

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA OVERLAND EXPRESS, L.P.,            )  
  )  
      Petitioner,                                )  
  )  
vs.    )  
  )  
  )  
DEPARTMENT OF TRANSPORTATION,            )  
  )  
      Respondent,                               )  
  )  
and    )  
  )  
  )  
BEE LINE MONORAIL SYSTEM, INC.,            )  
  )  
  )  
      Intervenor.                               )  
\_\_\_\_\_)

Case No. 98-2172BID  
DOT Case No. 98-80

RECOMMENDED ORDER

On June 16 and July 2, 1998, a formal administrative hearing was held in this case in Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are whether the specifications included in the Request for Proposals for Lease of Right-of-Way, S.R. 528 (Bee Line Expressway)("the RFP") are contrary to governing statutes and rules, clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

The Respondent, the Department of Transportation (the Department), issued the RFP on April 17, 1998. The Petitioner, Florida Overland eXpress, L.P. ("FOX") filed a written protest of the RFP's specifications on May 4, 1998.

On May 13, 1998, the Bee Line Monorail System, Inc. ("BLMS"), moved to intervene in support of the Department and the RFP's specifications and filed a Motion to Dismiss Formal Written Protests and Petitions for Formal Administrative Hearing in Case Nos. 98-2171BID and 98-2172BID. A Voluntary Dismissal was filed in the former case on May 19, 1998.

On May 20, 1998, BLMS was allowed to intervene, and final hearing was scheduled for June 11, 1998.

A hearing was held on BLMS' Motion to Dismiss on May 26, 1998. Later that day, FOX filed an unopposed Motion for Leave to Amend and Proposed Amended Written Protest and Petition for Formal Administrative Hearing. Anticipating leave to amend, BLMS

filed a Motion to Dismiss the Amended Written Protest and Petition for Formal Administrative Hearing on May 27, 1998. Later on that day, FOX filed a Response to Motion to Dismiss.

The Motion to Dismiss the Amended Written Protest and Petition for Formal Administrative Hearing asserted that FOX had no standing to protest the specifications of the RFP because FOX is not a prospective bidder.

On May 29, 1998, an Order Granting Leave to Amend and Denying Motion to Dismiss was entered grant; however, FOX's protest was limited to its interest in refining the RFP's specifications and was not allowed to extend to efforts to enjoin or cancel the RFP.

On June 3, 1998, BLMS' agreed Motion to Amend Prehearing Order was granted, and final hearing was rescheduled for June 16-17 and July 2, 1998, to accommodate witnesses.

The parties' Joint Prehearing Stipulation was filed on June 15, 1998. On June 16, 1998, FOX called two witnesses and had Petitioner's Exhibits 1 through 3 admitted in evidence. Joint Exhibits 1 through 6 were then received in evidence. The Department called one witness and had Department Exhibits 1 and 2 admitted in evidence. BLMS called one witness and had BLMS Exhibits 1 and 2 admitted in evidence. On July 2, 1998, FOX called one additional witness, and the parties rested their cases.

The parties ordered the preparation of a transcript of the

final hearing and were given ten days from the filing of the transcript in which to file proposed recommended orders. The transcript was filed on July 15, 1998.

## FINDINGS OF FACT

### The Bee Line Expressway

1. The Bee Line Expressway, which carries the number designation of State Road 528, extends from its western terminus at Interstate 4 in Orange County, easterly across the St. Johns River into Brevard County; it then extends slightly southerly across Interstate 95, the Banana River, Indian River, and Merritt Island; it ends at its eastern terminus at Port Canaveral in Brevard County.

2. The portion of the Bee Line Expressway from Interstate 4 to approximately the Florida Turnpike is owned by the Respondent, the Florida Department of Transportation ("the Department" or "DOT"). The portion from approximately the Turnpike to the vicinity of State Road 520, is owned by the Orlando-Orange County Expressway Authority (the "Expressway Authority") and is subject to a lease/purchase agreement between DOT and the Expressway Authority. The portion from the vicinity of State Road 520 to the center of the Intracoastal Waterway is owned by DOT. The portion from the center of the Intracoastal Waterway to Port Canaveral is owned by the Canaveral Port Authority (the "Port Authority.")

3. Since the late 1980s there has been consideration of a fixed guideway transportation system linking Orlando and the Space Coast along the Bee Line Expressway. There were at least two proposals prior to June 1997 to co-locate transportation

facilities along the Bee Line right-of-way. Such a system would be in accordance with and advance Department policies and responsibilities to develop new transportation systems to keep pace with Florida's growth.

#### Bee Line Rail Unsolicited Proposal

4. In June 1997, the Department received an unsolicited proposal titled "Proposal of Bee Line Rail System, Inc., for the Development of a Monorail System along the Bee Line Expressway." Since that time, the name of Bee Line Rail System, Inc. has been changed to Bee Line Monorail System, Inc. ("BLMS"). BLMS proposed the lease of certain Department properties along the Bee Line Expressway (S.R. 528) for the construction and operation of a rail system connecting a terminal at Cape Canaveral on the eastern coast of Florida, a terminal at the Orlando International Airport, and a terminal to be located near International Drive adjacent to Interstate 4.

5. The BLMS unsolicited proposal became the impetus for the Department's Request for Proposals ("RFP"), which is the subject of this proceeding. Knowing that a rail line connecting the Orlando area with the Space Coast had merit and would further Department policies and responsibilities, the Department formed a team of experts to write the RFP including the evaluation criteria to be used in reviewing proposals submitted in response to the RFP. The team worked together to develop the evaluation criteria and to formulate the RFP in accordance with the

governing statute and rules. In the process of formulating the RFP, the Department had discussions with the Expressway Authority, the Canaveral Port Authority, and Florida Overland eXpress (FOX), the Petitioner in this case. Each of these entities' concerns were considered in the formulation of the RFP. Specifically, DOT held several discussions with FOX and made modifications to the RFP as a result. The RFP is substantially different from the BLMS unsolicited proposal.

#### The Bee Line Expressway RFP

6. On April 17, 1998, DOT issued the RFP pursuant to Section 337.251, Florida Statutes (1997). It consists of the Request for Proposal Cover Page, the Evaluation Criteria for Lease of S.R. 528 (Bee Line Expressway) Right of Way (the "Evaluation Criteria"), and the Bee Line Lease Agreement. Each part of the RFP contains specifications that describe the information a proposer must provide in order to be responsive, as well as the criteria by which the submitted information will be evaluated. Responses to the RFP are due October 19, 1998.

7. The RFP solicited proposals for lease of the right-of-way within the Bee Line Expressway (State Road 528) for the purpose of establishing a transportation system (excluding pipelines) connecting terminals and stations in Orange and Brevard Counties, with an option to also lease right-of-way owned by DOT along portions of State Road 407. Among other things, proposals responsive to the RFP would have to clearly identify

the route for the proposed transportation system on aerial photographs. (Evaluation Criteria, Part III, page 7) Proposals would have to specify the services to be provided, whether they would be for passengers, for freight, or for both, and the locations of stations would have to be identified. (Evaluation Criteria, Part V, page 9.) Proposers would have the option to describe the specific technology to be deployed or to identify the performance specifications to be achieved for a technology to be specified at a later time. (Evaluation Criteria, Part VI, pages 10-11.) Safety of proposed systems would have to be fully explained including the identification of applicable federal and state safety regulations. (Evaluation Criteria, Part VII, page 11; Bee Line Lease Agreement, Paragraph 5.) Proposed systems would have to be in compliance with all applicable environmental and land use requirements. (Evaluation Criteria, Part IX, page 13 and Part XII, page 15; Bee Line Lease Agreement, Paragraph 2.) Constructability and maintenance of the proposed facilities would have to be described. (Evaluation Criteria, Part X, page 13 and Part XI, page 14.)

8. The RFP requires that proposals include the information designated in the Department's Florida Administrative Code Rule 14-109.0011(4)(c). Among other things, the RFP requires that proposals include:

The proposed design for the use of the space, including facilities to be constructed, as well as maps, plans and/or sketches as are necessary to set out pertinent features in



relation to the transportation facility are required by the RFP. (Evaluation Criteria, Part III, page 7.)

A three-dimensional drawing and legal description of the space to be leased is required by the RFP. (Evaluation Criteria, Part III, page 7.)

An explanation of all planned uses of the property to be leased as well as all activities to be conducted on the property is required by the RFP. (Evaluation Criteria, III, page 7 and V, page 9.)

### Clarification Of The RFP

9. The RFP provides two methods of obtaining a clarification about its requirements. A potential proposer is required to attend a "Mandatory Pre-proposal Conference." (RFP Cover page, 2.) (This conference had been scheduled for May 5, 1998, but was canceled due to the filing of the protests.) At this meeting the attendees would be given the opportunity to ask questions, and the Department would answer the questions, either orally at the meeting, or in writing. In addition, any person can submit a written request for clarification by a specified date, which was to be July 6, 1998; within 21 days, the Department would provide a written response. The request for clarification and the Department's response would be provided to all persons who attended the pre-proposal conference. (RFP Cover page.)

### Florida High Speed Rail Project

10. FOX's witnesses did not testify that the specifications in the RFP were invalid. Indeed, David S. Gedney, chief project executive for the FOX project, testified that FOX was not opposed to the RFP, just the timing of its issuance. FOX focused on the timing of the RFP and the way in which it might complicate FOX's planning efforts in establishing and locating the Florida High Speed Rail Project.

11. On February 28, 1995, the Department issued the High Speed Rail Transportation System Request for Proposals that

solicited applications for a franchise for a high speed rail transportation system to provide service to four designated service areas--Tampa Bay (Hillsborough and Pinellas Counties), Lakeland (Polk County), the Orlando area (Seminole, Orange, and Osceola Counties), and Southeast Florida (Dade, Broward, and Palm Beach Counties).

12. In April 1996, the Department awarded FOX the franchise for a high-speed rail system to connect the four service areas identified in the High Speed Rail Transportation System Request for Proposals. Brevard County is not in one of the service areas identified.

13. The award of the franchise was conditioned upon FOX and the Department entering into certain post-franchise agreements that would establish a solid foundation for the development of the high-speed rail project. These agreements included a Finance Post-Franchise Agreement (FPFA) to establish successful financing for the endeavor and the Pre-Certification Post-Franchise Agreement (PCPFA) to ensure the ultimate development and certification of the project. The Department's Final Order Awarding Franchise To Overland eXpress, L.P. - Franchise and Terms and Conditions and the post-franchise agreements collectively are referenced as the "Franchise."

14. In accordance with Section 341.3338, Florida Statutes (1997), and the Final Order that awarded the Franchise, FOX has the exclusive right to establish, and upon issuance of

certification, to locate, construct, operate, and maintain a high speed rail transportation system that serves the geographical areas identified. These exclusive rights only apply to high speed rail transportation systems.

15. The Franchise does not grant to FOX an exclusive right to provide high speed rail service to Brevard County, since that county is not listed as a service area in the Franchise.

16. In addition to the exclusive rights granted by the Final Order, the Department agreed to seek legislatively additional provisions to secure the exclusivity of the FOX Franchise and to protect the state's financial investment in the project. These are contained in the Finance Post-Franchise Agreement (FPFA). Specifically, the FPFA, provides, starting on page 3:

§2.2 Exclusivity. Pursuant to § 341.3338, Florida Statutes, and Article III, Section A of the Franchise Document, FOX has the exclusive right to plan, establish, construct, operate and maintain the System serving the service areas identified in the Franchise Document. Subject to the enactment of any necessary State legislation, as set forth in Section 12.21, the Department agrees as set forth in Sections 2.2(a) through (e) below:

(a) No Competing System. The Department shall not permit any new or substantially renovated fixed-guideway, inter-city passenger transportation system (including any high-speed rail transportation system) which competes with the System and any extensions thereof, it being understood that such legislation should not limit the development of feeder distribution systems.

\* \* \*

(e) New Fixed-Guideway Inter-City Systems In Florida. FOX (or, at the election of FOX, any of the Sponsors or one or more Affiliates of FOX or any of the Sponsors) shall have a right of first refusal with respect to the design, engineering, procurement, construction, testing, commissioning, operation and maintenance of any high-speed rail transportation system in the State of Florida other than the System in accordance with terms and conditions to be agreed in the Fixed-Guideway Development Post-Franchise Agreement to be entered into by the Department and FOX.

17. To ensure that the Department fully complied with the Franchise, including the above agreement, the RFP included specific protections for the FOX project in Part IV of the Evaluation Criteria, titled "High Speed Rail Project."

(Evaluation Criteria, pages 8-9.)

18. To safeguard the Department's agreements with FOX, and in particular Subsection 2.2(a) of the FPPA, relating to the protection from competing systems, the RFP included information requirements designed to protect the FOX Franchise and specifically stated:

. . . The Department must ensure that this proposed lease of the Bee Line expressway right of way does not compete with or otherwise adversely impact the FOX franchise.

(Evaluation Criteria, page 8.)

19. No proposal responsive to the RFP could compete with the FOX project. While any reliable existing technology or performance specifications that can be met by existing technology

are allowed to be proposed, the system proposed must not be capable of operating in excess of 120 miles per hour.

(Evaluation Criteria, Part VI, pages 10-11.)

20. The Department also is in compliance with the terms of Subsection 2.2(e) of the FPFA, relating to FOX's right of first refusal. Subsection 2.2(e) only applies to a new high-speed rail transportation system, and by definition a high-speed rail transportation system must be capable of operating in excess of 120 miles per hour. Section 341.322(16), Florida Statutes (1997). The RFP solicits a system that will not be capable of operating in excess of 120 miles per hour. In any event, Subsection 2.2(e) is not, as yet, effective because FOX and the Department have not entered into the Fixed-Guideway Development Post-Franchise Agreement.

21. A rail system proposed in response to the RFP would complement the FOX system by providing passenger transportation to specific destinations along the Bee Line Expressway, for example to the Port of Canaveral, a destination not within a service area to be served by FOX, or to the Orange County Convention Center. Such feeder distributor functions of a Bee Line rail system are specifically allowed by the FOX Franchise to be developed by entities other than FOX.

22. At present, the physical alignment of the FOX project is not known. FOX is currently in the preliminary phase of developing the high-speed rail project. DOT has retained

consultants who are presently engaged in the early stages of evaluating the potential environmental and socioeconomic effects of the FOX project.

23. Under the National Environmental Policy Act (NEPA), 42 U.S.C. Sections 4321, et seq., the Florida High Speed Rail Project must undergo an extensive review of all aspects of the proposed system. This review produces the Environmental Impact Statement (EIS). NEPA mandates analyses of the need for the project, a comparison of all reasonable alternatives and routes, including the alternative of not doing anything, as well as the impacts on the human environment for each alternative. The review is anticipated to take more than two years. The alternative routings undergoing NEPA review include alignments co-locating with portions of the Bee Line Expressway.

24. Simultaneously with the NEPA review, the project will be undergoing environmental review pursuant to a certification process established by the Florida High Speed Rail Transportation Act. This process, which is expected to take two to three years, will result in the denial or approval of certification for the project. The certification, which approves the final location of the project, and which becomes the sole license and authority for the project, is required prior to the construction and operation of the system. The alignments for the high-speed rail transportation system do not become final until the NEPA review is completed and certification granted.

25. On December 12, 1997, the United States Department of Transportation, Federal Railroad Administration (FRA), published notice of a proposed rule setting safety standards for the FOX High Speed Rail Project. These proposed safety standards, which are premised on accident and collision avoidance, contain various requirements to ensure that high-speed rail tracks remain free of any intrusion that could cause a wreck, including the requirements that the right-of-way be fenced, that physical barriers be built where the line is adjacent to other transportation systems, and that a detection and alarm system be installed to alert and stop the train should any intrusion occur.

26. The proposed FRA rule would require FOX to develop a system safety plan, which would describe FOX's system safety program. FOX cannot finalize the design of its system until it has developed its safety plan and completed the analysis required by that plan. Since the system safety program established by the plan will be a determining factor in deciding the exact right-of-way for the FOX project, the exact right-of-way cannot be determined until the at least the design portion of the system safety plan is approved.

27. Alternatives for collision avoidance can be costly. A berm, including the cost of additional land needed for such a structure, could cost \$300,000 per linear foot. A concrete barrier would cost \$1.8 million per mile. Elevation of the FOX



guideway would add \$10 million per mile to the cost of constructing the guideway.

28. If increased distance between FOX and another system required FOX to diverge from the Bee Line right-of-way, resulting in the need to purchase additional land, increased costs to the project would be significant. Required eminent domain proceedings also would be time-consuming. Increased environmental permitting and mitigation also might result, at additional costs in money and time. It was estimated that a year of delay in the project would reduce FOX's bottom line by \$200 million.

29. While the final alignment of the FOX Project may not be known for years, there was no evidence that a rail system constructed along the Bee Line Expressway in response to the RFP would make it impossible for FOX to comply with FRA safety standards. A separate transportation system using part of the Bee Line right-of-way can be planned simultaneously with the FOX system with proper coordination. It is not necessary to delay the Bee Line Expressway RFP until after FOX has its alignment fixed.

30. Planning the FOX Project and the Bee Line Expressway RFP simultaneously may, but would not necessarily, increase the construction cost of the FOX Project. Meanwhile, it might not be possible to plan and implement a rail system along the Bee Line Expressway after final alignment of the FOX project; if still

possible, logically, the costs of a rail system along the Bee Line Expressway could increase if it had to be planned and implemented after the final alignment of the FOX Project is determined. Finally, delaying the Bee Line Expressway RFP until after the FOX final alignment may only postpone, without totally eliminating, additional costs to the FOX project. Whether nearby transportation systems are in place initially or come after the FOX project, the FRA will require FOX to take the measures necessary to avoid collisions.

31. Delay in the issuance of the RFP delays the opportunity for the establishment of a complementary system along the Bee Line Expressway. It is in the public interest for both systems to go forward in a coordinated matter. The sooner the systems are implemented, the sooner the needs of Florida's traveling public will be served.

32. It also is noted that the RFP does not set a date of decision on proposals (except that the proposed Bee Line Lease Agreement form is designed to accommodate a date before the turn of the century.) In addition, the RFP Cover Sheet provides that the Department can reject all proposals if they are not satisfactory.

#### Property Not Owned By The Department

33. The RFP allows proposers to include in the proposal the use of right-of-way owned by the Port Authority and Expressway Authority. (Evaluation Criteria, Part I, page 1.) This is

allowed to give a proposer the opportunity to develop a rail system along the Bee Line Expressway that has meaningful station locations, and such locations may well be on, or require the use of, a portion of the Bee Line Expressway owned by another agency. There is merit for the system to connect the Port of Canaveral with the Orlando International Airport, and the RFP gives the proposer the opportunity to propose these as stations. It will be up to the proposer to suggest the property ownership relationship for those portions of the alignment not owned by the Department and to obtain approval of the land owners for such relationship. (Evaluation Criteria, Part I, page 1.) These other agencies agreed to issuance of the RFP and are willing to work with the Department to effectuate a rail system that both the Department and the agencies can approve. The RFP clearly requires that the land owners approve any proposal affecting their ownership rights. (Evaluation Criteria, Part I, page 1.)

#### Compliance With Zoning and Land Use Plans

34. Part XII of the RFP's Evaluation Criteria requires proposers to "demonstrate consistency to the maximum extent feasible" with the applicable land use plans and "indicate the extent of compatibility with existing and proposed land uses and transportation systems." (Evaluation Criteria, Part IX, page 13 and Part XII, page 15.) The proposed lease agreement which is part of the RFP specifies that the lessee is required to "conform

to and obey any present and future ordinances and/or rules, regulations, requirements and orders of governmental authorities or agencies respecting the use and occupation of said premises." (Bee Line Lease Agreement, Paragraph 2.)

35. As drafted, the RFP simply recognizes that certain aspects of local comprehensive plans may need to be modified, since a proposed transportation facility may not have been considered during plan development. A proposal may require a comprehensive plan amendment to be in compliance; alternatively, it is possible that a necessary variance could be obtained.

#### Milestones

36. The RFP allows for what it terms "milestones," which are events and critical decisions that need to occur in accordance with a schedule, because the Department recognizes:

Many requirements for system implementation such as the total financing package, station location selection, technology selection, permitting, etc., probably will not be finalized upon execution of a lease agreement.

(Evaluation Criteria, Part I, pages 1-2.)

37. This milestone concept is necessary to ensure the orderly development of the facilities on the leased premises. The "milestones" are conditions precedent and conditions subsequent that will become part of the business arrangement for the lease.

38. The RFP gives proposers wide latitude to propose a schedule for implementation of a proposal. The schedule will

include specific milestones for various activities. The activities for which milestones are expected are identified in the RFP. (Evaluation Criteria, Part I, pages 1-2; Part III, page 7; Part V, page 9; Part VI, page 11; Part VII, page 11; Part VIII, page 12; Part IX, page 13; Part X, page 13, Part XI, page 14; Part XII, page 15; Part XIII, page 22; Part XIII, Subpart H, page 23.) Proposers are to include in the proposal a schedule to comply with the milestones. The Department would use this information in evaluating the proposals. For the proposal selected, the Department would also use this information to establish a reasonable schedule for implementing the proposal. The Department would use the "team approach" to ensure the reasonableness of schedule, i.e. an expert in each milestone subject area would be consulted.

39. Part I. A. of the Evaluation Criteria refers to "technology selection" among items of milestone information required for system implementation that "probably will not be finalized upon execution of a lease agreement." FOX suggests that this reference makes the RFP confusing as to whether the technology proposed should be in the RFP response and subject to evaluation in the proposal selection process.

40. Part I.B. of the Evaluation Criteria provides that:

[i]n determining whether to select or reject a proposal the Department will consider and balance all information required to be submitted by the Request for Proposal and to this extent each item of information solicited is to be considered an evaluation

criterion. In its assessment of submitted application, the Department will analyze the information submitted in relation to the information requirements of this RFP, the provisions of Section 337.251, Florida Statutes (1997), and Florida Administrative Code Chapter 14-109, and will compare each proposal to the other proposals submitted.

Under this provision, all information--including proposed milestone schedules--will be subject to evaluation in the proposal selection process.

41. The evidence was reasonably clear that the RFP was not intended to defer the technology proposal to milestone information. Part VI of the Evaluation Criteria is reasonably clear that the technology proposed should be included in the RFP response and not deferred to milestone information. See Finding 7, supra. In addition, it is implied throughout Part VIII of the Evaluation Criteria, on "Operating Certification," that responses to the RFP would include the actual technology proposed. Also, while the RFP gives proposers flexibility in the selection of the technology to be used, it specifies that "new" and "untried" technologies are not to be proposed. (Evaluation Criteria, Part VI, pages 10-11) The RFP is reasonably clear that it does not defer the technology proposal to milestone information; rather, it should be construed at most to afford the option of proposing a milestone schedule for the "finalization" of the technology selection.

42. FOX also suggests that the requirement of a milestone schedule for ridership and revenue estimates in Part XIII.H. of

the Evaluation Criteria makes the RFP confusing as to whether the ridership analysis should be included in the RFP response and not deferred to milestone information. But Part IV of the Evaluation Criteria clearly requires proposers to provide an "[a]nalysis of the ridership of the proposed system by year and origin/destination pair to identify potential diversion of ridership and associated revenue from FOX." Part XIII.H requires, in addition, milestone information for "ridership and revenue estimates that are current (no more than six months old) and certified by a nationally recognized consulting firm."

43. Part I.B. of the Evaluation Criteria should not cause confusion as to whether information should be submitted at the time of a response to the RFP in the form of milestones. Rather, it simply makes clear that all information, including proposed milestone schedules, will be considered as part of a proposal.

#### Logic and Fair Competition

44. The Department RFP and its specifications, which were developed by a team of experts, are designed to further the Department's transportation policies and are based upon sound transportation concepts. Within the framework of the governing statute and rules, the specifications are logical in that they provide for the selection of a lessee who will use the leased premises for a much-needed transportation system.

45. The specifications of the RFP apply to any entity wishing to lease the Bee Line Expressway to develop a

transportation system that has a maximum speed capability of less than 120 miles per hour. The specifications do not favor any particular vendor of equipment or otherwise contain any requirement that would be adverse to open competition by all potential proposers desiring to respond to the RFP.

#### CONCLUSIONS OF LAW

46. Section 120.57(3)(b), Florida Statutes (1997), provides in pertinent part:

Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the bid tabulation or after receipt of the notice of the agency decision or intended decision and shall file a formal written protest within 10 days after filing the notice of protest. With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for proposals, and the formal written protest shall be filed within 10 days after the date the notice of protest is filed.

FOX filed its protest of the RFP's specifications under this statute.

#### Standing

47. The case law is clear that standing to protest agency decisions concerning a contract award arising from the contract bidding process under Section 120.57(3), Florida Statutes (1997), is limited to bidders except in "exceptional circumstances." See



Ft. Howard v. Dept. of Management Services, 624 So. 2d 783, 785 (Fla. 1st DCA 1993)(bidder's supplier had no standing to protest award to another bidder with a different supplier); Westinghouse Elec. v. Jacksonville Transp. Authority, 491 So. 2d 1238, 1241 (Fla. 1st DCA 1986)(submission of ruse, instead of good faith proposal, did not confer standing.) See also Brasfield & Gorrie General Contractor, Inc., v. Ajax Construction Company, Inc., of Tallahassee, 627 So. 2d 1200 (Fla. 1st DCA 1993)(non-bidder construction company would have had no standing to protest award and likewise had no standing to seek injunction of bidding process.)

48. In principle, there would not seem to be any reason why standing to protest agency decisions concerning bid solicitations or requests for proposals (and their specifications) should be treated any differently. In practice, however, since the bidding has not yet taken place when these early agency decisions are being made, it can be difficult if not impossible to ascertain whether such a protester will be a bidder.

49. In this case, FOX initially did not allege that it intended to respond to the RFP. After the Motion to Dismiss FOX's original petition (and while maintaining that its allegations were sufficient for standing,) FOX added the allegation in paragraph 24 of the Amended Written Protest and Petition for Formal Administrative Hearing that "FOX is a potential respondent to the RFP." Prehearing, BLMS discounted

this additional allegation because, it contended, not only is "potential" bidder status insufficient but also FOX's other allegations ruled out all "potential" that FOX would respond to the RFP.

50. While it seemed from the face of the Amended Written Protest and Petition for Formal Administrative Hearing as well as from FOX's Response to Motion to Dismiss improbable that FOX would respond to the RFP, it could not be said that all "potential" was ruled out at that time. It was not clear until final hearing that FOX has no intention to respond to the RFP.

51. Nonetheless, it is concluded that FOX had standing to protest the RFP specifications even though FOX is not a potential bidder. The Ft. Howard and Westinghouse decisions contained dicta that there can be "exceptional circumstances" that would confer standing on a non-bidder to protest a bid award. But neither defined the "exceptional circumstances," finding only that they were not present in those cases. It is concluded that FOX has a substantial interest in the RFP specifications because they could affect FOX's statutory and contract rights as Florida's exclusive high-speed rail transportation system provider. It is concluded that this interest is the kind of "exceptional circumstance" that is sufficient to support FOX's standing in this case.

52. FOX also contended that the decision in Fairbanks, Inc., v. Dept. of Transp., 635 So. 2d 58 (Fla. 1st DCA 1994),

supports its standing in this case under the "exceptional circumstances." But the Fairbanks court was careful to distinguish that the case before it arose from a request for a formal administrative proceeding under Section 120.57(1), not from a bid protest under Section 120.53(5) [now 120.57(3), Florida Statutes (1997)], Florida Statutes (1991). The court implied that the result may have been different had the case arisen from a bid protest. In addition, the Fairbanks court distinguished the Ft. Howard decision, stating that the protester in Ft. Howard would not have had standing under either Section 120.53(5) [now 120.57(3), Florida Statutes (1997)], or Section 120.57(1), Florida Statutes (1991). Fairbanks, at 61.

53. While it has been concluded that FOX has standing to protest the RFP specifications, that does not mean FOX has standing in this case to attempt to cancel the RFP altogether. It is concluded that the purpose of bid protests under Section 120.57(3), Florida Statutes (1997), is to facilitate the contract bidding process, not to enjoin it. (Even the ultimate rejection of all bids as a result of a bid protest must be seen as facilitating the contract bidding process, not enjoining it, as it often results in re-bidding.) As a result, FOX's protest is limited to its interest in refining the RFP's specifications; any efforts to enjoin or cancel the RFP would have to take place in some other proceeding.

#### Burden and Standard of Proof

54. Section 120.57(3)(f), Florida Statutes (1997),

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, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

In this case, FOX had the burden of proving that the RFP's specifications are contrary to the Department's governing statutes, rules or policies; in so doing, FOX must show that specifications are clearly erroneous, contrary to competition, arbitrary, or capricious.

#### Timing of the Lease

55. Section 337.251(1), Florida Statutes (1997), provides in pertinent part:

Leases under this section are subject to any reservations, restrictions, or conditions necessary to ensure adequate protection for the safe and efficient operation and maintenance of all transportation and utility facilities, the adequacy of traffic flow, and the full use of existing and future state transportation facilities. Such joint public-private use or commercial use of property may not interfere with the primary state transportation needs or present or future utility needs for that property nor be contrary to the best interests of the public.

FOX contends that the RFP is clearly erroneous, as contrary to this statute, because FOX's right-of-way alignment and operating

envelope cannot be ascertained prior to submission of responses to the RFP or a resulting lease.

56. While it does appear that the precise impact of a resulting lease on FOX cannot be ascertained prior to submission of responses to the RFP or a resulting lease, that does not necessarily mean that the Department will be unable to proceed with the RFP in a way that will meet the requirements of Section 337.251(1), Florida Statutes (1997).

57. While an adverse impact on the FOX Project may be enough to support FOX's standing, Section 337.251(1) only prohibits a lease that would "interfere with" the FOX project. One of the express purposes of the RFP is to obtain proposals that would not "interfere with" the FOX Project. It would be premature at this time to conclude that the Department cannot and will not receive a proposal that would enable the Department to proceed with both projects in a way that would meet the requirements of the statute.

58. FOX similarly also contends that the RFP's specifications are clearly erroneous, arbitrary or capricious because Parts III and IV of the Evaluation Criteria contain requirements that cannot be met prior to submission of responses to the RFP or a resulting lease. But, again, it is premature at this time to conclude that the Department cannot and will not receive a proposal that meets the RFP's requirements.

59. Part III of the RFP requires each proposer to describe

the proposed operating envelope and vertical alignment "within the lease limits and at any point where this system crosses or encroaches on any existing or proposed transportation facilities." Clearly, it may not be possible to specify where a proposed system would cross or encroach on the FOX system at this time because the FOX system has not yet been "proposed" with specificity. But just as clearly, a proposer could specify crossing and encroachments with any existing systems and specifically proposed systems (as well as with the FOX system to the extent possible at this time), which is all the RFP requires.

60. Part IV of the RFP requires responses to contain "[a]n analysis of the land to be leased showing it does not adversely impact the potential physical alignment of the FOX system," as well as "[a]n analysis of the ridership of the proposed system." Certainly, such analyses are possible although they might be limited by the uncertainty of the FOX system. Part IV simply states that, using the analyses, the "Department must ensure that [the lease] does not compete with or otherwise adversely impact the FOX franchise." It is premature at this time to conclude that the Department will not be able to "ensure that [the lease] does not compete with or otherwise adversely impact the FOX franchise."

61. FOX suggests that, to correct alleged deficiencies in the timing of the lease, either the proposal submission date or the date of decision must be postponed. However, it is noted

that the RFP does not set a date of decision on proposals. In addition, the RFP Cover Sheet provides that the Department can reject all proposals if they are not satisfactory.

Property Not Owned By The Department

62. Section 337.251(1), Florida Statutes (1997), also provides in pertinent part:

The department may lease to public agencies or private entities, for a term not to exceed 99 years, the use of department property, including rights-of-way, for joint public-private transportation purposes to further economic development in this state and generate revenue for transportation.

Florida Administrative Code Rule 14-109.001(2)(e) contains the definition:

"Joint Public/Private Development" means the leasing of Department-owned property, including airspace, on which major improvements will be constructed by the lessee, the term of which shall not exceed 99 years, and the Department may accept cash, goods, or services for rent, or a combination of cash and goods or services for rent.

FOX contends that the RFP is clearly erroneous, as contrary to this statute and rule, because the RFP covers property now owned by the Orlando-Orange County Expressway Authority and by the Canaveral Port Authority.

63. Neither the statute or rule prohibits the RFP as issued. The statute and rule simply authorize the Department to lease property it owns. Clearly, the Department cannot lease land owned by others without the owners' consent. It is clear that the Orlando-Orange County Expressway Authority and the Canaveral Port Authority have participated in the formulation of the RFP; the leasing entities logically have sought proposals integrating leases from all three into a single proposed project, and the Department initiated the RFP process on behalf of all three. Part I.A. of the Evaluation Criteria of the RFP specifies and makes clear that the Orlando-Orange County Expressway Authority and the Canaveral Port Authority must approve any proposed lease selected by the Department.

64. As the RFP is presently formulated, at some point after the selection of a proposal, the Orlando-Orange County Expressway



Authority and the Canaveral Port Authority would have to convey to the Department an interest in their property that the Department could in turn lease (or perhaps sub-lease) to the successful proposer. Proposals are expected to suggest how this should be done. It is premature to invalidate the RFP at this time.

Compliance With Zoning and Land Use Plans

65. Section 337.251(1), Florida Statutes (1997), also provides in pertinent part:

The department may not lease any such property if the proposed use conflicts with zoning or land development codes of any affected local government.

FOX contends that the RFP is clearly erroneous, as contrary to this statute, because Part XII of the RFP's Evaluation Criteria requires proposers to "demonstrate consistency to the maximum extent feasible" with the applicable land use plans and "indicate the extent of compatibility with existing and proposed land uses and transportation systems." While the statute does not permit the Department to lease property in conflict with local zoning and land use planning, the RFP does not suggest that it will result in a lease in violation of the statute. To the contrary, the proposed lease agreement which is part of the RFP specifies that the lessee is required to "conform to and obey any present and future ordinances and/or rules, regulations, requirements and orders of governmental authorities or agencies respecting the use and occupation of said premises." The RFP appropriately and

logically requires information from which the impact of a proposal on local zoning and land use planning can be assessed.

This information would let the Department know if a variance or amendment from existing or proposed local zoning or land use plans would be required.

#### Milestones

66. FOX makes several arguments with respect to alleged flaws in the RFP's solicitation of milestone information. It contends that the milestones inappropriately defer information that should be provided at the time of the responses to the RFP; allegedly, this results in the exclusion of evaluation criteria, in violation of Florida Administrative Code Rule 14-109.0011(4)(a)3. and Section 287.057(2), Florida Statutes (1997).

67. Rule 14-109.0011(4)(a)3. provides that "[e]valuation criteria for proposals shall be included in each Request for Proposals pursuant to Section 287.057(2), Florida Statutes." Section 287.057(2) requires that requests for proposals include: "all contractual terms and conditions applicable to the procurement . . . , including criteria . . . ."; it also requires selection of the proposal "determined in writing to be the most advantageous to the state, taking into consideration the price and the other criteria set forth in the request for proposals."

68. FOX contends that parts of the RFP inappropriately suggest that the selection of technology may be deferred and just be milestone information. But it has been found that the RFP is reasonably clear that this is not so. At most, the RFP merely

affords the option of proposing a milestone schedule for the "finalization" of the technology selection.

69. Similarly, FOX contends that a part of the RFP inappropriately suggests that the ridership analysis may be deferred. But it has been found that this clearly is not so. The RFP merely requires, in addition to the ridership analysis required to be submitted with responses to the RFP, milestone information for "ridership and revenue estimates that are current (no more than six months old) and certified by a nationally recognized consulting firm."

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Transportation enter a final order denying FOX's protest and upholding the RFP's specifications.

DONE AND ENTERED this 6th day of August, 1998, in Tallahassee, Leon County, Florida.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 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.