STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLOSE CONSTRUCTION, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-4996BID
	)	
SOUTH FLORIDA WATER MANAGEMENT DISTRICT,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
WORTH CONTRACTING, INC.,	)	
	)	
Intervenor.	)	
	)	

RECOMMENDED ORDER

Pursuant to appropriate notice, this proceeding came on for formal hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, on October 19, 2009. The hearing was conducted by video conference between Tallahassee, Florida, and West Palm Beach, Florida. The parties were located in West Palm Beach and the judge was located in Tallahassee. The appearances were as follows:

APPEARANCES

For Petitioner: Andrew J. Baumann, Esquire
Lewis, Longman and Walker, P.A.
1700 Palm Beach Lakes Boulevard,
Suite 1000
West Palm Beach, Florida 33401-2006

For Respondent: Josef M. Fiala, Esquire
South Florida Water Management District
3301 Gun Club Road, MSC 1410
West Palm Beach, Florida 33406

For Intervenor: Robert L. Frye, Esquire
Vezina, Lawrence & Piscitelli
The Museum Building
300 Southwest First Avenue, Suite 150
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner, Close Construction, Inc. (Petitioner), (Close) was the lowest responsive and responsible bidder in the Request For Bid (RFB) Number 6000000262, whether the subject contract should be awarded to the Petitioner, and, concomitantly, whether the Respondent agency's decision to award the contract to the Intervener, Worth Contracting, Inc. (Worth) was clearly erroneous, contrary to competition, arbitrary or capricious.

PRELIMINARY STATEMENT

This dispute arose when the South Florida Water Management District (Respondent or District) issued an RFB designed to procure refurbishment and automation of district-owned and

operated water control structures G-123 and S-34. After the RFB was issued on June 5, 2009, the District issued two addenda to the RFB. On June 30, 2009, Addendum No. Two, which was the subject of this dispute, was issued. It would require that each bidder add a $40,000 discretionary owner-directed allowance, for Florida Power and Light utility work, to the base bid. Addendum No. Two also included a revised Bid form that included an itemization of this $40,000 owner-discretionary allowance as an expressly identified itemization. The new Bid form was attached to Addendum No. Two and the Addendum was supplied to the bidders, including the Petitioner and Intervenor, by electronic posting on the above date.

Six bids were received in response to the RFB, including bids from Close, from Cone and Graham, Inc., Worth Contracting Inc., Inter-County Engineering, Inc., Murray Logan Construction, Inc. and Harry Pepper and Associates. The bids were opened on July 10, 2009.

Cone and Graham, Inc., was the lowest bidder; however, it withdrew its bid from consideration. The next lowest bidder was Close. The District, however, determined Close to be non-responsive for purportedly failing to comply with the requirements of Addendum No. Two. Specifically, Close did not replace the original Bid form with the revised Bid Form expressly identifying, as a separate itemization, the additional

$40,000 owner-directed allowance for the Florida Power and Light (FPL) utility work, as required by Addendum Two. Worth was deemed to be in compliance with Addendum Two, and otherwise compliant with the RFB. It was deemed responsible and responsive and awarded the bid by the District. The posting of the intent to award was on August 14, 2009.

Close filed a timely protest of the intended award and the matter was then referred to the Division of Administrative Hearings on September 14, 2009. The undersigned Administrative Law Judge was assigned to conduct the formal proceeding and upon conferring with the parties, the matter was set for hearing for October 19, 2009, by video conference between Tallahassee and West Palm Beach. In the meantime, on October 1, 2009, the Notice to Bidders was filed and served by the Respondent District, which resulted in the intervention of Worth in this proceeding.

The cause came on for final hearing as noticed. Close, the Petitioner, presented the testimony of Danny Boromei, the Vice-President for Civil Construction of the Petitioner Close, Christopher Rossi, Close's estimator, and Gerard Flynn, the Construction Manager for the South Florida Water Management District.

The District presented the testimony of James Reynolds, the Senior Contract Specialist, and Donna Lavery, the Contracts

Manager. The parties submitted Joint Exhibits 1 through 7 which were admitted into evidence. Official recognition was taken of Chapter 120, Florida Statutes, and of relevant portions of the Florida Administrative Code.

The Petitioner contends that the intended award of the contract to Worth is erroneous based upon its position that the irregularity in the Petitioner's bid, involving mistakenly using the original Bid Form, was a non-material irregularity which conferred no competitive advantage upon the Petitioner. Close maintains that the District should have verified any question it had regarding Close's bid, based upon the requirements of the District's procurement and contracting policies and policy manual, and under the express terms of the RFB. The Petitioner thus contends that the irregularity as to its bid should have been waived, that the bid should have been verified by the Respondent District in accordance with its policies on verification of bids, and that the Petitioner should have received the award for its bid of $3,751,795.00, which is $146,615.00 lower than the awardee, Worth.

Upon conclusion of the hearing the parties ordered a transcription thereof and took the opportunity to submit Proposed Recommended Orders. The transcript of the proceeding was filed on November 6, 2009, and Proposed Recommended Orders were thereafter filed by agreement of the parties on

November 16, 2009. The Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The South Florida Water Management District is a public corporation authorized under Chapter 373, Florida Statutes. It issued a request for bids for the refurbishment and automation of certain facilities in Broward County, Florida. Close is a construction company duly authorized to do business in the state of Florida. It was one of the bidders on the procurement represented by the subject request for bids and is the Petitioner in this case.

2. This dispute had its beginnings on June 5, 2009, when the Respondent issued RFB number 6000000262. The RFB solicited construction services for the refurbishment and automation of two facilities in Broward County. The procurement would involve the installation of new direct-drive electric pumps at the Respondent's G-123 Pump Station in Broward County, along with the construction of an equipment shelter and the replacement of a retaining wall with a poured concrete retaining wall, as well as refurbishment of "pump flap gates." The RFB also requested construction services for the replacement of gates at the Respondent's S-34 water-control structure in Broward County. Both facilities would thus be automated so that they can be

remotely operated from the Respondent's headquarters in West Palm Beach.

3. After issuance of the RFB, two addenda were supplied to vendors and were posted. The first addendum was posted on or about June 19, 2009, concerning a change in specifications for flap gates and is not the subject of this dispute. Addendum No. Two was electronically posted on or about June 30, 2009. It amended the technical specifications of the RFB by deleting Section 11212 regarding measurement of payment of electric motors/belt-driven axial flow pumps. That addendum also added a new measure and payment to Subpart 1.01 of the technical specifications to provide for an owner-directed allowance of $40,000.00 to provide for the potential need for certain electrical utility work to be done by FPL in order to complete the project.

4. Addendum No. Two added an additional term to the RFB in providing that the $40,000.00 allowance price "Shall be added to the other costs to complete the bid." The second Addendum also stated, "The allowance price shall be used at the discretion of the District and, if not used, will be deducted from the final Contract Price." That addendum also directed bidders to replace the original Bid Form 00320-2, which had been enclosed with the RFB, with a new Bid Form, 00320R1-2. The new Bid Form is identical to the original form except that the schedule of bid

prices contained in paragraph four, on page 003201-2, was altered to itemize the $40,000.00 discretionary cost allowance. The original form had contained a single line for the bidder's lump sum bid price, whereas the revised form provided for a lump sum bid amount to be itemized and a base bid amount, which required the bidder to enter on the form the amount of its bid, then add the discretionary cost amount and write the sum of those two numbers on a third line.

5. In paragraph four of the new bid form there is re-printed language concerning the use of the discretionary allowance which appeared on the face of Addendum No. Two. Other than the change to paragraph four and the alteration of the page numbers to include an "R" in the page number, the revised bid form is identical to the original bid form. The other bid documents were not altered in any manner by Addendum No. Two.

6. The deadline for bid submissions was Thursday, July 9, 2009, at 2:30 p.m. The Petitioner timely submitted its bid to the District. In submitting its bid however, the Petitioner used the original bid form which had been enclosed with the RFB. The bid form submitted was an exact copy of the bid form furnished by the District which Close had printed from the electronic copy of the RFB received from the District. The Petitioner did not substitute the revised bid form, attached to Addendum No. Two, for the original form in submitting its bid.

The Petitioner's bid was deemed non-responsive by the District and was rejected on the basis that Close had failed to submit the bid on the revised form required by Addendum No. Two.

7. Thereafter, the District, at its August 13, 2009, meeting, approved award of the bid to Worth. The intent to award was posted electronically on or about August 14, 2009.

8. The persuasive evidence establishes 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.

9. The evidence shows that Close was aware of the $40,000.00, owner-directed cost allowance and that it incorporated it in the formulation of its total bid price. Thus, Close's final bid amount was $3,751,795.00. That number included the $40,000.00 cost allowance at issue, added to the bid documents by Addendum No. Two.

10. The internal bid work sheets, prepared by personnel of Close, identified and itemized the $40,000.00 discretionary cost allowance as a component of the final bid price. The persuasive evidence thus establishes that Close's final bid amount did include the $40,000.00 cost allowance.

11. Moreover, the written notes of witness Christopher Rossi, the estimator for Close, show the $40,000.00 amount as an

"FPL Allowance." Both Mr. Rossi and Mr. Boromei, the Vice President for Close, who prepared the bid, explained that the $40,000.00 was understood by Close to be a cost allowance, that it would only be charged to the District to the extent that it was actually used, at the District's discretion. If it were not used, it was to be deducted from the overall contract price. Addendum Two specifically provides that the discretionary cost allowance was to be used only at the discretion of the District and that the unused portion would be deducted from the contract amount.

12. When Close submitted its bid it mistakenly submitted it on the original bid form and failed to exchange the bid forms as directed in Item Two of Addendum No. 2.

13. In paragraph one of both bid forms, however, the bidder is required to specifically fill out, acknowledge and identify all addenda. By doing so the bidder expressly agrees to build the project in conformance with all contract documents, including all addenda, for the price quoted in the bid. Close completed this paragraph, specifically identified both Addendum One and Addendum Two, and specifically agreed to strictly conform, in performance of the work to the plans, specifications and other contract documents, including Addendum Nos. One and Two. Paragraph one was not changed by the addition of Addendum No. Two and it is identical in both the original and the revised

forms at issue. Paragraph one of the original and the revised bid forms constitutes an agreement by the bidder to perform and construct a project "in strict conformity with the plans, specifications and other Contract Documents. . . ." The addenda are part of the contract documents and are expressly referenced as such in this agreement. Both bid forms, the original and the revised, include paragraph eight, which clearly states that the bidder will post a bid bond to secure and guaranty that it will enter into a contract with the District, if its bid is selected. Paragraph eight was unchanged by Addendum No. Two and its terms are identical in both Bid forms at issue, including the form that Close signed and submitted as its bid.

14. The persuasive evidence shows that in submitting its bid, whether on either form, Close committed itself to the identical terms as set forth in the identical contract documents agreed to by Worth and the other bidders. The evidence established that Close intended to bind itself to the terms of the RFB, and all terms of Addendum No. Two, including the discretionary cost allowance term. Close considered itself bound to enter into a contract for the price of its bid if selected by the District. It likewise considered that the price of its bid, would only include the cost allowance if the discretionary allowance was implemented by the District.

15. Upon the opening of the bids, the firm of Cone and Graham, Inc., was identified as the lowest bidder. Cone and Graham's bid was in the amount of $2,690,000.00. Close was the second lowest bidder, with a bid of $3,751,795.00. The third lowest bidder was Worth Contracting, Inc., with a bid of $3,898,410.00. Cone and Graham was allowed to provide additional information and to even meet with some District staff following the opening of its bid. The additional information it was allowed to provide concerned technical specifications of the pumps proposed in its bid. Through this verification process conducted with the Agency, Cone and Graham ultimately convinced the District to permit them to withdraw its bid without forfeiting their bid bond. This left the Petitioner, Close, the lowest bidder, at $146,615.00 less than the bid submitted by Worth, the initially-awarded bidder.

16. Close's bid, upon review, was rejected as non-responsive due to its failure to exchange the original Bid form with the revised Bid form, as indicated above, in spite of the fact that Close had also agreed to adhere to the entirety of Addendum No. Two on the face of the Bid form. Thus the recommended award to Worth for the above-referenced additional amount of bid price was adopted by the District, engendering this protest.

17. James Reynolds, the Contracts Specialist for the District, conceded that it was apparent on the face of Close's bid that a mistake had been made in the use of the original form, rather than the revised form. He conceded there was an inconsistency between Close's clear acknowledgement of and agreement to the terms of the contract documents, which expressly included Addendum No. Two and Close's apparent mistaken use of the original Bid form.

18. 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." Mr. Reynolds admitted, however, that he did not apply the terms of Article 19.03 of the RFB in his review of Close's bid and did not construe the bid in the manner provided in the RFB to resolve the apparent inconsistency. He reasoned that Close had used the wrong bid form and looked no further.

19. The District's Procurement Manual provides a procedure whereby a bidder may correct inadvertent mistakes in its bid. Under the terms of Chapter 5-5 of that manual, where the District knows or has reason to conclude, after unsealing of bids, that a mistake may have been made by a bidder, the District "shall request written verification of the bid." In such a circumstance the bidder "shall be permitted the opportunity to furnish information in support of the bid

verification as long as it does not affect responsiveness, i.e., the bid substantially conforms to the requirements of the RFB as it relates to pricing, surety, insurance, specifications and any other matter unequivocally stated in the RFB as determinant of responsiveness." See Joint Exhibit 7,6 pages 61 and 62, in evidence.

20. Mr. Reynolds admitted in his testimony that he did not follow the procedure set forth in the manual for verifying a bid because, in his view, that would be allowing an impermissible supplementation of Close's bid. Ms. Lavery, in her testimony, in essence agreed.

21. The Procurement Manual expressly required the District, upon recognizing the mistake and an inconsistency apparent on the face of Close's bid, to verify that bid and to provide Close with the opportunity to furnish information in support of bid verification. Thus, by the express terms of the manual, a bidder must be given an opportunity to clarify mistakes. 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." See Joint Exhibit 7, page 62, in evidence.

22. It is patently apparent that Close's use of the original bid form, inadvertently, while also unequivocally acknowledging and agreeing to the entirety of Addendum No. Two, represented a non-judgmental mistake. Both of the District witnesses, however, testified that the policy regarding mistakes was not followed and Close was not given an opportunity under the District's policy to provide additional information to support verification of the bid.

23. Although Close failed to substitute the revised Bid form for the original Bid form, as called for by Addendum No. Two, its bid was substantively responsive to the technical specifications and requirements of the RFB, and the irregularity is technical in nature. The parties stipulated that the use of the original form, rather than the revised bid form, was the sole basis for Close being determined to be non-responsive by the Agency.

24. In accordance with Florida Administrative Code Rule 40E-7.301, in Chapter 5 of the District's Procurement Manual, the District reserves the right to waive minor irregularities in a bid. 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. See Joint Exhibit 7, page 58, in evidence.

25. The preponderant, persuasive evidence shows that the irregularity in Close's bid did not affect the price of the bid or truly deprive the District of assurance that the contract would be entered into and performed according to all the terms of the RFB, including addenda. The evidence established that Close actually included the $40,000.00 discretionary cost allowance in its final bid price. It merely did not show it as a separate itemization, because it did not use the revised form providing that itemization line. The fact that the discretionary allowance was itemized in the revised bid form, as part of the bid amount, does not equate to an effect on the contract price as a result of Close's using the original Bid form. Close's error, by mistakenly submitting its bid on the original bid form, did not alter the price of its bid. The evidence clearly established that the bid price for Close's bid would be the same regardless of which form it used.

26. Moreover, the preponderant, persuasive evidence establishes that the use of the original Bid form by Close did

not deprive the District of assurance that the contract would be performed in accordance with the all bid documents. Close's bid, secured by its bid bond, clearly acknowledged and agreed to the express terms of Addendum No. Two in their entirety, which included the terms under which the discretionary cost allowance could be applied. Close considered itself bound to the terms of the RFB and assured the Agency that it was so bound by the written acknowledgement and agreement it submitted to the Agency as part of its bid, concerning the elements of Addendum No. Two. The evidence demonstrated that Close understood that the $40,000.00 amount was a discretionary cost allowance and that Close would not be entitled to it unless the District decided to use it.

27. Despite the opinion of Agency witnesses to the contrary, the error in Close's bid was a technical one and non-material because it did not confer a competitive advantage upon Close. Close's use of the wrong form did not alter the price of its bid. Its mistake in the use of the original bid form could only change the relative, competitive positions of Close and Worth if the amount of the discretionary cost allowance was greater or equal to the difference between those two bids, i.e., the $146,650.00 amount by which Worth's bid exceeded the bid of Close. [1/] The bid of Worth exceeds Close's bid by an amount far greater than the amount at issue in the discretionary cost

allowance identified in Addendum No. Two and expressly itemized in the revised Bid form, i.e. $40,000.00.

28. The District contends that Close gained some competitive economic advantage over other bidders by having the means by which it could optionally withdraw its bid, based upon alleged non-responsiveness, in not substituting the revised Bid form which would contain the itemization of the $40,000.00 cost allowance. It is difficult to see how it could gain a competitive advantage versus other bidders through some perceived ability to deem itself non-responsive, at its option, and withdraw its bid, thus denying itself the contract. The competitive bidding laws are designed to prevent a firm from gaining a competitive advantage in obtaining a contract versus the efforts of other bidders, not in depriving itself of the opportunity to get the work. Moreover, concerning the argument by the District that this may confer the advantage to Close of allowing it to withdraw its bid at its option and still obtain a refund of its bid bond; even if that occurred, it would not confer a competitive advantage vis-à-vis other bidders. It would merely involve a potential pecuniary advantage to Close's interest, versus that of the Agency itself, which obviously is not a bidder. Moreover, it should again be pointed out that Cone and Graham was allowed to provide additional information concerning its bid elements, and even to meet with the District

staff, following the opening of the bids. It was then allowed to withdraw its bid without forfeiting its bid bond.

29. If the District had inquired, by way of verification of Close's bid, as to whether the discretionary cost amount was included in it's bid, that inquiry does not equate to allowing Close to unlawfully supplement its bid. Indeed, if in response to such an inquiry, Close announced that the discretionary allowance was not included in its bid, its bid at that point would be materially non-responsive to the specifications. If Close was then allowed to supplement its bid by changing its price to add the allowance, such would indeed be an unfair competitive advantage and a violation of law on the part of Close and the Agency. The evidence does not show that such happened or was proposed by any party.

30. If a verification inquiry had been made and Close announced that, indeed, its bid price did include the subject discretionary cost allowance, without further response to the specifications being added, then no competitive advantage would be afforded Close and no legal violation would occur. In fact, however, as pointed out above, the verification request, pursuant to the District's policy manual, was never made. This was despite the fact that the District's witness, Mr. Reynolds, acknowledged that the use of the original bid form was an apparent mistake on the face of the bid, when considered in

conjunction with Close's express agreement to construct the project in strict conformance with all contract documents, and particularly with regard to Addenda Numbers One and Two.

31. The non-judgmental mistake, involving use of the original bid form in lieu of the revised bid form, could have been easily clarified by a verification inquiry. That policy was not followed, based solely on the fact that the wrong bid form was used, even though the preponderant, persuasive evidence shows that in all material and substantive respects the bid was a conforming, responsive bid and included in its price the discretionary cost allowance. The preponderance of the evidence shows that the mistaken use of the original Bid form was a non-material irregularity under the District's policies and the terms of the RFB.

32. The District's actions in failing to uniformly apply its own bid verification policy when, in fact, it had allowed verification to one of the other bidders, and when, according to its own witness, it perceived an apparent mistake, was clearly erroneous. It is true that Close may not supplement its bid by changing material terms, but it is permitted to verify whether, in light of the mistaken use of the original Bid form, its bid price, as submitted, included the $40,000.00 discretionary allowance or not. 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 (2008). NCS Pearson, Inc. v. Dept of Education, 2005 WL 31776, at page 18 (DOAH, Feb. 8, 2005).

33. Even without verification of the bid, the bid on its face agrees to compliance with all terms and specifications, including Addendum No. Two. It is thus determined that there is no material irregularity. The bid submitted by Close does not afford it any competitive advantage vis-à-vis the other bidders and it is responsive.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1) and (3), Fla. Stat. (2009).

35. Section 120.57(3)(f), Florida Statutes, provides in pertinent part as follows:

> . . . Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. 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 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 proceeding shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. . .

36. The Petitioner must therefore demonstrate that the agency's proposed action is contrary to governing statutes, the agency's rules or policies or the bid or proposal specifications. It must demonstrate that action by preponderant evidence. Dept. of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); State Contracting and Engineering Corp. v. Dept. of Transportation, 709 So. 2d 607, 609 (Fla. 1998). Stated differently, in a de novo proceeding such as this, pursuant to the above-referenced statutory authority, it must be demonstrated by the Petitioner whether the agency erred in applying a governing principle of law, by virtue of its interpretation or application of its bid specifications or interpretation of the bidder's response thereto.

37. Whether an act is contrary to competition is determined by considering whether it offends the purpose of the competitive bidding statutes. "The purpose of the competitive bidding process is to secure fair competition on equal terms to all bidders by affording an opportunity for an exact comparison of bids." Harry Pepper and Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2d DCA 1977).

38. Although Close mistakenly used the original Bid form rather than the revised form, the preponderant, persuasive evidence establishes that the deviation was a non-material one and could have been easily remedied by the District by use of its established bid-verification process. Even without the bid verification policy being employed by the District, in the "free-form" stage of this proceeding, the bid document submitted by Close itself showed that it had unequivocally agreed to comply with all specifications and requirements of the RFB and contract documents, including, particularly, Addendum No. Two. The assurance actually provided to the Agency by Close's bid response demonstrates that Close would be bound by its contract price, whether or not the relevant $40,000.00 discretionary cost allowance was separately itemized. Under well-established contract principles, the Agency would have been able to protect itself against being charged such an amount, or portion thereof, over and above the proposed contract price submitted by Close.

39. The case of Intercontinental Properties v. DHRS, 606 So. 2d 380 (Fla. 3d DCA 1992), stands for the proposition that the disqualification of a low bidder for non-responsiveness, where the bid irregularity does not impart an unfair competitive advantage to that bidder, is not favored by the courts. In that case, the court reversed an Administrative Law Judge's finding of unresponsiveness on the part of a low bidder, and the court

discussed at length the well-known case of Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So. 2d 505 (Fla. 1982). The Intercontinental opinion contains an apt discussion of that Supreme Court decision regarding bid irregularities and principles of competitive bidding:

> A minor irregularity is a variation from the bid invitation or proposal terms and conditions which does not affect the price of the bid, or give the bidder an advantage or benefit not enjoyed by other bidders, or does not adversely impact the interest of the [agency] . . . [quoting from F.A.C. Rule 10-13.012]. . .
>
> 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 . . .
>
> In either event, there is a strong public policy in favor of awarding contracts to the low bidder, and an equal strong public policy against disqualifying the low bidder for technical deficiencies which do not confer an economic advantage on one bidder over another.
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> Id. at 387 (emphasis added).

40. In the instant situation, Close is the low bidder by a substantial amount of $146,615.00. The preponderant, persuasive evidence establishes that Close received and reviewed Addendum No. Two and incorporated the technical requirements of that

addendum, including the $40,000.00 discretionary cost allowance, into the development and submission of its bid. Close included that discretionary cost amount in the bid.

41. Close specifically agreed to the terms of Addenda Nos. One and Two, but during the final hearing, Mr. Reynolds, testifying for the District, indicated that he viewed Close's agreement in paragraph one of its bid to be void, because an obsolete form was used. He acknowledged, however, that Cone and Graham, on the other hand, had submitted its bid using a portion of the revised form, but had actually signed the page from the original form, as did Close. Despite actually signing a portion of what Mr. Reynolds had described as an obsolete form, he nevertheless found that Cone and Graham's bid documents were responsive in his bid checklist. His position that Close's bid was unresponsive is thus intellectually inconsistent.

42. Close's bid mistake was a technical error that did not confer any competitive advantage to Close or undermine the common standards of competition. The irregularity did not alter the price of Close's bid and, in any event, the amount of the cost allowance (whether or not it was included in Close's bid price, which it was) was far less than the difference between Close's bid and Worth's bid. Therefore, even if, assuming arguendo, Close's bid did not include the $40,000.00 allowance and, theoretically, it had to be added to Close's bid price,

Close's resulting bid price would still be $106,615.00 less than Worth's bid, a not insignificant amount. Only if the amount of the discretionary cost allowance was greater, or at least approximately equal to the $146,615.00 difference between Close's bid and Worth's bid, could Close's mistaken use of the original Bid form possibly alter the competitive positions of the two bidders, or any of the bidders in the procurement for that matter. See, e.g., Warren Building Company, Inc. v. Dept. of Military Affairs, at page 8-9 Case No. 08-2369BID (DOAH, Aug. 20, 2008). The relative competitive positions of the bidders are simply too far apart to have been altered by the cost allowance factor.

43. The irregularity in Close's bid did not give it the ability to "look back" to the comparative bids of the other bidders and somehow then alter its bid to its advantage. The notion that Close's mistake conferred upon it the right to supplement its bid and "add" $40,000.00 to its price after the bids are unsealed is entirely unsupported by any persuasive evidence. According to un-refuted evidence, the bid included the allowance. The only inquiry that would need to be made of Close would be whether it could confirm or deny whether the allowance was included, upon a proper verification request by the District. No party to this matter, including Close, has

ever suggested that it should be permitted to alter its bid price through the Agency verification process.

44. In like vein, Close could gain no competitive, economic advantage by having the ability to withdraw its bid without penalty, through use of the obsolete form in its bid submission, as the Respondent District suggests. It is difficult to fathom how Close could gain any competitive advantage over another bidder by acting to withdraw its bid and thus deny itself the work represented by the ultimate contract in this procurement. The public bidding laws are designed to prevent a firm from gaining a competitive advantage over other vendors or bidders in seeking to obtain the subject work, not in depriving itself of the work. Moreover, this purported fear by the Agency does not appear significant in the face of the fact that it allowed another bidder this purported advantage of withdrawing its bid without penalty.

45. Close's use of the original bid form was clearly a non-judgmental mistake, as identified and defined in the Agency's Procurement Manual. The mistake was apparent on the face of the bid, which not only expressly identified and agreed to the terms of both addenda, but which must be construed by the District as if all addenda are received and acknowledged by the bidder, in submitting its bid.

46. The District did not follow the clear terms of Article 19.03 of the RFB in construing the bid. This is especially the case in light of the express agreement to comply with Addendum No. Two contained in Close's submittal. The District did not follow its own policies contained in Chapter 5 of its Procurement Manual and exercise the opportunity to verify Close's bid as to the obvious mistake, and afford an opportunity to correct that non-judgmental mistake. That mistake and the simple verification question of whether the bid price included the discretionary cost allowance, would not have affected the price of Close's bid nor Close's relative competitive position vis-à-vis any other bidders, by conferring it any competitive advantage. A simple yes or no question and answer procedure would have sufficed.

47. Contrary to the testimony of the District's witnesses, the Procurement Manual expressly permits a bidder to furnish additional information to support verification of its bid in the face of a mistake. As stated above, another bidder was indeed given this opportunity. Under that policy, the bidder is not allowed to alter or supplement its bid and there was no effort or intent to do so. If the simple opportunity to clarify the mistake and verify the bid had been taken, this proceeding might have been unnecessary.

48. In summary, after conduct of this de novo proceeding, the preponderant, persuasive evidence shows that, if the District's position and action persisted through final order, it would be clearly erroneous by its failure to apply the interpretive presumptions in Article 19.03 of the RFB and in failing to apply the bid verification process as delineated above. That would also be the case if it made a legal determination that, although the Petitioner agreed to all terms of all bid documents, including Addendum No. Two, that as to the cost allowance matter and the use of the original bid form, the bid was non-responsive. By allowing Cone and Graham to submit additional information after the bids were opened, in its verification process, and ultimately allowing it to withdraw its bid without sacrificing its bid bond, while denying such an opportunity to Close, under the above-found circumstances, the District would be acting arbitrarily. It would also be acting in a manner "contrary to competition" by allowing such a technical mistake, which did not affect the price of Close's bid, to result in denying the work to a bidder which was a substantial amount cheaper, by $146,615.00, than the price proposed by the bidder initially chosen by the Agency.

49. Thus Close has established by preponderant, persuasive evidence that the District's proposed award to Worth would be clearly erroneous, contrary to competition, and arbitrary, as

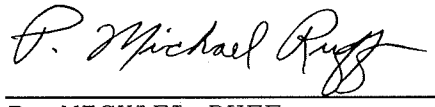
those terms are defined herein and in the decisional law cited by the parties. The bid submitted by Close was thus responsive, responsible, and was the lowest bid of the remaining bidders.

RECOMMENDATION

Having considered the foregoing Findings of Fact, conclusions of law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a Final Order be entered by the South Florida Water Management District, awarding the subject contract for RFB 6000000262 to the Petitioner herein, Close Construction, Inc.

DONE AND ENTERED this 5th day of January, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of January, 2010.

ENDNOTE

[1/] See, e.g., Warren Building Company, Inc. v. Dept. of Military Affairs, page 8-9, Case No. 08-2369BID (DOAH, August 20, 2008). In that case it was determined that a low bidder's cost savings in preparing its bid, by failing to certify that it had visited the project site in preparing its bid, would only change the relative competitive positions of the two lowest bidders if the amount of any such cost savings equaled or exceeded the difference between the two bids.

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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.