for the debarment. As of the time of hearing in this cause, that suit was unresolved and remained pending in federal court.

28. The electronic listings for debarred companies maintained for the State of Florida and the federal government does not include any of the bidders for this ITB.

29. The School Board did not consider the erroneous listing of the Toshiba e520, instead of the Toshiba e600 as the Group 1, category 3, listing to be a minor irregularity of the bid submission.

30. The School Board did not consider the erroneous omission of the debarment from Hillsborough County a disqualifying offense for Ikon.

31. When compared to the Copyco submission, the award of the ITB to Ikon will result in higher copier costs incurred by the School Board.

32. Copyco did not refuse to execute an agreement with the Toshiba e600 as the Group 1, category 3 copier. In fact, Copyco has represented it will do so as that was the machine clearly identified in the addendum materials.

33. In researching the debarment, the School Board made a telephone call to Hillsborough County to ascertain facts pertinent to the debarment. Any negative information related to Ikon was deemed irrelevant to the instant ITB.

34. The Copyco protest to the intended award to Ikon was timely filed.

35. Copyco intended to bid the Toshiba e600 in Group 1, category 3 of the instant ITB. The Toshiba e600 is identified throughout the bid submittal including the proposed transition plan. To have awarded the contract to Copyco with the Toshiba e600 noted as the Group 1, category 3 copier would not have afforded the Petitioner a competitive advantage as that machine was clearly denoted. The cost to the School Board would not have changed but would have been less than the cost proposed by Ikon.

36. Even before a final decision was reached on this contract and before the posting of the award, Ms. Brazier was exchanging e-mails with Ikon regarding the transition under the new contract.

37. Ms. Brazier did not make her supervisor fully aware of the Copyco proposal (as supported by the addendum materials) and did not believe the Ikon bid should be rejected for the failure to disclose the debarment.

38. The School Board's purchasing manual provides, in pertinent part:

The following are reasons a bidder may be declared nonresponsible:

* * *

D. The bidder does not have a satisfactory record of integrity, or the bidder is currently debarred or suspended by the District or other State of Florida jurisdiction...

39. Ms. Swan did not investigate Ikon's debarment until after the posting of the award.

40. The School Board has taken the position that the Hillsborough County debarment does not preclude the award of the contract to Ikon.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569, and 120.57(1) and (3), Fla. Stat. (2005).

42. Section 120.57(3)(f), Florida Statutes (2005), provides, in pertinent part:

(f) . . . 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.

43. As the protesting party, the Petitioner bears the burden of proof in this matter. Accordingly, Copyco must establish that the proposed award to Ikon was clearly erroneous, contrary to competition, arbitrary, or capricious. Thus, the purpose of a bid protest proceeding is to evaluate the action taken by the agency (in this case the School Board) in relation to the standards set forth in Section 120.57(3)(f), Florida Statutes. See State Contracting & Engineering Corp. v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998).

44. All parties have standing in this cause. See Advocacy Center for Persons with Disabilities, Inc. v. Department of Children and Family Services, 721 So. 2d 753 (Fla. 1st DCA 1998).

45. Typically, an agency is to adhere to the requirements of an ITB when evaluating submissions from bidders. Nevertheless, it is acceptable, and well-established, that agencies have broad discretion to waive minor, non-material irregularities in bids if doing so would save the public money. See, e.g., Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So. 2d 505 (Fla. 1982).

46. Further, there is a strong public interest in favor of

saving tax dollars in awarding public contracts. See Intercontinental Properties, Inc. v. State Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3rd DCA 1992).

47. Accordingly, there is a "strong public policy against disqualifying the low bidder for technical deficiencies which do not confer an economic advantage on one bidder over another." Intercontinental Properties at 387.

48. Whether an irregularity or technical deficiency is material or not turns on whether the effect of accepting the bid gives the bidder an advantage over the other bidders. See Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2nd DCA 1978). In this case, Copyco was disqualified or deemed non-responsive for including the erroneous model number on the Group 1, category 3 listing. The supporting materials correctly identified the model bid as the Toshiba e600. The cost calculations were computed with the Toshiba e600 as the Group 1, category 3 machine. Copyco received no benefit from having the Toshiba e600 machine considered as the Group 1, category 3 copier, as the price quoted already included that machine for the category. In contrast, if Copyco is disqualified and the award is made to Ikon, the School Board will incur a higher cost for its copiers. It defies logic to award the contract to a higher bidder when Copyco has represented (and the response to the ITB in its totality supports) it will provide new copiers (including the Toshiba e600 in Group 1, category 3) for less public expense.

49. If the School Board had uniformly held all bidders in this matter to a strict interpretation of the ITB the refusal to deem Copyco a qualified bidder would not seem arbitrary. For example, had Ikon been deemed non-responsive for its failure to disclose the Hillsborough County debarment and all bids been rejected, the School Board's strict approach would have seemed logical and consistent. To the contrary, the School Board determined that Ikon's failure to disclose the ITB was not material to its bid. The School Board's explanation that a county debarment does not disqualify Ikon under its policy, the terms of the ITB, or state law is not convincing or logical. Given the serious nature of the matter, and the strict application afforded the Copyco bid, a similar response to the failure to disclose would seem reasonable. Again, the failure to disclose was the underlying disqualifying issue, not whether the debarment would be or should be upheld by a court of law. This is particularly critical since it a minor failure to note the correct model number that disqualified the lower bidder. If both errors were oversights the disparate treatment of them begs the question of why Ikon would receive favored treatment?

50. The public must have confidence in the process of public procurement. By law procurement decisions cannot be "arbitrary" and "capricious." A capricious action is one which is taken without thought or reason. Similarly, an arbitrary decision is one not supported by facts or logic. See Agrico

Chemical Company v. State Department of Environmental Regulation, 365 So. 2d 759 (Fla. 1st DCA 1978), cert. denied 376 So. 2d 74 (Fla. 1979). In this case the rejection of the lower bid for the acceptance of the higher bid when both entities failed to comply with minor technicalities of the ITB defies logic. Given the favored and preferential treatment afforded the existing provider, it is concluded the bidding process was tainted. The determination to award the bid to the higher bidder was without logic and merit. Given the contacts before the ITB was presented to establish the specifications for the copiers, the waiver of the non-disclosure of the debarment, and the preparations for the post-award transition even before the posting of the award, it is concluded that Ikon received this award by the arbitrary decision of the School Board personnel.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Palm Beach County enter a Final Order that rejects all bids for the contract.

DONE AND ENTERED this 9th day of February, 2006, in
Tallahassee, Leon County, Florida.



J. D. PARRISH
Administrative Law Judge.
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of February, 2006.

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.