10-29-04

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

ANCHOR TOWING, INC.,

Petitioner,

AT

vs.

DOAH CASE NO.: 04-1447BID
DOT CASE NO.: 04-041

RSC
CLS

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

SUNSHINE TOWING, INC.,

Intervenor.
_____/

FILED D.O.T. CLERK
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FINAL ORDER

This proceeding was initiated by the filing of a Notice of Intent to Protest on March 22, 2004, and a Formal Written Protest on March 29, 2004, by **Petitioner, ANCHOR TOWING, INC.** (hereinafter **ANCHOR TOWING**), pursuant to Section 120.57(1), Florida Statutes, in response to a posting by the **Respondent, DEPARTMENT OF TRANSPORTATION** (hereinafter **DEPARTMENT**), of its intent to award RFP-DOT-04/05-6063DS, for Road Ranger services to motorists on certain Florida highways, to **INTERVENOR, SUNSHINE TOWING, INC.** (hereinafter **SUNSHINE TOWING**). On April 22, 2004, 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 July 20 and 21, 2004, and on August 10, 2004, before the Honorable Robert S. Cohen, a duly appointed administrative law judge. Appearances on behalf of the parties were as follows:

For Petitioner: Miguel A. De Grandy, Esquire
Stephen Cody, Esquire
Miguel De Grandy, P.A.
800 Douglas Road, Suite 850
Coral Gables, Florida 33134

For Respondent: C. Denise Johnson, Esquire
Assistant General Counsel
Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

For Intervenor: John C. Shawde, Esquire
Valria C. Screen, Esquire
Steel, Hector & Davis, LLP
200 South Biscayne Boulevard, Suite 4000
Miami, Florida 33131-2398

At the hearing, **ANCHOR TOWING** presented the testimony of Takako Monica Savits, president of Anchor Towing, Inc.; Nancy Kay Lyons, District VI Contracts Administrator, Department of Transportation; Arnaldo Fernandez, District VI ITS Production Management Engineer, Department of Transportation; Angel Reanos, District VI ITS Operations Engineer, Department of Transportation; Omar Meitin, District VI ITS Production Engineer, Department of Transportation; Aurelio Carmenates, from the Miami-Dade Expressway; Alexis Ramos, president of Sunshine Towing, Inc.; and Ann Margaret Ramos, vice president of Sunshine Towing, Inc. **ANCHOR TOWING** offered Exhibit Nos. 18, 28, 30, and 31, which were received into evidence. The **DEPARTMENT** presented the testimony of Nancy Kay Lyons. **SUNSHINE TOWING** presented the testimony of Ann Margaret Ramos; Takako Monica Savits; Christopher Savits; Arnaldo Fernandez, and Omar Meitin. **SUNSHINE TOWING** offered Exhibit Nos. 8, 10, 12, 13, and 19, which were received into evidence. The parties offered Joint Exhibit Nos. 1-7, 14, 15, 20, 21, 24-27, and 29, which were received into evidence. Official recognition was taken of all relevant statutes and rules.

The transcript of the hearing was filed on September 8, 2004. An Order was issued on September 27, 2004, granting an extension of time to file proposed recommended orders no later than October 5, 2004. The **DEPARTMENT** filed its proposed recommended order on

September 23, 2004. **ANCHOR TOWING** filed a proposed recommended order and a closing memorandum on October 5, 2004, and **SUNSHINE TOWING** filed a proposed recommended order and closing argument on October 6, 2004. On October 29, 2004, Judge Cohen issued his Recommended Order. On November 8, 2004, **ANCHOR TOWING** filed its letter of exceptions to the Recommended Order, to which the **DEPARTMENT** and **SUNSHINE TOWING** each filed a response on November 17, 2004. On November 10, 2004, the **DEPARTMENT** filed a Motion for Costs. No response to the **DEPARTMENT'S** motion was filed.

STATEMENT OF THE ISSUE

As stated by the administrative law judge in his Recommended Order, the issue presented was:

> [W]hether the Department of Transportation's intended award of RFP-DOT-04/05-6063DS to Sunshine Towing, Inc., is contrary to the Agency's governing statutes, rules, or policies, or the bid proposal specifications.

BACKGROUND

On March 18, 2004, the **DEPARTMENT** posted its notice of intention to award RFP-DOT-04/05-6063DS, for Road Ranger services, to **SUNSHINE TOWING**. **ANCHOR TOWING** filed a Notice of Intent to Protest on March 22, 2004, and filed a Formal Written Protest and Incorporated Memorandum of Law on March 29, 2004. On April 22, 2004, the matter was referred to DOAH and was assigned to Judge Cohen. The case was set for hearing and discovery ensued.

A formal administrative hearing was held on July 20 and 21, 2004, and on August 10, 2004, in Miami, Florida, before Judge Cohen.

EXCEPTIONS TO RECOMMENDED ORDER

ANCHOR TOWING filed the following letter of exceptions to the Recommended Order[1]:

The Request for Proposal (RFP) was created by Nancy Kay Lyons, the **DEPARTMENT'S** District VI Contracts Administrator. As drafted by Ms. Lyons, the RFP contained the following qualification:

> QUALIFICATIONS OF THE PROPOSER:
> Prospective proposers must be able to meet or exceed the qualifications and proposer requirements in accordance with proposal documents
>
> IN THE ADDITION TO THE ABOVE THE PRIME PROPOSER **SHALL BE REQUIRED TO SUBMIT PROOF OF THE FOLLOWING** ALONG WITH THE SEALED PROPOSAL:
>
> *1. The proposer shall provide proof that the firm not the individual is authorized and licensed to do business in the state of Florida and has been providing the type of services required for a minimum of five (5) years in good corporate standing.*
> (emphasis supplied)

The RFP stressed the mandatory nature of this five (5) year good corporate standing that "failure to adhere to this directive ***shall result in the successful proposer's proposal being declared non-responsive***."

However, the testimony at the hearing was clear that no one considered responsiveness. Ms. Lyons stated that she assumed that the four (4) members of the evaluation committee would do a responsiveness review. The committee members all testified that they considered a responsiveness review to be Ms. Lyons' responsibility. Apparently, to this day, no one in the **DEPARTMENT** has performed a review to see if **SUNSHINE TOWING** was responsive and met the five (5) year corporate existence requirement. Ms. Lyons testified that she could waive any of the qualifications of a bidder, except their failure to submit a response to the RFP itself.

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[1] What follows is, for the most part, reproduced verbatim from **ANCHOR TOWING'S** letter. All emphasis was supplied by **ANCHOR TOWING** in the original letter.

SUNSHINE TOWING was proven at the bid protest hearing not to have met this corporate existence requirement. The Hearing Examiner found that on the day it submitted its response to the RFP, **SUNSHINE TOWING** had been incorporated less than five (5) years. The language of the RFP, would, therefore, **require that the DEPARTMENT even today should declare SUNSHINE TOWING as non-responsive** because the company did not meet this qualification.

The **DEPARTMENT** was well aware that **SUNSHINE TOWING** had not been in corporate existence for the required five (5) years. Ms. Lyons' assistant, Michelle, had filled out a **DEPARTMENT** form entitled "Pie-Award/Execute Checklist (RFP Contracts)" which noted that **SUNSHINE TOWING** did not meet the five (5) year requirement. (Ex. 30) Ms. Lyons identified it as "a standard sheet that my assistant does up when the contracts come in." (T. at 776, lines 11 to 13) She testified that "We do the same thing for every contract. We pull all of these for every contract. Not this contract alone but for every contract that we do." (T. at 778, line 25 to 779, line 3) It is, therefore, clear that Ms. Lyons and District VI were on notice that **SUNSHINE TOWING** had not been in "good corporate standing" for the required five (5) years, but chose to ignore that fact and, by their actions, waived the requirement. The Hearing Examiner, erroneously, failed to find that **SUNSHINE TOWING** was not responsive.[2]

In addition, there was a mandatory requirement in the RFP for disclosure of information concerning lawsuits and judgments,

> The Proposer shall indicate if their company or any of their principle [sic] officers, employees or owners have been involved with any lawsuits or judgements [sic] against the individual or the firm. They shall include a list of all outstanding judgements [sic] (if any) relating to towing or storage activities.

The terms of this provision are not entirely clear. It requires an "indication" of whether

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[2] **ANCHOR TOWING** further notes: "The Hearing Examiner found all of these facts to be true, but made a finding regarding the technicalities of pleading, a finding with which we disagree, that permitted him to overlook the failure of **SUNSHINE TOWING** to meet this mandatory qualification."

the company making the submission has been involved in any lawsuits or judgments, but does not disclose how that indication should be made. It also required an indication of whether the "principle [sic] officers, employees or owners" have been involved in any lawsuits or judgments. In neither case does it explain how that indication should be made. It does ask an unspecified "they" for a list of "outstanding judgements [sic]," but restricts that category only to judgments "relating to towing or storage activities." At the mandatory pre-bid conference, Ms. Lyons told the assembled bidders:

> The other thing that is very important. If you have been involved in any lawsuits. . .
>
> (*Unintelligible colloquy with someone.*)
>
> Okay, if the company or any of the principals, officers, employees or owners have been involved in any lawsuits and judgments against individuals and the firm, ***they shall list ... they shall include a list of all of the outstanding judgments of any related to towing or storage activities. We will have our legal department review it, okay, and make a determination of whether ... its*** [sic] ***... you know.*** Obviously, if there is no judgment against you or its being settled and there is no cause on your part, that's not gonna' count against you. Okay, but we want to know, I mean, you know, what is going on in the company. You gotta' understand that this contract is like a representative of the DOT and MDX. You're out there on the roads every single day, so we want to make sure that we have a qualified firm running up and down the highway.

(Ex. 29, side 1 at 20:42 to 21:47 (emphasis added)) Ms. Lyons' explanation restricted the requirement solely to a listing of all outstanding judgments "related to towing or storage activities."

ANCHOR TOWING complied by providing a listing in its submission of lawsuits that it had been involved with in its response to the RFP. There was no evidence that there were any outstanding civil judgments related to towing or storage activities. The Hearing Examiner noted that **ANCHOR TOWING** did not disclose in its response two lawsuits which were filed **after** the date that **ANCHOR TOWING** made its submission on the RFP. To attempt to penalize **ANCHOR TOWING** for not disclosing litigation that was not in existence at the time it

responded to the RFP is clearly erroneous.

The Hearing Examiner was also clearly erroneous when he noted that "Petitioner failed to disclose two litigation matters involving Monica Savits, president of Anchor Towing, which were dismissed prior to a judgment or a verdict having been rendered." However, both were minor matters which had been brought in county court. One was brought before **ANCHOR TOWING** was even formed as a corporation and the other was a small claims suit brought by Ms. Savits' veterinarian.[3] Neither case involved towing or storage activities.

The Hearing Examiner was also clearly erroneous in attributing to **ANCHOR TOWING** a criminal judgment of guilt against Christopher Savits, the husband of Monica Savits, **ANCHOR TOWING'S** president and sole shareholder. The judgment states that Mr. Savits entered a plea of guilty to one count of "Vehicle/Sell/Transport/Deliver/Salvage Dealer," a third degree felony and the judgment specifically referenced Section 319.30(2)(b), Florida Statutes.[4]

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[3] **ANCHOR TOWING** notes: "In a companion RFP for Road Ranger services, which **ANCHOR TOWING** was a bidder and **SUNSHINE TOWING** was [sic], the **DEPARTMENT** interpreted the requirement for disclosure of lawsuits and judgment to be restricted to the time since 'the inception of business.' As a participant in the companion RFP, **SUNSHINE TOWING** was privy to this interpretation, while **ANCHOR TOWING** was not."

[4] **ANCHOR TOWING** adds: "Section 319.30(2)(b) provides:

> b) When a motor vehicle is sold, transported, or delivered to a salvage motor vehicle dealer, it shall be accompanied by:
>
> 1. A properly endorsed certificate of title, salvage certificate of title, or vehicle certificate of destruction issued by the department; or
>
> 2. If the certificate of title has been surrendered to the department, a notarized affidavit signed by the owner stating that the title has been returned to the State of Florida pursuant to paragraph (a), the date on which such return was made, the year, make, and vehicle identification number of the motor vehicle, and the name, address, and personal identification card number of the owner. Any person who willfully and deliberately violates this subparagraph by falsifying a required affidavit commits a felony of the third degree, punishable as provided in s. 775 082, s. 775.083, or s. 775 .084.

By its terms, section 319.30(2)(b) is not a crime which relates to towing or storage or to which

The statute does not state that towing or storage is a required element. Moreover, there was no finding by the Hearing Examiner that Mr. Savits was a principal officer, principal employee, or principal owner of **ANCHOR TOWING**. Thus, the Hearing Examiner was clearly erroneous in determining that **ANCHOR TOWING** was under an obligation to report this criminal judgment.

By contrast, **SUNSHINE TOWING** admitted to two crucial matters which established that it was not a responsive bidder. First, it admitted that it did not make any disclosures concerning litigation or judgments. Its response to the RFP was silent as to this mandatory requirement and they gave, to use the words of the RFP, no "indication" of involvement in lawsuits or judgments. **SUNSHINE TOWING** conceded that in its response to the RFP that it did not include an indication as to whether it or its principal officers, employees, or owners had been involved in any lawsuits or judgments. Second, **SUNSHINE TOWING** further admitted that, at the time it submitted its response to the RFP, it and its president, Alexis Ramos, were each parties to at least one lawsuit in the Circuit Court for the Eleventh Judicial Circuit. Further, **SUNSHINE TOWING** admitted that it had been served with a copy of a complaint in case styled José Fadul v. Sunshine Towing, Inc., had been actively defending itself in the Fadul case, and admitted that the case related to towing activity "to the limited extent that a Sunshine Towing vehicle was parked on the shoulder of the subject highway and was ***hit by another vehicle while Sunshine Towing was providing roadside assistance.***" (emphasis supplied) Thus, **SUNSHINE TOWING** did not even attempt to comply with the provision requiring an "indication" of involvement in litigation.

The Hearing Examiner erroneously points to the holding of the Third District Court of Appeal in International Properties, Inc. v. State, 606 So. 2d 380 (Fla. 3d DCA 1992),[5] to say that **ANCHOR TOWING** is barred from raising **SUNSHINE TOWING'S** failure to make any

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towing or storage is one of the required elements."

[5] The proper citation for this case is: Intercontinental Properties, Inc. v. DHRS, 606 So. 2d 380 (Fla. 3d DCA 1992).

disclosure concerning litigation and judgments. In International [sic] Properties, an unsuccessful bidder filed a bid protest claiming that the winning bidder failed to submit necessary information and was, therefore, unqualified. The Invitation to Bid required the bidders to submit documentation reflecting their authority, stating, "If the Bid Submittal is signed by an Agent, written evidence from the owner of record of his/her authority must accompany the original." Id. at 382 (emphasis in original). Intercontinental Properties, the losing bidder, filed a protest claiming that Coliseum Lanes, Inc., the winning bidder, failed to attach proof of Coliseum Lanes' agent's authority to submit the proposal. Coliseum Lanes responded that Intercontinental Properties was actually acting as an agent for Royal Trust Tower, Ltd., the actual owner of the real property that was the subject of Intercontinental Properties' bid. The hearing officer found that both Intercontinental Properties and Coliseum Lanes were unresponsive. On appeal, the Third District Court of Appeal held:

> At the least, a party *protesting an award to the low bidder* must be prepared to show not only that the low bid was deficient, but must also show that the protestor's own bid does not suffer from *the same deficiency*. To rule otherwise is to require the State to spend more money for a higher bid which suffers from the same deficiency as the lower bid.

Id. at 384 (emphasis supplied). The court in International [sic] Properties went on affirm an order of the Department of Health and Rehabilitative Services, rejecting all bids.[6]

The response of **ANCHOR TOWING** does not suffer from "the same deficiency" as **SUNSHINE TOWING**: a failure to respond at all. **ANCHOR TOWING** did indicate relevant litigation activity, while **SUNSHINE TOWING** failed to indicate any at all. Moreover,

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[6] **ANCHOR TOWING** also notes: "The court in Intercontinental Properties noted that, 'There is a strong public interest in favor of saving tax dollars in awarding contracts to *the low bidder*, and an equally strong public policy against disqualifying the low bidder for technical deficiencies which do not confer an economic advantage on one bidder over another.' Id. at 387. In the instant case, both **ANCHOR TOWING** and **SUNSHINE TOWING** bid the same contract amount: $2,074,870. Thus, the equity against awarding the contract to a higher bidder are [sic] not present in the instant case."

Intercontinental Properties does not stand for the proposition that a protesting bidder's submission must be perfect, only that it not suffer from the identical defect that forms the basis of its protest. Thus, the Hearing Examiner was clearly erroneous.

The Hearing Examiner was also clearly erroneous in determining that the way in which the responses to the RFP were scored met the requirements of the RFP and the law. Both the Notice of RFP and the RFP itself contained identical provisions with regard to the way in which the submitted proposals would be scored, providing as follows:

> Evaluation Criteria:
>
> Technical Proposal (One Hundred (100) Points Maximum)
> Will Consist Of The Following:
>
> | | | |
> |---|---|---|
> | 1. Management Plan | | 55 |
> | I) Administration And Management | 20 | |
> | II) Identification Of Key Personnel | 15 | |
> | III) Business History/ Experience Of The Contractor | 20 | |
> | 2. Proposer's Technical Plan | | 45 |
> | I) Technical Approach | 20 | |
> | II) Facility And Equipment Capabilities | 20 | |
> | III) Insurances | 05 | |
>
> Price Proposal (Fifteen (15) Points Maximum)

(Ex. 1: RFP page 16 of 22; Notice of RFP page 3 of 5) Neither the RFP nor the Notice of RFP provided that these six (6) evaluation categories would be further subdivided by the **DEPARTMENT** or its evaluators. In fact, section 21.1 of the RFP stated that the evaluators would "independently evaluate the proposals on criteria established in the section ... entitled 'Criteria for Evaluation' in order to assure that proposals are uniformly rated" and further stated that "the Committee will assign points utilizing the technical evaluation criteria identified herein." (RFP, page 16 of 22) There was no indication in the RFP or the Addenda that subcategories would be further divided into sub-subcategories

However, the evaluators created twenty-four (24) sub-subcategories. A review of all four

(4) evaluators' score sheets shows that they differed widely in terms of the maximum points to be awarded in twenty-three (23) of the twenty-four (24) sub-subcategories, as can be seen in the table below drawn from the four (4) evaluators' score sheets entered into evidence in the heating.

	Meitin	Reanos	Fernandez	Carmanates
1. Management Plan				
I) Administration and Mgmt.				
a)	1	3	3	3
b)	8	7	7	11
c)	8	7	7	5
d)	3	3	3	1
ii) Identification of Key Personnel.				
a)	4.5	5	4.5	2
b)	10.5	10	10.5	13
iii) Business History/Exp. of Contractor				
a)	1	1	1	3
b)	2	2	4	5
c)	5	5	5	4
d)	4	4	6	1
e)	2	2	2	3
f)	1	1	1	2
g)	3	5	1	2
2. Proposers Technical Plan				
I) Technical Approach				
a)	5	5	5	8
b)	5-	5-	5	5
c)	5	5	5	3
d)	5	5	5	4
II) Facility and Equipment Capabilities				
i)	3	3	3	3
ii)	3	3	3	4
iii)	12	10	12	4
iv)	0.5	0.5	0.5	3
v)	0.5	0.5	0.5	3
vi)	1	3	1	3

In only one sub-subcategory, which was a part of the Technical Plan, and was the first under the category of Facility and Equipment Capabilities, requiring proposers to list all of their tow truck drivers and provide copies of their Class D drivers, did all four (4) evaluators set the maximum number of points at 3. The other categories showed great variations. For instance, Messrs. Meitin and Fernandez were willing to award a maximum of twelve (12) points for a

description of office automation and equipment capabilities, while Mr. Carmanetes was only willing to award three (3) points. The **DEPARTMENT** did not tell proposers that the evaluators would be permitted to breakdown the six (6) subcategories into twenty-four (24) sub-subcategories. Further, the **DEPARTMENT** did not give proposers any sort of notice that the evaluators would be free to give varying weight to different information presented. As such, the non-uniform scoring methodology used by the evaluation committee was arbitrary and capricious. The finding of the Hearing Examiner that such a non-uniform approach to grading the proposals was "uniform" is clearly erroneous.

The **DEPARTMENT** has the responsibility to administer the procurement process in compliance with the law, the terms of the RFP, and basic tenets of fairness and integrity. See Procacci v. State Department of Health and Rehabilitative Services, 603 So. 2d 1299, 1301 (Fla. 1st DCA 1992)("The Legislature has placed upon [the Department] the primary responsibility for evaluating bids and selecting the bidder to whom the contract or lease at issue should be awarded; and, in general, for ensuring that the integrity of the competitive bidding process is maintained.") It has been held that:

> it is ... the public policy of this state that public bidding be fair and open, and that all bidders should have an equal opportunity to present bids. *There should be no opportunity for favoritism* or insider information that gives one bidder an advantage over the other. This boosts public confidence in the public contract bidding process and is in the public interest."

Sutron Corp. v. Lake County Water Authority, 870 So. 2d 930, 933 (Fla. 5th DCA 2004). Ms. Lyons, a **DEPARTMENT** administrator, testified that the **DEPARTMENT** had the ability to waive any provision of the RFP. The testimony of Ms. Lyons showed that the **DEPARTMENT** did, in fact, waive the five year requirement. **That position, by itself, was arbitrary and capricious**. Section 11.5 of the RFP only empowered the **DEPARTMENT** to "waive minor informalities or irregularities in proposals received where such is merely a matter of form and not substance, and the correction of is not prejudicial to Proposers." A decision to toss out a

mandatory requirement of an RFP, the announced basis on which a proposer will be judged qualified or unqualified, on an administrative whim, is not a matter a form — it is the definition of substance. See Robinson Electrical Company, Inc. v Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982). Respectfully, the **DEPARTMENT'S** conduct not only established egregiously arbitrary and capricious conduct; it also created the appearance of favoritism. The only beneficiary of the waiver of the five (5) year corporate requirement or the failure to provide information concerning lawsuits and judgments was **SUNSHINE TOWING**.

There was additional evidence of favoritism which came before the Hearing Examiner. The RFP required that bidders submit their proposals in a specific format or face the possibility that they would be disqualified. **SUNSHINE TOWING** admitted that it did not follow the required format. (T. at 521, lines 1 to 7) It is submitted that the failure to follow the required format was instrumental in the evaluators wrongly crediting **SUNSHINE TOWING** for meeting certain requirements, such as when it failed to provide any information regarding litigation or having five (5) years of good corporate standing. The RFP stated that only the contents of proposal would be considered. **Yet, the Hearing Examiner noted that Ms. Lyons and the evaluators relied on information not contained in SUNSHINE TOWING'S response in evaluating that response.** The failure of the Hearing Examiner to find that consideration of information which was outside the proposals violated the stated terms of the RFP and resulted in an improper award to **SUNSHINE TOWING** was clearly erroneous.

In addition, the **DEPARTMENT** issued a "Question and Answer" with regard to the RFP, which **ANCHOR TOWING** referred to as "Addendum 2." The "Question and Answer" stated that "Failure to acknowledge receipt of this document may resulting [sic] your bid being declared non-responsive." **SUNSHINE TOWING** failed to acknowledge receipt of the "Question and Answer." The **DEPARTMENT** never considered disqualifying **SUNSHINE TOWING**. The Hearing Examiner's failure to acknowledge these facts is clearly erroneous.

The case presented is one which the evidence establishes beyond any doubt whatsoever

that: (1) **SUNSHINE TOWING**, the recommended bidder, did not meet the minimum requirements of the of the solicitation; and (2) the **DEPARTMENT'S** staff acted in an arbitrary manner and in reckless disregard of facts that the Hearing Examiner found to be true and would have led any reasonable and prudent public servant to disqualify **SUNSHINE TOWING**. Although we strongly maintain that **ANCHOR TOWING** should have been awarded the contract, we respectfully submit that, at a minimum, in order to maintain and preserve the principles of integrity and transparency in public procurement, the **DEPARTMENT** should reject this process and issue a new bid with clear terms that its staff will enforce fairly and uniformly.

DEPARTMENT'S RULING ON LETTER OF EXCEPTIONS

In addressing **ANCHOR TOWING'S** letter of exceptions, it is first noted that **ANCHOR TOWING** has taken no exception to any specific finding of fact or conclusion of law and that the letter merely reiterates **ANCHOR TOWING'S** interpretation of the evidence and the arguments it made at the hearing and in its post-hearing submittals. Failure to file exceptions to an administrative law judge's findings of fact constitutes a waiver of the party's right to challenge a recommended order. Couch v. Comm'n on Ethics, 617 So. 2d 1119, 1124 (Fla. 5th DCA 1993) (holding that appellant had waived his right to challenge a recommended order's findings of fact because he did not file exceptions to the hearing officer's findings of fact). Moreover, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> An agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

ANCHOR TOWING'S letter fails to identify any specific paragraph or finding to which it specifically takes exception and many statements, which are attributed to witnesses who testified at the hearing, contain no citations to the record. Without waiver of its position that

ANCHOR TOWING'S exceptions do not satisfy the requirements of Section 120.57(1)(k), Florida Statutes, the **DEPARTMENT**, in the interest of judicial economy, herein addresses **ANCHOR TOWING'S** letter of exceptions.

ANCHOR TOWING'S first exception merely reargues its position at the hearing below and in its post-hearing submittals that **SUNSHINE TOWING** does not meet the RFP's provision that information be provided regarding whether the proposer's "firm not the individual" has been providing towing services for at least "five (5) years in good corporate standing." **ANCHOR TOWING** fails to clearly identify the portions of the Recommended Order to which this exception applies. Nevertheless, review of the record in its entirety establishes that the administrative law judge fully considered **ANCHOR TOWING'S** arguments in this regard and concluded, based upon **ANCHOR TOWING'S** Formal Written Protest and its unilateral pre-hearing statement, that **ANCHOR TOWING** did not allege that **SUNSHINE TOWING** was non-responsive because of a failure to meet the "five (5) years in good corporate standing" provision of the RFP.

As accurately noted by the administrative law judge, **ANCHOR TOWING** failed to raise this issue in its original petition or in its prehearing statement. Moreover, the administrative law judge specifically found and concluded that:

> No additional issues were raised by Petitioner either through a motion to amend its original petition or any form of pleading, whether written or ore tenus, to expand the scope of the proceeding or to inform the Department and the Intervenor of its intent to raise, argue, and present evidence on matters not previously raised. (CL 81)[7]

Therefore, the administrative law judge concluded, **ANCHOR TOWING** could not raise this issue for the first time at hearing because it did not afford fair notice to the **DEPARTMENT** or **SUNSHINE TOWING**. (CL 82-85) **ANCHOR TOWING** offers no specific exception to these

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[7] References to a Conclusion of Law in the Recommended Order will be identified as (CL) followed by the appropriate paragraph number(s).

conclusions, which are mixed findings of fact and conclusions of law.

As previously noted, the administrative law judge concluded that **ANCHOR TOWING** failed to avail itself of the numerous procedural opportunities to properly place the matter at issue. (CL 82-85) The administrative law judge's conclusions regarding **ANCHOR TOWING'S** failures to amend its pleadings or seek leave to amend are particularly on point in light of the fact that due to the length of the hearing and scheduling difficulties the hearing in this case was concluded after a twenty-one day hiatus when it could not be completed on July 21, 2004, as scheduled. As such, **ANCHOR TOWING** has waived its right to now complain that error was committed by the administrative law judge in this regard. See, e.g., Century 21 Admiral's Port v. Walker, 471 So. 2d 544, 545 (Fla. 3d DCA 1985) (failure to seek leave to amend complaint prior to dismissal with prejudice precludes consideration of the issue for the first time on appeal).

The administrative law judge also made several findings of fact regarding the experience and expertise of **SUNSHINE TOWING** and the Selection Committee's consideration of all documents submitted with **SUNSHINE TOWING'S** proposal. (FF 41-44)[8] Again, no exception was taken to these findings. Failure to take exception to specific findings of fact waives a party's right to challenge a recommended order. Comm'n on Ethics v. Barker, 677 So 2d 254, 256 (Fla. 1996); Couch, 617 So. 2d at 1124.

The administrative law judge properly concluded that **ANCHOR TOWING** failed to put the **DEPARTMENT** and **SUNSHINE TOWING** on notice that the "five (5) year good corporate standing" provision of the RFP would be an issue in this case. In addition, **ANCHOR TOWING'S** failure to amend its pleadings during the course of the proceeding constitutes a waiver to raise the issue at this time.

ANCHOR TOWING'S first exception is rejected.

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[8] References to Finding of Fact in the Recommended Order will be identified as (FF) followed by the appropriate paragraph number(s).

ANCHOR TOWING'S second exception relates to the fact that the **DEPARTMENT** failed to make a specific determination that **SUNSHINE TOWING** was non-responsive because **SUNSHINE TOWING** failed to provide information regarding its litigation history. Once again, **ANCHOR TOWING** fails to clearly identify the portions of the Recommended Order to which this exception applies.

The record is undisputed that **SUNSHINE TOWING** failed to include in its proposal a list of its litigation history. The record also reveals that the administrative law judge made several findings regarding the litigation history submittals of both **SUNSHINE TOWING** and **ANCHOR TOWING**, and the submittals' shortcomings. (FF 48, 54, 55, 57 58, 59) **ANCHOR TOWING** also asserts that it should not be penalized for failing to reveal lawsuits filed subsequent to the submission of its proposal. The administrative law judge concluded that had the Selection Committee evaluators been aware of **ANCHOR TOWING'S** omissions, the points awarded for this category "surely would have been reduced." (CL 90) However, review of the record and the Recommended Order reveal that no penalty was assessed for **ANCHOR TOWING'S** failures by the Selection Committee because the evaluators were unaware that **ANCHOR TOWING'S** submittal was incomplete, and no penalty was assessed by the administrative law judge.

The record reveals and the administrative law judge specifically recognized and concluded that the Selection Committee awarded **ANCHOR TOWING** 11 points in this category, notwithstanding the incomplete litigation history provided. (CL 90) On the other hand, **SUNSHINE TOWING** was awarded no points for its failure to provide any litigation history whatsoever.[9] (CL 90) (FF 48) Notwithstanding **ANCHOR TOWING'S** claim to the contrary, it is indisputable that **ANCHOR TOWING** benefitted from the points awarded for this category,

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[9] Notably, the administrative law judge also found that **ANCHOR TOWING** indicated in its proposal that it had included a copy of its certificate of occupancy, but had, in fact, failed to do so. (FF 53) The Recommended Order does not suggest or include any reduction for **ANCHOR TOWING'S** shortcoming in this regard.

not **SUNSHINE TOWING**. **ANCHOR TOWING'S** claim that **SUNSHINE TOWING** is the only beneficiary of the failure to provide the requisite litigation history is unfounded. In fact, the administrative law judge concluded that **ANCHOR TOWING** received a benefit in this category not available to **SUNSHINE TOWING** as a result of **SUNSHINE TOWING'S** failure. (CL 90) **ANCHOR TOWING** took no exception to any of these findings and conclusions.

Review of the record in its entirety reveals that each of those findings and conclusions is supported by competent, substantial evidence and the law. It is the function of the administrative law judge "to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); State Beverage Dep't v. Ernal, Inc.,115 So. 2d 566 (Fla. 3d DCA 1959). If, as is often the case, the evidence presented supports two potential yet inconsistent findings, it is the administrative law judge's role to decide the issue one way or the other. Packer v. Orange County School Bd., 881 So. 2d 1204, 1207 (Fla. 5th DCA 2003); Heifetz, 475 So. 2d at 1281. An agency may not reject an administrative law judge's finding of fact unless there is no competent, substantial evidence from which the finding could reasonably be inferred. Packer, 881 So. 2d at 1207 (quoting Tedder v. Florida Parole Comm'n, 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003)(citing Heifetz, 475 So. 2d at 1281)). An agency is not authorized to reweigh the evidence presented, judge credibility of witnesses, or otherwise reinterpret the evidence. Packer, 881 So. 2d at 1207; Heifetz, 475 So. 2d at 1281.

In this case, the administrative law judge weighed the evidence and reached his ultimate findings of fact and conclusions of law, which are supported by competent, substantial evidence and the law.

ANCHOR TOWING'S second exception is rejected.

ANCHOR TOWING'S third exception contends that findings of fact related to **SUNSHINE TOWING'S** failure to follow the required proposal format is evidence of

favoritism, and contributed to the wrongful award of points to **SUNSHINE TOWING**. Again, **ANCHOR TOWING** fails to identify portions of the Recommended Order to which this exception applies.

The record establishes that failure to follow the organizational format outlined in the RFP was a non-issue for Selection Committee. Having heard and weighed all of the testimony and evidence presented, the administrative law judge found that both the **SUNSHINE TOWING** and the **ANCHOR TOWING** proposals failed to follow the organizational format outlined in the RFP. (FF 46, 52) The record supports a conclusion that both of these findings are supported by competent, substantial evidence. **ANCHOR TOWING** took no exception to either of these findings. In addition, the administrative law judge concluded, as a matter of law, that **ANCHOR TOWING** lacked standing to raise the issue of **SUNSHINE TOWING'S** failure to follow the organizational format because **ANCHOR TOWING'S** proposal suffered from the same defects as **SUNSHINE TOWING'S** proposal.[10] (CL 87)

As recognized by the administrative law judge, this conclusion is supported by Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380, 384 (Fla. 3d DCA 1992). There, in response to an invitation to bid, HRS selected the low bidder from which to lease office space. Id. The high bidder, Intercontinental, challenged the award to the low bidder, Coliseum, raising several bases for its challenge. Id. Among the issues raised was Coliseum's failure to attach written authority from the property owner that its agent had the authority to bind the owner. Id. at 382. At the hearing, the evidence established and the hearing officer found that neither Intercontinental nor Coliseum had provided the requisite written authority with its bid. Id. at 384. As a result, the hearing officer found both bids unresponsive and recommended to HRS that both bids be rejected. Id. at 381. HRS entered a

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[10] The administrative law judge reached a similar conclusion regarding **SUNSHINE TOWING'S** failure to provide the company's litigation history because **ANCHOR TOWING'S** proposal suffered a similar defect, albeit an incomplete litigation history as opposed to a complete failure to provide a litigation history. (CL 87)

final order rejecting all bids and Intercontinental appealed.

On appeal, the Third District concluded the hearing officer had erred in recommending rejection of both bids for failure to provide the requisite written authority, concluding:

> At the least, a party protesting an award to the low bidder must be prepared to show not only that the low bid was deficient, but **must also show that the protestor's own bid does not suffer from the same deficiency.** To rule otherwise is to require the State to spend more money for a higher bid which suffers from the same deficiency as the lower bid.

Id. (emphasis added). That is precisely the situation in the instant case, and the administrative law judge's conclusions regarding **ANCHOR TOWING'S** deficiencies are well supported in the record and the law. Id.

In the instant proceeding, the administrative law judge also concluded that the format requirement is a minor irregularity that could be waived by the **DEPARTMENT** under Rule 60A-1.001(17), Florida Administrative Code, and Section 11.5 of the RFP. (CL 89) This conclusion is also supported by Intercontinental. Id. at 385-386 (citing and quoting Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982)).

ANCHOR TOWING relies on Intercontinental as authority for its position that the administrative law judge in the instant case erred in failing to reject all bids, because the Third District affirmed HRS's order affirming the hearing officer's recommendation that both bids be rejected. **ANCHOR TOWING'S** reliance is misplaced. A careful reading of Intercontinental reveals that the appellate court affirmed the rejection of all bids only because the low bidder, Coliseum, had dropped out of the competition and rented its premises to others. Intercontinental, 606 So. 2d at 387. Had Coliseum not dropped out of contention for the lease, the Third District would have reversed and affirmed HRS's original order awarding the lease to Coliseum. Id. Intercontinental follows the tenets of Baxter's Asphalt regarding an agency's wide discretion in the bidding process and its authority to waive minor bid irregularities. Id. at 385-386.

The administrative law judge further concluded that neither the parties' failures in this

regard, nor the **DEPARTMENT'S** determination of a minor irregularity affected the price quoted by either party, gave either party a benefit not enjoyed by other proposers, or adversely affected the interests of the **DEPARTMENT**. These conclusions are support by competent, substantial evidence and the law.

ANCHOR TOWING took no exception to any of these findings or conclusions.

ANCHOR TOWING'S third exception is rejected.

ANCHOR TOWING'S fourth exception relates to the record lack of evidence of an Addendum No. 2, upon which **ANCHOR TOWING** relied at the hearing in its attempt to establish that **SUNSHINE TOWING'S** proposal was not responsive. In this regard, the administrative law judge specifically concluded that "no evidence was produced to demonstrate that an 'Addendum Two' even existed. . . . Since no evidence appears on the record to support Petitioner's contention that Intervenor's proposal is non-responsive for failure to file an 'Addendum Two,' this allegation is rejected." (CL 91) **ANCHOR TOWING** took no specific exception to this conclusion of law or the factual finding therein that no evidence had been presented on the issue. In addition, **ANCHOR TOWING** offers no legal authority or record evidence to support its position that the administrative law judge erred and that, as a result, the **DEPARTMENT** should reject the Recommended Order and find **SUNSHINE TOWING** non-responsive.

ANCHOR TOWING'S fourth exception is rejected.

ANCHOR TOWING'S fifth exception challenges the manner in which the Selection Committee scored the proposals and the conclusion that the manner in which the proposals were scored met the requirements of the RFP and the law. **ANCHOR TOWING** does not identify the portions of the Recommended Order to which this exception applies.

The issues of scoring and the relevant testimony presented are addressed by the administrative law judge in his detailed and specific statements in Conclusions of Law 92-94. The record establishes and the administrative law judge concluded that each evaluator scored the

proposals independently, and that the evaluators remained within the point values assigned for each subcategory. (CL 92) Most compelling in this regard is the administrative law judge's conclusion that "the testimony offered by the four members of the Selection Committee proves their diligence and thoughtfulness in evaluating all the materials before them during the scoring process." (CL 93) It is the function of the administrative law judge "to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Heifetz, 475 So. 2d at 1281. The **DEPARTMENT** is without authority to reject an administrative law judge's finding of fact unless there is no competent, substantial evidence from which the finding could reasonably be inferred. Packer, 881 So. 2d at 1207. The **DEPARTMENT** is similarly without authority to reweigh the evidence presented, judge credibility of witnesses, or otherwise reinterpret the evidence. Id.; Heifetz, 475 So. 2d at 1281. The administrative law judge's findings and conclusions in this regard are supported by competent, substantial evidence.

Importantly, **ANCHOR TOWING** offered no evidence at the hearing that if the evaluators had used some other scoring method **ANCHOR TOWING** would have been the higher scored proposer. As concluded by the administrative law judge:

> If the scoring methodology were arbitrary and capricious, then it was so as to all proposers, not just Petitioner. Moreover, Petitioner failed to prove at the hearing that it would have been the higher-scored proposer if a different scoring methodology were used. . . . By not proving that the Department's scoring methodology resulted in Petitioner's proposal receiving unfair treatment or Intervenor's proposal having somehow received an unfair competitive advantage due to the scoring methodology employed, Petitioner has failed to meet its burden of proof on the issue of whether the Department's scoring methodology was arbitrary and capricious. Accordingly, Petitioner's argument on this point must similarly fail. (CL 93)

ANCHOR TOWING'S fifth exception is rejected.

The burden was on **ANCHOR TOWING** to establish that the **DEPARTMENT'S** intended award of the subject contract to **SUNSHINE TOWING** was clearly erroneous, contrary

to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat. Based upon the evidence presented, the administrative law judge concluded: "No evidence was produced at hearing to show that the Department committed illegality, fraud, oppression, or misconduct in the RFP solicitation process . . . . Clearly, Petitioner failed to meet its burden of proving that either it should be awarded the contract as the second highest proposer or that the proposals should be rejected." (CL 94) Upon review of the record in its entirety, the record and the law support the administrative law judge's conclusion in this regard.

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 1-74 are supported by competent, substantial evidence. As such, they are adopted and incorporated as if fully set forth herein.

2. A total of $4,666.33 of taxable costs has been incurred by the **DEPARTMENT** for transcript and mailing costs and charges.

CONCLUSIONS OF LAW

1. The **DEPARTMENT** has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapters 120 and 287, Florida Statutes.

2. The Conclusions of Law in paragraphs 75 through 94 of the Recommended Order are fully supported in the law. As such, they are adopted and incorporated as if fully set forth herein.

3. Pursuant to Section 287.042(2)(c), Florida Statutes, "any person who files an action protesting a decision or intended decision pertaining to contract administered by the division or any state agency shall post . . . a bond" and if "the agency prevails, it shall recover all costs and charges which shall be included in the final order or judgment . . . ."

ORDER

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

ORDERED that the Recommended Order is adopted in its entirety. It is further

ORDERED that the **RESPONDENT, DEPARTMENT OF TRANSPORTATION,** proceed to award the subject contract to the lowest responsible bidder, **INTERVENOR, SUNSHINE TOWING, INC.** It is further

ORDERED that the motion of the **RESPONDENT, DEPARTMENT OF TRANSPORTATION** is granted and $4,666.33 shall be deducted from the bond posted in the form of a $20,748.70 check, and the balance returned to **PETITIONER, ANCHOR TOWING, INC.**

DONE AND ORDERED this 29th day of November, 2004.

(FEF)

JOSE ABREU, P.E.
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

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.

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