

Memorandum



Date: July 21, 2009
To: Honorable Chairman Dennis C. Moss and Members,
Board of County Commissioners

Supplement to
Agenda Item No.
8(Q)3(A)

From: George M. Burgess
County Manager

A handwritten signature in black ink, appearing to read "Burgess".

Subject: Supplement to Contract Award Recommendation for Area 3 (Seaboard Terminal) Bulkhead – Project No: 2008.033; Contract No: 2008.033, to Central Florida Equipment Rentals, Inc.

This supplement to subject contract award is presented to report that, during the bid protest period, a bid protest was filed on said award recommendation by the second lowest bidder, American Bridge Company (ABC). In accordance with the bid protest procedures, a hearing examiner was appointed and a hearing was conducted on June 23, 2009.

ABC's protest regarding Central Florida Equipment Rentals, Inc.'s (CFER) bid is based on the following four issues: 1) the submission was incomplete, therefore, CFER's bid should have been deemed non-responsive and subsequently rejected; 2) the omission by CFER of the required list of subcontractors and suppliers within their bid documents; 3) the requirement in the bid documents that the bidding contractor must perform at least 25% of the work on the project with its own resources; and, 4) the capabilities of CFER to perform the work.

The hearing examiner determined that the justification provided by County staff in response to all four issues cited by ABC was sufficient to uphold the County's decision to award the contract to CFER and deny the bid protest submitted by ABC. Therefore, based on the hearing examiner's ruling, it is recommended that this contract award recommendation to CFER be approved.

A handwritten signature in black ink, appearing to read "George M. Burgess".
Assistant County Manager



Harvey Ruvin
CLERK OF THE CIRCUIT AND COUNTY COURTS
Miami-Dade County, Florida

CLERK OF THE BOARD OF COUNTY COMMISSIONERS
STEPHEN P. CLARK MIAMI-DADE GOVERNMENT CENTER

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July 1, 2009

Mr. Richard C. Kermode
Senior Vice President
American Bridge Company
5430 West Tyson Avenue
Tampa, Florida 33611

Re: Bid Protest – Project No. 2008.033 – Contract No. 2008.033
Area 3 (Seaboard Terminal) Bulkhead

Dear Mr. Kermode:

Pursuant to Section 2-8.4 of the Code and Implementing Order 3-21, forwarded for your information is a copy of the Findings and Recommendations filed by the hearing examiner in connection with the foregoing bid protest which was held on June 23, 2009.

Should you have any questions regarding this matter, please do not hesitate to contact this office.

Sincerely,
HARVEY RUVIN, Clerk
Circuit and County Courts

By *Diane Collins*
Diane Collins, Acting Division Chief
Clerk of the Board Division

DC/fcd
Attachment

cc: Honorable Carlos Alvarez, Mayor, Miami-Dade County (via email)
George Burgess, County Manager, (via email)
Ysela Llort, Assistant County Manager (via email)
Hugo Benitez, Assistant County Attorney (via email)
Richard Seavey, Assistant County Attorney (via email)
Miriam Singer, Director, Dept. of Procurement Management (via email)
Walter Fogarty, Dept. of Procurement Management (via email)
Bill Johnson, Director, Port of Miami (via email)
Maria H. Cerna, Contract Manager, Port of Miami (via email)
Kari Garland, Project Manager, Port of Miami (via email.)
Jennifer Glazer-Moon, Director, OSBM (via email)
Johnny Martinez, Jr., P.E., Director, Capital Improvements (via email)
Central Florida Equipment Rentals, Inc. (via US mail)
American Bridge (via US mail)
Community Asphalt (via US mail)
Shoreline Foundation, Inc. (via US mail)
Ebsary Foundation Company (via US mail)
Munilla Construction Management, LLC d/b/a MCM (via US mail)
Gonzalez & Sons Equipment, Inc. (via US mail)
GLF Construction Corporation (via US mail)

DOUTHIT LAW, LLC
5955 NE 4th Court
Miami, FL 33137
(305) 893-0110 (305) 893-7499 Fax

June 29, 2009

TO: Clerk of the Board

FROM: Marc Anthony Douthit, Esq.

RE: Bid Protest–Project No. 2008.33
Area 3 (Seaboard Terminal) Bulkhead

MEMORANDUM OPINION

This matter came before this Hearing Officer on June 23, 2009 on the Bid Protest of American Bridge Company (American Bridge) protesting Miami-Dade County's Recommendation of Award of Project 2008.33, Area 3 (Seaboard Terminal) Bulkhead Project to Central Florida Equipment Rentals, Inc. (CFER). At the Protest Hearing, CFER moved to intervene in these proceedings as a party who had an interest in the outcome and determination of the Bid Protest. Neither the Protestor, nor Miami-Dade County had any objection to the intervention. As such, CFER was represented by counsel and allowed to participate in and be heard during the proceedings.

American Bridge filed its Bid Protest on June 5, 2009. There were no objections to the timeliness or the validity of American Bridge's Protest and the Bid Protest on its face appears to comply with the relevant time provisions of the Miami-Dade County Code.

The Protest sets forth four independent basis' which American Bridge asserts ought to compel a finding that the award by Miami-Dade County to CFER of the project ought to be rejected and that as the second low bidder, American Bridge ought to be awarded the contract.

The first issue raised by American Bridge is that CFER's submission was incomplete and that they ought to be deemed a "non-responsive" bidder and their bid should be rejected. In support of this position, American Bridge asserts that CFER failed to include Form DBD 400 (DBD 400), Schedule of Intent Affidavit along with its bid. Therefore, the failure to do so is fatal to the bid of CFER. As support for this assertion, American Bridge relies on its own review of the documentation that was provided to them by the Clerk of the Board in response to American Bridge's Public Records request.

American Bridge had requested the entire bid package of CFER and received 72 pages of documents in response. In reviewing the response from the Clerk of the Board, American Bridge determined that CFER's DBD 400 form was not included in the documents. American Bridge then surmised that CFER must not have included the document with its Bid submission and therefore the CFER Bid was deficient. This deficiency according to the language of the Bid Documents "would render the bid non-responsive".

Miami-Dade County counters this argument by stating that while the DBD 400 may not have been included in the response to the Public Records request, it was a part of the Bid Documents submitted by CFER. In support of this position Miami-Dade County

presented the testimony of Leticia Stewart who testified that the initial review of the Bids was done by the Department of Small Business Development (SBD) who reviewed the Bids to determine whether or not they were compliant with the Community Small Business Enterprise Goals. This information would be set forth on the DBD 400 Form. She further testified that any bidder who did not provide the form at the time of the bid opening would have been considered "non-responsive".

This is the procedure utilized in "two envelope" bid procedures, which were employed here. Each bidder submits their bid in two separate envelopes. The first envelope is opened by SBD and if a bidder meets their requirements related to the Community Small Business Enterprise Goal, then the bidder's second envelope is opened. If a bidder did not meet the Community Small Business Enterprise Goal, then the bidder's second envelope would never be opened and their bid would not be considered.

According to Ms. Stewart, all of the bidders complied with the SBD requirements and all bidders' who submitted bids had their second envelopes opened. Ms. Stewart refers to the April 1, 2009 Memorandum from Caesar Suarez of SBD which states that all bids on the project were found responsive. As a result of this analysis by SBD, CFER's second envelope was opened and considered.

The second issue raised by American Bridge raises a similar challenge to the Bid Documents submitted by CFER. American Bridge asserts that a required List of Subcontractors and Suppliers was apparently not included in the Bid Documents

submitted by CFER. CFER refers to a letter dated May 19, 2009 from the Port of Miami requesting that CFER provide the Port of Miami with a list of its subcontractors and suppliers. This letter was followed by a June 2nd letter further clarifying this request.

In response to the May 19th letter, American Bridge responded that its list of suppliers and contractors was unchanged from its original submission. This response appeared to be answering a different question than was being asked, which prompted the further letter from the Port of Miami on June 2, 2009 attempting to clarify what information was they were seeking.

At the hearing, Arthur Tillberg, Chief of Construction Management at the Port of Miami explained the reason for these letters and the why the Port of Miami was seeking this information from CFER. The Port was seeking information related to a particular sub-contractor who was recently placed on a list of de-barred contractors and if they were being utilized by CFER, then it would fundamentally affect CFER's status and their responsiveness to the Bid.

As to both of these issues raised by American Bridge, the explanation and rationale provided by Miami-Dade County provides sufficient explanation for the actions taken by the County. While it is curious that the DBD 400 was not included in the response to the Public Records request submitted by American Bridge, that failing alone is not determinative of whether the form was submitted at the appropriate time. *Asphalt Pavers, Inc. v. State Department of Transportation, 602 So.2d 558 (Fla. 1st DCA 1992)*. The testimony of Ms. Stewart as to the procedure that was followed here, coupled with

the Department of Small Business Development Memorandum, dated April 1, 2009, just two days after the opening of the bids, leads to the conclusion that with respect to the DBD 400, it was properly included in the Bid Documents submitted by CFER.

The same is true for the List of Subcontractors and Suppliers. American Bridge has drawn its conclusion primarily from the correspondence sent to CFER after the opening of the Bids. While it is certainly understandable how American Bridge could reach the conclusion that led them to believe the List of Contractors and Suppliers was not there, the explanation of Arthur Tillberg provides a sufficient logical rationale for why the correspondence was sent. There was nothing presented at the hearing to contradict the testimony of Mr. Tillberg, nor to call it into question.

Having determined that the documents in question were properly submitted by CFER at the time of the opening of the bids, I do not need to address whether the County could or could not waive the requirements that these documents be timely filed.

The third point raised by American Bridge relates to the requirement in the Bid Documents that a bidding contractor must perform at least 25% of the work on the project with its own organization. American Bridge asserts that based upon its own analysis of the CFER Bid, over 80% of the work on the project would have to be performed by someone other than CFER. A detailed explanation of what work CFER was incapable of doing was provided by Bob Wind, an officer of American Bridge.

Unfortunately, the testimony of Mr. Wind is inadequate to make the point. His analysis is based upon assumptions that no objective information presented at the hearing

can support. The fundamental flaw being that he was and is unaware of the internal operations of CFER and further, he is unaware of the full range of capabilities that CFER may actually possess. Without something other than American Bridge's analysis based upon these assumptions, the evidence presented by American Bridge on this point is not sufficient to make a finding that the 25% rule has not been satisfied.¹

The last point made by American Bridge goes directly to the capabilities of CFER to perform the work. In this regard, I am reluctant to insert my opinion in place and in stead of the opinion of the contracting agency. Again, Arthur Tillberg testified that he had previous experience with CFER on other projects and was satisfied with their ability to perform the work on this project. In matters such as this, the County is given broad discretion and latitude to determine the capabilities and qualifications of a contractor.

Liberty County v. Baxter's Asphalt & Concrete, 421 So.2d 505 (Fla. 1982).

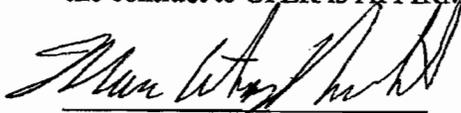
*American Bridge cites Intercoastal Contracting v. Collier County School Board, 2002 Fla. Div. Adm. Hear. Lexis 1447, *45 (Fla. DOAH 2002) to support its position.*

However, I find nothing in *Intercoastal Contracting* that would contradict the holding of

¹It has not been definitively established that CFER had any obligation to make a showing at this time that it could or would comply with the 25% requirement. According to Mr. Tillberg, this issue is not generally raised until the pre-construction meeting which is after an award has been made and is not an issue of responsiveness to a bid. Beyond that Robert Baez, Vice President of CFER testified that it was CFER's intention to perform more than 25% of the work on the project. The post hearing case law submitted by American Bridge goes only to the issue as to whether the question of self performance is a responsiveness issue, not to the question of whether they have shown that CFER was prepared to perform more than 25% of the work on the project. In this regard, the only testimony presented was the testimony of Bob Wind of American Bridge (*Centech Group v. United States, 79 Fed. Cl. 562; Blount v. United States, 22 Cl. Ct. 221*).

Baxter and support the proposition that in the absence of fraud, illegality, oppression or misconduct, the County's decision must be upheld. *Baxter at 507.*

Based upon the law and facts presented at the hearing the determination to award the contract to CFER is AFFIRMED and the Protest of American Bridge is DENIED.


Hearing Officer