

9-21-01

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STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

COMMISSION OF
ADMINISTRATIVE
HEARINGS

PCL/CENTEX ROONEY, a joint
venture comprised of PCL CIVIL
CONTRACTORS, INC., and CENTEX
CONSTRUCTION GROUP, INC.,

AT

JDP-CLOS

Petitioner,

vs.

DOAH CASE NO.: 01-2704BID
DOT CASE NO.: 01-079

STATE OF FLORIDA, DEPARTMENT
OF MANAGEMENT SERVICES, and
DEPARTMENT OF TRANSPORTATION,

Respondents,

and

TURNER CONSTRUCTION COMPANY,

Intervenor.

FINAL ORDER

This proceeding was initiated by the filing of a Notice of Protest on June 4, 2001, and a Petition-Formal Written Protest on June 13, 2001, by **Petitioner, PCL/CENTEX ROONEY** (hereinafter **PCL**), pursuant to Section 120.57(1), Florida Statutes, in response to the Notice of CM Selection Results for a construction manager-at-risk (CM-at-risk) contract for a project known as the Miami Intermodal Center Program Phase I, by the **Respondents, DEPARTMENT OF TRANSPORTATION** (hereinafter **DEPARTMENT**). The **DEPARTMENT OF MANAGEMENT SERVICES** (hereinafter **DMS**) is identified as a

respondent due to the fact that **DMS** assisted the **DEPARTMENT** in consultation and advice in various aspects of the CM-at-risk selection procedures and **DMS** rule, and **PCL** filed its Notice of Protest and Formal-Written Protest with both the **DEPARTMENT** and **DMS**. The Notice of CM Selection Results indicated **Intervenor, TURNER CONSTRUCTION COMPANY** (hereinafter **TURNER**), to be the initial firm to negotiate the CM-at-risk contract with the **DEPARTMENT**. On June 22, 2001, an order was issued granting **TURNER** leave to intervene. On July 10, 2001, the matter was referred to the Division of Administrative Hearings (hereinafter **DOAH**) for assignment of an Administrative Law Judge and a formal hearing.

A formal administrative hearing was held in this case in Miami, Florida, on August 6 and 7, 2001, before the Honorable Joyous D. Parrish, a duly appointed Administrative Law Judge. Appearances on behalf of the parties were as follows:

For Petitioner: Gregory S. Martin, Esquire
 Moyer, O'Brien, O'Rourke,
 Hogan & Pickert, P.A.
 800 South Orlando Avenue
 Maitland, Florida 332751

For Respondent, Department of Transportation:

Brian F. McGrail, Esquire
Assistant General Counsel
Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

Paul Sexton, Esquire
Law Offices of Thornton Williams
& Associates, P.A.
215 South Monroe Street, Suite 600A
Tallahassee, Florida 32301

For Respondent, Department of Management Services:

O. Earl Black, Jr., Esquire
Assistant General Counsel
Department of Management Services
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399

For Intervenor: E. A. "Seth" Mills, Jr., Esquire
Fowler, White, Gillen, Boggs,
Villareal & Banker, P.A.
Post Office Box 1438
Tampa, Florida 33601

At the hearing, **PCL** presented the testimony of Larry Coleman, Tom Berley, Steven Thompson, Nick Serianni, Kouroche Mohandes, and Gary Glenewinkel. The **DEPARTMENT** presented the testimony of Nicholas Serianni, Kouroche Mohandes, Steve Thompson, and Gary Glenewinkel. **DMS** presented the testimony of Thomas Berley. **TURNER** presented the testimony of Thomas Berley, Larry Coleman, Gary Glenewinkel, Patrick Klein, Kouroche Mohandes, Nicholas Serianni, Jose Hevia, and Scott Skidelsky. The parties pre-marked all exhibits and Exhibits 1, 3, 3A, 3B, 4, 6, 7, 11-17, 30-32, 36-39, 50, 52, 55-61, 63, 65, 66, 76-79, 82, 83, 102-105, and 126 (with the deletion of pages 43, 44, and 131-133) were admitted into evidence. Official recognition was taken of all relevant statutes and rules.

The transcript of the proceedings was filed with DOAH on August 21, 2001. Proposed recommended orders were filed by **PCL** on August 30, 2001; the **DEPARTMENT** on August 31, 2001; **TURNER** on September 4, 2001; and **DMS** on September 5, 2001. On September 19, 2001, the **DEPARTMENT** filed a Motion for Order Authorizing the Entry of a Single Final Order, in which **DMS** and **TURNER** concurred. **PCL** opposed the request and filed a

motion on September 20, 2001, which included a motion to strike.

On September 21, 2001, Judge Parrish issued her Recommended Order. The Administrative Law Judge denied the motion to strike in the Recommended Order, and addressed the **DEPARTMENT'S** motion at Conclusions of Law No. 51 and 52. Therein, the Administrative Law Judge explains that under the circumstances of this case, while **DMS** may have participated in the various phases of the Request for Qualifications and the selection process, the project was always anticipated as a **DEPARTMENT** effort. Thus, she concludes, while **DMS** may have to sign off on the ultimate decision, she has the obligation to address the protest itself, but recommends that both the **DEPARTMENT** and **DMS** enter a Final Order. No exceptions to the Recommended Order were filed. On October 1, 2001, the **DEPARTMENT** filed a motion for costs, to which **PCL** filed no response. On October 10, 2001, **DMS** filed a motion for costs, to which **PCL** filed no response.

STATEMENT OF THE ISSUE

As stated by the Administrative Law Judge in his Recommended Order, the issue presented was:

Whether the Respondents' decision to rank the Intervenor, Turner Construction Company (Turner) first for purposes of entering into contract negotiations was clearly erroneous, arbitrary, capricious, or contrary to competition as alleged by the Petitioner, PCL/Centex Rooney, a joint venture comprised of PCL Civil Contractors, Inc. and Centex Rooney Construction Company, Inc. (PCL/Centex or Petitioner).

BACKGROUND

On May 31, 2001, the **DEPARTMENT** issued a Notice of CM Selection Results for the CM-at-risk contract for a project known as the Miami Intermodal Center Program Phase I.

The Notice of CM Selection Results indicated **TURNER** to be the initial firm to negotiate for the CM-at-risk contract. On June 4, 2001, **PCL** filed a Notice of Protest, and on June 13, 2001, it filed a Petition-Formal Written Protest in response to the Notice of CM Selection Results. On June 22, 2001, an order was issued granting **TURNER** leave to intervene. On July 10, 2001, the matter was referred to DOAH. A formal administrative hearing was held on August 6 and 7, 2001.

FINDINGS OF FACT

1. After review of the record in its entirety, it is determined that the Administrative Law Judge's Findings of Fact in paragraphs 1 through 42 are accepted.
2. The **DEPARTMENT** has incurred costs in the amount of \$3,750.00 associated with this proceeding.
3. **DMS** has incurred costs in the amount of \$473.00 associated with this proceeding.

CONCLUSIONS OF LAW

1. The **DEPARTMENT** has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapters 120 and 479, Florida Statutes.
2. The Conclusions of Law in paragraphs 44 through 52 of the Recommended Order are fully supported in law.
3. Notwithstanding the recommendation of the Administrative Law Judge that both **DMS** and the **DEPARTMENT** enter a Final Order, based upon Conclusions of Law No. 51 and 52, and in the interests of judicial economy to avoid the potential for two appeals taken from identical final orders, it is concluded that the **DEPARTMENT** shall have the responsibility for the entry of the Final Order in the case.

4. Section 287.042(2)(c), Florida Statutes, provides, in pertinent part:

If, after completion of the administrative hearing process and any appellate court proceeding, the water management district or agency prevails, it shall recover all costs and charges which shall be included in the final order at judgment, excluding attorney's fees. . . . (emphasis added)

ORDER

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

ORDERED that the Recommended Order is adopted in its entirety and is incorporated as if fully set forth herein. It is further

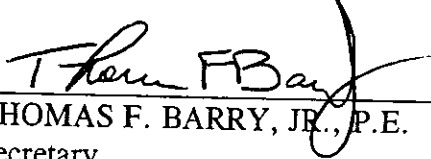
ORDERED that the decision of the Respondent, DEPARTMENT OF TRANSPORTATION, to negotiate the construction manager-at-risk contract for the Miami Intermodal Center Program Phase I with Intervenor, TURNER CONSTRUCTION COMPANY, is confirmed. It is further

ORDERED that costs are assessed against Petitioner, PCL/CENTEX ROONEY, in favor of the Respondent, DEPARTMENT OF TRANSPORTATION, in the amount of \$3,750.00, payment for which shall be deducted from the cashier's check posted as a bond with the Respondent, DEPARTMENT OF TRANSPORTATION, in this proceeding within ten (10) days of the later of thirty (30) days from the date of this Final Order if no appeal has been filed or upon the issuance of a mandate in any appellate proceedings brought by Petitioner, PCL/CENTEX ROONEY, in this matter, and the balance shall be returned to Petitioner, PCL/CENTEX ROONEY. It is further

ORDERED that costs are assessed against Petitioner, PCL/CENTEX ROONEY, in

favor of the Respondent, DEPARTMENT OF MANAGEMENT SERVICES, in the amount of \$473.00, payment for which shall be deducted from the cashier's check posted as a bond with the Respondent, DEPARTMENT OF MANAGEMENT SERVICES, in this proceeding within ten (10) days of the later of thirty (30) days from the date of this Final Order if no appeal has been filed or upon the issuance of a mandate in any appellate proceedings brought by Petitioner, PCL/CENTEX ROONEY, in this matter, and the balance shall be returned to Petitioner, PCL/CENTEX ROONEY.

DONE AND ORDERED this 19th day of October, 2001.


THOMAS F. BARRY, JR., P.E.
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
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NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

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The Honorable Joyous D. Parrish
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