STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AJAX PAVING INDUSTRIES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 88-1963RX
	)	
DEPARTMENT OF TRANSPORTATION, BUREAU OF CONTRACT ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Before J. Lawrence Johnston, Hearing Officer, Division of Administrative Hearings.

For Respondent: Reynold Meyer, Esquire, of Tallahassee

For Petitioner: James W. Anderson, Esquire, of Tallahassee

A hearing was held in Tallahassee on May 6, 1988, on this challenge to the validity of the entire Chapter 14-91, Florida Administrative Code, but particularly with respect to the "shortlisting" of design/build teams (Rules 14-91.005 and 14-91.006) and the limitation on the number of teams allowed to be "shortlisted." (Rule 14-91.006(4)).

FINDINGS OF FACT 1/

1. To implement Section 337.11(5), Florida Statutes (1987), the Respondent, the Department of Transportation (the DOT), promulgated Chapter 14-91, Florida Administrative Code. Section 337.11(5) authorizes the DOT the accomplish certain construction projects by requesting proposals for both the design and construction from design-build teams consisting of a design consultant, a construction engineering inspection (CEI) consultant and a construction contractor. Section 337.11(5) outlines a procedure that would require prequalification of design-build teams and at least three proposals in order for the DOT to proceed with the selection process. Chapter 14-91 provides for a procedure whereby interested design-build teams first submit letters of interest and the DOT selects ("shortlists") no less than three nor more than six teams as the most highly qualified. Only teams "shortlisted" are allowed to submit the proposals from which the DOT chooses.

2. The DOT understood that the Legislature intended design-build projects to proceed in a manner similar to how the DOT has let contracts for the design of roads and bridges since 1973 in accordance with Chapter 14-75, Florida Administrative Code. The design-build concept combines the design and construction phases of a project, otherwise separate, into a single contract for the performance of both design work and construction by a design-build team. Since about 1973, entities seeking to contract with the DOT to do design work have gone through a selection process, by rule, which provided for submission of

letters of interest and "shortlisting" (selection) of three to six most highly qualified applicants.

3. A procedure that includes shortlisting, whether for design contracts or for design-build contracts, has several advantages over a straightforward request for proposals. In the types of requests for proposals often made by the DOT, the overall quality of the proposal and the qualifications and capabilities of the contractor ultimately selected often are of greater importance than the price of the proposal. "Shortlisting to eliminate lesser qualified offerors saves offerors unlikely to receive the contract wasted time and money preparing a proposal and saves the DOT unnecessary time and money reviewing their proposals. Capping the number of teams shortlisted insures a limit to the amount of time and money the DOT must spend reviewing proposals for any one project; meanwhile, in order for the DOT to proceed, the statute requires at least three teams to submit proposals, enough to insure the DOT of enough competition among highly qualified offerors and therefore a quality proposal.

4. The Petitioner, Ajax Paving Industries, Inc. (Ajax), is a paving contractor prequalified to do paving work as a contractor or subcontractor for the DOT. Ajax has formed a design-build team which has submitted a letter of interest to contract with the DOT to do a design-build project in Charlotte County. Although that particular project pre-dated, and is not governed by, Chapter 14-91, Florida Administrative Code, future design-build projects will be governed by these rules. Ajax is substantially affected by the rules.

CONCLUSIONS OF LAW

A. The Nature of Rule Challenge Proceedings.

5. Section 120.52(8), Florida Statutes (1987), provides in pertinent part:

> "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(7);
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);
>
> (e) The rule is arbitrary or capricious.

6. A capricious action is one which is taken without thought or reason or which is taken irrationally. An arbitrary decision is one that is not supported by facts or logic or that is despotic. Agrico Chemical Company v. State, Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1979) cert. denied, 376 So.2d 74 (Fla. 1979).

7. Rules will be sustained as long as they are reasonably related to the purpose of the enabling legislation and are not arbitrary or capricious. Florida Beverage Corporation v. Wynne, 306 So.2d 200, 202 (Fla. 1st DCA 1975); Agrico Chemical Company v. State, Department of Environmental Regulation, supra;

Jax's Liquors, Inc. v. Division of Alcoholic Beverages and Tobacco, et al., 388 So.2d 1306 (Fla. 1st DCA 1980); Grove Isle, Ltd. v. State, Department of Environmental Regulation, 454 So.2d 571 (Fla. 1st DCA 1984). As stated in Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So.2d 515, 517 (Fla. 1st DCA 1984):

> The well recognized general rule is that agencies are to be accorded wide discretion in the exercise of their lawful rulemaking, clearly conferred or fairly implied and consistent with the agencies' general statutory duties. Florida Commission on Human Relations v. Human Development Center, 413 So.2d 1251 (Fla. 1st DCA 1982). An agency's construction of the statute it administers is entitled to great weight and is not be overturned unless clearly erroneous. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983); Barker v. Board of Medical Examiners, 428 So.2d 720 (Fla. 1st DCA 1983). Where, as here, the agency's interpretation of a statute has been promulgated in rulemaking proceedings, the validity of such rule must be upheld if it is reasonably related to the purposes of the legislation interpreted and it is not arbitrary and capricious. The burden is upon petitioner in a rule challenge to show by a preponderance of the evidence that the rule or its requirements are arbitrary and capricious. Agrico Chemical Co. v. State, Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1978); Florida Beverage Corp. v. Wynne, 306 So.2d 200 (Fla. 1st DCA 1975). Moreover, the agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations Department of Health and Rehabilitative Services v. Wright, 439 So.2d 937 (Fla. 1st DCA 1983) (Ervin, C. J., dissenting); Depart-ment of Administration v. Nelson, 424 So.2d 852 (Fla. 1st DCA 1982); Department of Health and Rehabilitative Services v. Framat Realty, Inc., 407 So.2d 238 (Fla. 1st DCA 1981)

(Emphasis in original.) Whether an agency's interpretation of a statute is within the range of possible interpretations--so that it neither illegally enlarges, modifies or contravenes the statute nor is arbitrary and capricious--is impacted by how closely the statute circumscribes the agency's discretion in implementing the statute. As statutes confer broader discretion by broadly outlining how the agency must act, the range of possible interpretations available to the agency correspondingly broadens. This is particularly true of procedures adopted by an agency to implement a program designed to achieve a legislative objective.

B. The Enabling Statute.

8. Section 337.11(5), Florida Statutes (1987), enacted by Section 87-162, Laws of Florida (1987), effective June 30, 1987, provides:

> (5)(a) If the head of the department determines that it is in the best interest of the public to combine the design and construction of a road, structure, or building and appurtenant facilities or equipment into a single contract, the department may secure such work through a request for proposals. Factors including, but not limited to, time savings, cost reduction, experience to be gained, or use of state of the art methods shall be considered when determining the best interest of the public.
>
> (b) The department shall adopt by rule procedure for administering combined design and construction contracts. Such procedures shall include, but not be limited to:
>
> 1. Prequalification of applicants.
>
> 2. Announcement of occasions when a design and construction contract is desired.
>
> 3. Criteria and personnel to be used for evaluation proposals and awarding contracts.
>
> (c) If at least three responsible proposals are submitted pursuant to a request for proposals, the department may proceed to evaluate the proposals as provided herein. In evaluating proposals, the department shall consider the cost, safety, and long-term durability of the project; the feasibility of implementing the project as proposed; the ability of the design and construction teams to complete the work in a timely and satisfactory manner; and such other factors as the department deems appropriate. In evaluating the capabilities of the design and construction teams to perform in a timely and satisfactory manner, the department shall also consider such factors as the abilities of the professional personnel, past performance, capacity to meet time and budget requirements, location, recent, current, and projected workload of the firms, and the volume of work previously awarded to the firms by the department.
>
> (d) The department may conduct a combined design and construction contract

> demonstration program not to exceed a total contract amount of $50 million. Pursuant to this program, the department may award, to the qualified firm or joint venture with the lowest cost and best technical proposal, combined design and construction contracts for projects in the department's current 5-year transportation plan in each of the following project categories:
>
> 1. Resurfacing;
> 2. Bridge replacement, or new bridge construction;
> 3. Multilane new construction or reconstruction; and
> 4. Fixed capital outlay and parking garages.
>
> Annually, the department shall submit to the transportation committees of the Senate and the House of Representatives a report outlining the results obtained from completed combined design and construction contracts awarded to that time.

9. Before enactment of Section 337.11(5), Florida Statutes (1987), the DOT accomplished all of its construction projects in a manner fundamentally different than the manner now authorized by Section 337.11(5). If the project were to be designed by outside engineering or architectural consultants, the design work first was contracted under Section 287.055, Florida Statutes (1987), the "Consultants' Competitive Negotiation Act."

10. The Consultants' Competitive Negotiation Act purports to govern all state agencies desiring to contract for certain categories of professional services. Like the rest of Chapter 287, Florida Statutes, the Legislative intent is set out in Section 287.001, Florida Statutes (1987):

> The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically; and that documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in the process by which contractual services are procured. It is essential to the effective and ethical procurement of contractual services that there be a system of uniform procedures to be utilized by state agencies in managing and procuring contractual services; that detailed justification of agency decisions in the procurement of contractual services be maintained; and that adherence by the

> agency and the consultant to specific ethical considerations be required.

11. Under Section 287.055(3), an agency first must publicly announce the need for the design work and solicit "statements of qualifications and performance data." Then, under Section 287.055(4), the agency evaluates current statements of qualifications and performance data on file, together with those submitted in direct response to the public announcement, and select no less than three consultants considered to be the "most highly qualified to perform the required services," based on several criteria listed in the statute. Finally, under Section 287.055(5), the agency negotiates with the most qualified consultant to arrive at a satisfactory contract. If negotiations with the most highly qualified consultant on the list are unsuccessful, the agency then negotiates with the next most highly qualified consultant on the list, and so on, until it negotiates a satisfactory contract with one of the consultants as high on the list as possible. If none of the consultants on the list will agree to a satisfactory contract, Section 287.055(5) authorizes the agency to add more consultants to the list, in order of their qualifications, and continue to negotiate with the highest qualified consultant remaining on the list until a satisfactory contract is reached.

12. After a DOT project has been designed by the more usual methods, the DOT would advertise for bids to construct the project that has been designed under Section 337.11(2) and, under Section 337.11(3), either award the construction contract to the lowest responsible bidder or reject all bids. Those provisions of Section 337.11 must be read together with Section 287.057(2), Florida Statutes (1987), which provides uniform procedures for use of all state agencies soliciting bids for contractual services, as defined by Section 287.012(4), Florida Statutes (1987). See Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981); Agrico Chemical, supra.

13. As can be seen under the new design-build program authorized and established by Section 337.11(5), Florida Statutes (1987), the DOT would combine the design and construction (and construction engineering inspection) components into one contract. The statute broadly outlines a general procedure for the DOT to follow in obtaining design-build projects.

C. The Challenged Rule.

14. Although the rule challenge in this case purports to challenge all of Chapter 14-91, Florida Administrative Code, it actually is directed to two specific rules in the chapter: Rule 14-91.005, and Rule 14-91.006.

15. Rule 14-91.005, Florida Administrative Code, governs the "Public Announcement Procedures" and, specifically under challenge here, solicits letters of interest, not proposals, from design-build teams.

16. Rule 14-91.006, Florida Administrative Code, confirms that the DOT's rule procedure contemplates an initial review of the letters of interest and selection ("shortlisting") of not less than three nor more than six design-build teams to be eligible to submit proposals. Rule 14-91.006, Florida Administrative Code, provides in pertinent part:

> (1) Firms desiring to submit proposals on the design/build project must submit a letter of interest setting forth the qualifications of the entities involved in the firm and provid-

ing any other information required by the announcement of the project.

(2) There shall be a Certification and Technical Review Committee comprised of the following: Director of Construction; Director of Preconstruction and Design; Directors of Operations and Production representing the District in which the project is located; and other members as agreed upon by the previously listed members. For Turnpike projects, the Turnpike Engineer will serve instead of the District Directors.

(3) The Certification and Technical Review Committee shall determine the relative ability of each firm to perform the services required for each project. Determination of ability shall be based upon staff training and experience, firm experience, location, past experience with the Department, financial capacity, past performance, and current and projected work load.

(4) The Certification and Technical Review Committee shall select not less than three nor more than six firms deemed to be most highly qualified to perform the required services, after considering the factors in 14-91.006(3) above. Each of the firms will be eligible for consideration in accordance with rule 14-91.007. The Committee will report its selection of finalists to the Deputy Assistant Secretary for Technical Policy and Engineering Services and the Deputy Assistant Secretary representing the District in which the project is located for their review and approval. For Turnpike projects the Deputy Assistant Secretary of Facilities and Systems will represent the District Office.

D. Validity Of The Shortlisting Procedure.

17. Section 337.11(5), Florida Statutes (1987), does not by its express terms provide for, or direct the DOT to provide for, a "shortlist" procedure.

18. Just as Sections 337.11(2) and (3), Florida Statutes, must be read together with Section 287.057(2), Florida Statutes, Section 337.11(5), Florida Statutes (1987), must be read together with Section 287.057(3), Florida Statutes, which authorizes, and provides general procedures for, procuring contractual services by sealed competitive proposals when a state agency determines that use of competitive sealed bidding is not practicable. Section 287.057(3), Florida Statutes (1987), does not provide for, or direct agencies to provide for, a "shortlisting" procedure.

19. Subparagraph (a) of Section 337.11(5), Florida Statutes, authorizes the DOT to secure design-build work "through a request for proposals."

Subparagraph (b) authorizes the DOT to promulgate rule procedures to "include, but not be limited to: 1. Prequalification of applicants. . . ." From this authority, the DOT's Rules 14-91.005 and 14-91.006 provide for the "shortlist" procedure.

20. Rules 14-091.005 and 14-091.006, insofar as they provide for "shortlisting," do not exceed the DOT's rulemaking authority. Section 120.52(8)(b). Whether it enlarges, modifies or contravenes the specific provisions of the law implemented, in violation of Section 120.52(8)(c), or is arbitrary or capricious, in violation of Section 120.52(8)(e), Florida Statutes (1987), turns on whether the DOT's interpretation of the legislative intent as contemplating "shortlisting" is within the range of possible interpretations of the statute. See Department of Professional Regulation v. Durrani, supra.

21. Although neither Section 337.11(5) nor Section 287.057(3), by their express terms, provide for, or direct the DOT to provide for, a "shortlisting" procedure, neither does either statute prohibit the use of "shortlisting" as part of the procedures implementing the design-build program. The statute merely broadly outlines the procedures the DOT must follow to implement the program, conferring broad discretion for promulgation of specific procedures. In addition, Section 337.11(5)(b) specifically authorizes procedures for "prequalification of applicants." It is not outside the range of possible interpretations to conclude that the Legislature was authorizing the DOT to "prequalify applicants" through "shortlisting," either instead of or, as Chapter 14-91 does, in addition to the procedures already in place for prequalification of contractors to do work under Section 337.11(2) and (3) and of design consultants to do work under Section 287.055, Florida Statutes.

22. In addition, since Section 337.11(5) combines procurement of design services and procurement of construction contracting services in one request for proposals, it is reasonable for the DOT to look to, and attempt to harmonize it with, Section 287.055, as well as Section 287.057(3). Arguably, design-build is more akin to the procedure involved in the selection of design consultants and other professional engineers. Rule 14-75.004(3)(b)2, Florida Administrative Code, implements Section 287.055 and provides that, with respect to any project for which the DOT can clearly define the scope of the work required, "the Department shall select no less than three firms nor more than six firms deemed to be the most highly qualified and capable of performing the required services after considering such factors as the technical proposal when requested . . . As found, this consultant selection process has been in effect since 1973.

23. Finally, although, with respect to the construction component of the design-build request for proposals, Section 337.11(5) must be read together with Section 287.057(3), Florida Statutes, it must be remembered that DOT construction projects proceed under Section 337.11(2) and (3) invitations to bid, not under Section 287.057(3) requests for proposals. It is reasonable for the DOT to interpret the legislative intent behind Section 337.11(5) as not to strictly tie the design-build request for proposal to the Section 287.057(3) request for proposals but rather to envision closer ties to the procedure for procuring consultant services under Section 287.055, Florida Statutes.

E. Validity Of The Limitation On Proposals.

24. For many of the same reasons just given, it is reasonable for the DOT to interpret Section 337.11(5), Florida Statutes (1987), to authorize it to limit the number of design-build teams eligible to submit proposals to six although, by its express terms, it only sets a minimum of three proposals. As

previously mentioned, Section 287.055, Florida Statutes (1987), also lacks express authority to limit the number of consultants to be placed on the list of those eligible to negotiate with the agency. While recognizing that the Consultants' Competitive Negotiation Act clearly is different from the request for proposal process established by Section 337.11(5), Florida Statutes, it is significant that, as previously mentioned, Rule 14-75.004(3)(b)2., which has been in effect since 1973, has limited to six the number of consultants placed on the DOT "shortlist" for further negotiation for contracts whose scope the DOT cannot clearly define. With presumptive knowledge how the DOT has been interpreting and implementing Section 287.055, the Legislature has not acted to curb the DOT. This must be taken as strong evidence that the DOT's interpretation of Section 287.055 is consistent with the legislative intent. See State v. Massachusetts Co., 95 So.2d 902 (Fla. 1957), cert. den., 355 U.S. 881 (1957); State v. Stein, 198 So. 82 (Fla. 1940); Walker v. Department of Transportation, 366 So.2d 96 (Fla. 1st DCA 1979); Austin v. Austin, 350 So.2d 102 (Fla. 1st DCA 1977), cert. den., 357 So.2d 184 (Fla. 1978).

DISPOSITION

Based on the foregoing Findings Of Fact and Conclusions Of Law, Ajax' petition challenging the validity of Chapter 14-91, Florida Administrative Code, is dismissed.

DONE AND ORDERED this 27th day of June, 1988, in Tallahassee, Florida.

J. LAWRENCE JOHNSTON
Hearing Officr
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Filed with the Clerk of the
Division of Administrative Hearings
this 27 day of June 1988.

ENDNOTE

1/ Explicit rulings on the Petitioner's proposed findings of fact (the DOT not having submitted any) may be found in the attached Appendix To Final Order, Case No. 88-1963RX.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 88-1963RX

To comply with Section 120.59(2), Florida Statutes (1987), the following explicit rulings are made on the Petitioner's proposed findings of fact (the Respondent not having filed any):

1. Accepted and incorporated.
2. Accepted but subordinate and unnecessary and, because the facts of the case pre-date the rule under challenge in this case, perhaps irrelevant.

3-4. Accepted and incorporated.

5. Rejected as being a conclusion of law.

6. Rejected as contrary to facts found. It is one reason, not the only reason.

7. Rejected as not proven that shortlisting causes the DOT to spend more time and money, net, than not shortlisting. Accepted that in one case it did, but unnecessary.

8. Accepted but unnecessary.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.