



Bid Protests in Florida

Lessons from the Field

Introduction to Speaker

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Topic of Discussion

- Bid Protests –Lessons Learned from Recent Sustained Protests

Bid Protest Statistics – 2006-2010

- Protests Filed: 30, 32, 26, 27, 40
- Closed: 60%, 41%, 54%, 67%, 65%
- Decisions: 40%, 59%, 46%, 33%, 35%
- Granted: 3, 4, 3, 3, 4
- Percentage Sustained: 25, 21, 25, 33, 33

Bid Protest Statistics – 2010

- Protests Filed – 40
- Closed – 26 (65%)
- Decisions -12 (30%) (2 awaiting orders)
- Granted – 4 (10% and 33%)
- Denied – 8 (20% and 67%)

Bid Protest Statistics – 2009

- Protests Filed – 27
- Closed – 18 (67%)
- Decisions -9 (33%)
- Granted – 3 (11% and 33%)
- Denied – 6 (22% and 67%)

Bid Protest Statistics – 2008

- Protests Filed – 26
- Closed – 14 (54%)
- Decisions - 12 (47%)
- Granted – 3 (12% and 25%)
- Denied – 9 (35% and 75%)

Bid Protest Statistics – 2007

- Protests Filed – 32
- Closed – 13 (41%)
- Decisions - 19 (59%)
- Granted – 4 (12% and 21%)
- Denied – 15 (47% and 79%)

Bid Protest Statistics – 2006

- Protests Filed – 30
- Closed – 18 (60%)
- Decisions - 12 (40%)
- Granted – 3 (10% and 25%)
- Denied – 9 (30% and 75%)

Number 1 – TMS JV

- Parent, Subsidiary, JV, & Team
- Firm, Predecessor, Key Personnel

Number 1 – You Evaluated Whom?

- Awardee included Experience and Financials of its Affiliates – “MV”
- RFP - evaluate “Prime Vendor”
- Protester was Joint Venture – ok to evaluate both venturers
- Proposer, Affiliates, Team Members, Key Personnel – decide in advance and include in RFP

You know you are in trouble when

- “Other than Ms. Somerset, who skimmed the contents of the RFP, none of the evaluators had reviewed the RFP, including the addenda, prior to their evaluations of the proposals.”
- *TMS Joint Venture v. Commission for the Transportation Disadvantaged*, Case Nos. 10-0030BID, 10-0051BID, 2010 WL 1217801 (Fla. Div. Admin. Hrgs. Mar. 25, 2010)

Proposer, Affiliates, and Key Personnel

- *Another Case to Consider*
- *Phil's Expert Tree Service, Inc. v. Broward County School Board*, DOAH Case No. 06-4499BID (RO March 19, 2007) [not reported in Westlaw]

Number 2 – Sun Art

- Minor v. Material
- Unsigned Bid Form
- Improper to Reject

Number 2 – Am I Ambiguous to you?

- While a material ambiguity may justify the rejection of all bids, an ambiguity based on a minor deviation does not.
- Where bidders were instructed to “sign” a bid acknowledgement form, but only to “execute” a bid form, arbitrary to reject low bidder who failed to sign the bid form and to reject all bids to clarify the perceived ambiguity.

Agency Must Waive Minor Irregularity

- Agency should have waived failure to sign the bid form as a minor irregularity and awarded to the low bidder
- *Sun Art Painting Corp. v. Palm Beach County School Board*, Case No. 10-0376BID, 2010 WL 2174652, *16-*17 (Fla. Div. Admin. Hrgs. May 27, 2010)

Number 3 – American Lighting

- Schedule of Values Missing
- Improper to waive
- Should have rejected

Number 3 – You Waived What?

- Minor v. Major Deviation
- Deprive the government of its assurance that the contract will be entered into, performed, and guaranteed according to its specified requirements or
- Affect competitive bidding by placing the bidder in a position of advantage over other bidders or by otherwise undermining the common standard of competition.

Shall means shall – at least generally

- Vendor did not include listing of categories for Schedule of Values, which was mandatory item, in this technically acceptable, low price procurement
- Agency acted arbitrarily by failing to find intended awardee nonresponsive
- *American Lighting & Signalization v. DOT*, Case No. 10-7669BID, 2010 WL 4926224 (Dec. 1, 2010)

Generally Not Best Practices

- Sometime before the Department issued the RFP, it had a meeting with some of its staff, including Ms. Thomas. During the meeting, the **Department's staff was advised that they were scrutinizing technical proposals submitted by low bidders too thoroughly.** The new philosophy was for TRCs to ask clarifying questions of the low bidder if they had concerns and if those questions were not answered correctly, to find the low bidder non-responsive.

Number 4 – Close Construction

- Used old form
- Missing 40k pass-through
- Improper to reject
- Clarification – yes or no – ok
- *Close Construction, Inc. v. SFWMD*, Case No. 09-4996BID, 2010 WL 55299 (Fla. Div. Admin. Hrgs. Jan. 5, 2010)

Another – Responsiveness Case

- ALJ found no competitive advantage by giving bidder opportunity to verify price included \$40k. Not permitted to add the amount.
- Providing such “yes or no” type of additional information in order to clarify, and only clarify, information already submitted in the bid, in response to an inquiry by the District does not constitute “supplementation” of the bid for purposes of Section 120.57(3)(f), Florida Statutes
- Allowed other low bidder to verify, and then withdraw without forfeiting bid bond

Rejection Improper

- Protester's bid was \$3,751,795.00, which was \$146,615.00 lower than the awardee, for contract regarding construction at pump stations
- Addendum No. 2 added an owner-directed allowance of \$40k and new bid form with line for bid plus the \$40k
- Persuasive evidence established that Close received both addenda to the bid documents. It was aware of the Addendum No. Two, and it accounted for all of the changes to the technical specifications made in both addenda in the preparation of its bid.
- Under the express terms of Article 19.03 of the RFB, "The Bid shall be construed as though the addendum(a) have been received and acknowledged by the bidder."
- The Procurement Manual expressly permits a bidder under these circumstances to correct any "inadvertent, non-judgmental mistake" in its bid. Chapter 5 of the Manual provides that "a non-judgmental mistake" is a mistake not attributable to an error in judgment, such as mistakes in personal judgment or wrongful assumptions of contract obligations. Inadvertent technical errors, such as errors of form rather than substance, are considered non-judgmental errors.

You say Minor and I say Major. . . .

- A material irregularity is defined by the District's policy as one which is not minor in that it: (a) affects the price, quality, time or manner of performance of the service such that it would deprive the District of an assurance that the contract will be entered into, performed and guaranteed according to the specified requirements; (b) provides an advantage or benefit to a bidder which is not enjoyed by other bidders; or (c) undermines the necessary common standards of competition.

Substance Over Form

- There is a very strong public interest in favor of saving tax dollars in awarding public contracts. There is no public interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, where the low bidder did not derive any unfair competitive advantage by reason of the technical omission

The Story Continues

- Final Order – Agency Rejected All
- Rule gives the Agency discretion to waive or not to waive minor irregularity
- Waiver here is inappropriate
- Final Order (March 12, 2010)
- Currently on appeal to 4th DCA

Number 5 – You fixed what?

- Inadequate Bid Protest Bond (late and wrong amount) constituted a waiver of the right to protest
- Agency required to dismiss initial protest
- *Turner Pest Control v. University of North Florida*, Case No. 09-3442BID, 2009 WL 4730176 (Dec. 8, 2009)

Bid Protest Bond – Opportunity to Cure?

- *General Electric v. Department of Transportation*, 869 So. 2d 1273, 1274 (Fla. 1st DCA 2004) (“Appellant is correct that notice and an opportunity to cure are required before a bid protest is dismissed solely due to a deficient bond.”)
- *RHC and Associates, Inc. v. Hillsborough County School Board*, DOAH Case No. 09-6060BID, 2010 WL 255961, *4-*5, ¶¶ 21-22 (Fla. Div. Admin. Hrgs. Jan. 20, 2010) (dismissing protest where protester failed to post proper bond after receiving written demand to do so within 10 days)

Bid Protest Bond – Dismiss

- *Mad Dads of Greater Ocala, Inc. v. Department of Juvenile Justice*, DOAH Case No. 03-3670BID (Jan. 16, 2004) (protest dismissed for failure to file bond in proper amount; agency may not waive or give extension)

Turner - Follow Evaluation Scheme in RFP

- First evaluation flawed because committee did not contact references
- Permissible for evaluators to take into consideration their individual experiences with vendor
- Second time around, process was not as provided for under the RFP – use of a non-committee member

Number 6 - The RFP Says What?

- Terms and Conditions of the Solicitation Must be Consistent with Governing Statutes and Rules
- Uniform standards for evaluating proposals
- Publish standards at the outset of the process
- *Elmwood Terrace Ltd. Partnership v. Florida Housing Finance Corp.*, Case No. 09-4682BID, 2009 WL 3826164 (Nov. 12, 2009)

Tell Them What You Want & Its Importance

- Potential bidders are advised in advance of the requirements to be met in order to receive the contract award, as well as the standards by which each bid will be evaluated by the agency and each standard's relative importance to the agency
- Central to the integrity and reciprocity of the competitive bidding process is the requirement that an agency's action on a bid can be expressed within the bid specifications and evaluation criteria

Number 7 – Two out of Four isn't Bad

- Granted protest, in part, because on 2 out of 4 evaluators had sufficient knowledge and experience in program area
- RFP specifically required at least 3 to have such qualifications
- Especially important because scores were so close.
- *Veolia Transportation Services, Inc. v. Commission for the Transportation Disadvantaged*, Case No. 08-1636BID, 2008 WL 2941559 (Fla. Div. Admin. Hrgs. Jul. 9, 2008)

Other Lessons from *Veolia*

- DOAH won't address pure Sunshine Law Violation
- Intended awardee nonresponsive because did not include back-up cost data that was required by RFP. Material deviation because prevented comparison.
- Agency had failed to respond to question regarding requirement

People Who Live in Glass Houses. . . .

- Protester also nonresponsive
- No transition plan
- Evaluators scored lower, but did not reject
- Protester was incumbent, but new contract had additional requirements
- Throw everyone out, reject all
- Veolia Transportation Services, Inc. v. Commission for the Transportation Disadvantaged, Case No. 08-1636BID, 2008 WL 2941559 (Fla. Div. Admin. Hrgs. Jul. 9, 2008)

Number 8 – I Can't Reject All?

- Protester low bidder - roof repairs at state park
- Rejected all after protest - addendum had created uncertainty by advising bidders to ignore new Fla. Admin. Code
- The potential that additional work might be required based on a future change not a basis for confusion because proposed contract has a procedure in place for pricing change orders.

Review is Not Rubber Stamp

- ALJ must give substantial deference to the agency's determination to reject all
- “There is an appreciable difference, however, between according the respect that deference entails and affixing the rubber stamp.”
- *Spinella Enterprises, Inc. v. Department of Environmental Protection*, DOAH Case No. 08-3380BID, 2008 WL 4974751 (Fla. Div. Admin. Hrgs. Oct. 2, 2008)

To Stay or Not To Stay -

- ALJ concluded that Agency violated the automatic stay
- Following decision to reject all, Agency conducted new procurement
- Agency rejected ALJ's finding
- Law probably permits new procurement, but stay prohibits actual award of new procurement

No. 9 - Why Can't I Award to the Better Offeror?

- Landscaping maintenance contract
- Procured as RFP with technical and price factors to be scored, but the terms of the RFP said award to the lowest price, responsive and responsible proposal.
- Intended awardee may have been more experienced, but RFP did not call for award to most qualified
- *Greenbriar Landscaping, Inc. v. Fishhawk Community Development District*, DOAH Case No. 08-3881BID (not available on Westlaw, but available on DOAH website) (Sep. 11, 2008)