

12-28-04

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

FILED  
05 JAN 27 PM 3:50  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

AMEC CIVIL, LLC,

AP

Petitioner,

vs.

DOAH CASE NO.: 04-3169BID  
DOT CASE NO.: 04-071

SFD  
CWS

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

SUPERIOR CONSTRUCTION CO., INC.,

Intervenor.

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FINAL ORDER

This proceeding was initiated by the filing of a Notice of Protest on June 21, 2004, and a Formal Written Protest on July 2, 2004, by **Respondent, AMEC CIVIL, LLC** (hereinafter **AMEC**), pursuant to Section 120.57(1), Florida Statutes, in response to the notice of intent to award posted on June 17, 2004, in which all bids were rejected for Financial Project Number 209278-I-52-01 by the **Petitioner, DEPARTMENT OF TRANSPORTATION** (hereinafter **DEPARTMENT**), on June 17, 2004. On September 2, 2004, the matter was referred to the Division of Administrative Hearings (hereinafter **DOAH**) for assignment of an administrative law judge and a formal hearing. On September 28, 2004, a Petition to Intervene was filed by

**Intervenor, SUPERIOR CONSTRUCTION CO., INC.** (hereinafter **SUPERIOR**).

A formal administrative hearing was held in this case in Jacksonville, Florida, on October 20-22, 2004, and in Tallahassee, Florida, on October 27-28, 2004, before the Honorable Stephen F. Dean, a duly appointed administrative law judge. Appearances on behalf of the parties were as follows:

For Petitioner: F. Alan Cummings, Esquire  
S. Elysha Luken, Esquire  
Smith, Curie & Hancock, LLP  
1004 Desoto Park Drive  
Tallahassee, Florida 32302

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

For Intervenor: Mike Piscitelli, Esquire  
Vezina, Lawrence & Piscitelli, P.A.  
350 East Las Olas Boulevard, Suite 1130  
Fort Lauderdale, Florida 33301

At the hearing, the **DEPARTMENT** presented the testimony of Robert S. Hansgen, P.E., Construction Project Manager/Resident Engineer for the **DEPARTMENT**; Allan Moyle; John (Jack) Box; Freddie Simmons, P.E., State Highway Engineer for the **DEPARTMENT**; Mohammed Majboor, P.E., District II Design Project Manager for the **DEPARTMENT**; and Ananth Prasad, P.E., Director of Office of Construction for the **DEPARTMENT**; and offered Respondent's Exhibits 1 through 4, which were admitted into evidence. **AMEC** presented the testimony of Richard L. Kelly, P.E., Vice President of **AMEC**; Grant Ralston, P.E., Estimating and Engineering Manager for **AMEC**; Shannon Douglas, paralegal at Smith, Currie

& Hancock, LLP; Allan L. Moyle, District II Construction Engineer for the **DEPARTMENT**; and John (Jack) Box, Senior Project Engineer with H. W. Lochner, Inc., design engineer for the project; presented rebuttal testimony of Jack Palmer, Operations Manager for AMEC Civil; and David Leonard, President of AMEC; and offered Petitioner's Exhibits 9, 21, 24, 30, 33, 44, 63, 64, 68 through 72, 74, 89 through 91, 96 through 98, and 101 through 107, which were admitted into evidence. **SUPERIOR** presented the testimony of Richard (Dick) Ayers, Executive Vice President of **SUPERIOR**.

Official recognition was taken of all relevant statutes and rules. The transcript (Volumes I-IX) of the proceedings was filed on November 17, 2004. On November 24, 2004, **SUPERIOR** filed its Proposed Findings of Fact and Conclusions of Law. On November 29, 2004, the **DEPARTMENT** filed its Proposed Recommended Order. On November 30, 2004, **AMEC** filed its Proposed Findings of Fact and Conclusions of Law. On December 28, 2004, Judge Dean issued his Recommended Order. On January 5, 2005, the **DEPARTMENT** filed its exception to the Recommended Order. **AMEC** filed its exceptions to the Recommended Order on January 7, 2005. On January 14, 2005, **AMEC** filed a response to the **DEPARTMENT'S** exception and "Request for Re-Referral to Division of Administrative Hearings." The **DEPARTMENT** filed a response to the "Request for Re-Referral" on January 24, 2005. Responses to **AMEC's** exceptions were filed by the **DEPARTMENT** on January 18, 2005. On January 19, 2005, **SUPERIOR** filed its response to the **DEPARTMENT'S** exceptions. On January 20, 2005, the **DEPARTMENT** filed a motion for costs. No response to the **DEPARTMENT'S** motion for costs was filed.

## STATEMENT OF THE ISSUE

As stated by the administrative law judge in his Recommended Order, the issue presented was: “Whether the Department of Transportation’s decision to reject all bids for Financial Project No. 209278-1-52-01 (J. Turner Butler Blvd.) a major interchange in Duval County, Florida, was exercised illegally, arbitrarily, dishonestly or fraudulently.”

## BACKGROUND

On April 1, 2004, the **DEPARTMENT** advertised its Bid Solicitation Notice for Financial Project No. 209278-I-52-01. On June 17, 2004, the **DEPARTMENT** posted the notice of intent to award in which all bids were rejected due to plan errors for Financial Project Number 209278-I-52-01 for the interchange at State Road 9A (J. Turner Butler Blvd.) in Duval County, Florida. On June 21, 2004, a Notice of Protest was filed by **AMEC**, and on July 2, 2004, **AMEC** filed its Formal Written Protest and bond. On September 2, 2004, the matter was referred to DOAH and was assigned to Judge Dean. The case was set for hearing and discovery ensued. On September 28, 2004, a Petition to Intervene was filed by **SUPERIOR**, which was granted on September 29, 2004.

A formal administrative hearing was held on October 20-22, 2004, Jacksonville, Florida, and on October 27-28, 2004, in Tallahassee, Florida, before Judge Dean.

## EXCEPTIONS TO RECOMMENDED ORDER

The **DEPARTMENT’S** exception is to Conclusion of Law 41, which states:

While the evidence shows that the Department issued a Letter of Concern to Petitioner and that Department employees or representatives involved with construction on the I-95/I-295 Southern Interchange project may have some personal “dislike” or “animus” toward Petitioner or its corporate officers, Richard

Kelly and Jack Palmer, these factors do not change the impression that the rejection of all bids on the JTB project was for reasons other than safety concerns over the MOT plans.

The **DEPARTMENT** believes that Conclusion of Law 41 should read:

While the evidence shows that the Department issued a Letter of Concern to Petitioner and that Department employees or representatives involved with construction of the I-95/I-295 Southern Interchange project may have some personal “dislike” or “animus” toward Petitioner or its corporate officers, Richard Kelly and Jack Palmer, these factors do not change the impression that the rejection of all bids on the JTB project was for safety concerns over the MOT plans.

According to the **DEPARTMENT**, the evidence adduced at trial supports the **DEPARTMENT’S** position that safety issues were paramount to the decision to reject all bids. The **DEPARTMENT** notes that its resident engineer, Robert Hansgen, testified at length regarding the safety issues that he uncovered in his review of the MOT plans. (FoF 13, 14, 15)<sup>1</sup>

In addressing the **DEPARTMENT’S** exception, a review of the Recommended Order and the record in its entirety leads to the conclusion that it should be considered as a request to correct scrivener’s error. In this regard, the **DEPARTMENT** has given thorough consideration to the Recommended Order in its entirety, including all findings of fact, and Findings of Fact 13, 14, and 15, in particular. The **DEPARTMENT** has also given consideration to Conclusions of Law 38, 39, and 40 and to the ultimate recommendation of the administrative law judge that the **DEPARTMENT** enter a Final Order dismissing AMEC’s protest “concerning the bid rejection for the project in this litigation.”

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<sup>1</sup> Citation to Findings of Fact in the Recommended Order will be in the form of (FoF).

The **DEPARTMENT** thus concluded that Conclusion of Law 41 indeed contained a scrivener's error. As a result, the **DEPARTMENT** filed an emergency motion for clarification to give the administrative law judge an opportunity to re-address Conclusion of Law 41 and to correct the potential scrivener's error. On January 14, 2005, the administrative law judge issued an "Order Correcting Scrivener's Error in Recommended Order," wherein Conclusion of Law 41 is corrected by the administrative law judge to read:

41. While the evidence shows that the Department issued a Letter of Concern to Petitioner and that the Department employees or representatives involved with the construction on the I-95/I-295 Southern Interchange project may have personal "dislike" or "animus" toward Petitioner, or its corporate officers, Richard Kelly and Jack Palmer, these factors do not change the impression that the rejection of all the bids on the JTB project was for any reason other than safety concerns over the MOT plans.

**AMEC** filed a response to the **DEPARTMENT'S** exception, disagreeing with the manner in which the **DEPARTMENT** proposed to rewrite Conclusion of Law 41 in its exception, and contending that the proposed revision changes the meaning of the conclusion. Further, **AMEC** asserts that the premise of the conclusion is called into doubt by its argument for re-referral of the matter to DOAH. However, **AMEC** filed no written objection to the **DEPARTMENT'S** emergency motion, nor has **AMEC** filed any objection or response to the administrative law judge's "Order Correcting Scrivener's Error in Recommended Order."

**AMEC** seeks to have the **DEPARTMENT** re-refer this case to DOAH to resolve alleged discovery violations because such re-referral will allegedly establish error in Conclusion of Law 41. As set forth above, Conclusion of Law 41 was corrected by the administrative law judge because it contained a scrivener's error. **AMEC** has not objected to

the corrected Conclusion of Law 41, nor did AMEC object to or respond to the DEPARTMENT'S Emergency Motion for Clarification.

AMEC alleges that subsequent to the conclusion of the final hearing in this case, the DEPARTMENT provided in a separate bid protest of a project known as the Hillsborough Project (let for bid on the same day as the instant bid in this bid protest) a "privilege log" which purported to list documents that were privileged and would not be produced. One such entry was an e-mail from Ananth K. Prasad to the Assistant Secretary for Engineering and Operations, Kevin Thibault, dated May 27, 2004, the day after the bid letting in the bids that culminated in this case and the Hillsborough Bid Protest. The title of this e-mail was "AMEC Contract Awards." According to AMEC, the plural form of this reference line indicates that the subject of the e-mail references both the bid for the Duval Project, which is the subject of the instant bid protest, as well as the bid for the Hillsborough Project, which is the subject of a separate and still-pending bid protest. As such, AMEC asserts that this e-mail is within the ambit of AMEC's prior requests for production and notices of taking deposition duces tecum in the instant bid protest; however, AMEC asserts, this document was not provided and no privilege log listing such a document was ever provided.

AMEC accuses the DEPARTMENT of having improperly claimed "attorney-client/work product" privilege in association with this document, yet, no attorneys are involved in the communication and the decision to reject all bids for the Duval Project had not even as yet been made. This begs the question of what "work-product" the DEPARTMENT could be preparing prior the telephone call from Mr. Burluson to Mr. Prasad regarding the alleged MOT "problems" with the plan for the Duval Project. AMEC believes that this

e-mail reveals the apparent nexus that the administrative law judge found lacking in his Recommended Order, to wit, the implicit finding of fact that Mr. Prasad did not participate in any way in the **DEPARTMENT'S** decision to reject all bids. By the **DEPARTMENT'S** own admission, Mr. Prasad was having communications with the Assistant Secretary just one day after the bid opening for the Duval Project and the Hillsborough Project regarding "AMEC Contract Awards." This document was requested, and not provided during the course of discovery in the administrative hearing. Given the circumstantial case that had to be presented in order to demonstrate the correctness of **AMEC'S** position, the **DEPARTMENT'S** failure to produce or even identify this document is especially critical. New evidence withheld by the **DEPARTMENT** warrants a reopening of this bid protest with DOAH, and this matter should be re-referred to DOAH for a resolution of this disputed issue of fact.

Further, **AMEC** asserts, other items on additional privilege logs provided by the **DEPARTMENT** in the Hillsborough Bid Protest reveal that there are additional documents that were requested by **AMEC** in the instant bid protest that were not produced, and were never listed on a privilege log by the **DEPARTMENT**. For example, **AMEC** claims that on the privilege log provided by the **DEPARTMENT** for Ms. Juanita Moore in the Hillsborough Bid Protest, there are three (3) e-mails that explicitly reference the Duval Project. These documents were not produced by the **DEPARTMENT**, and were not listed in a privilege log provided by the **DEPARTMENT**. It is not clear, **AMEC** admits, what these documents will reveal; however, what is clear is that the **DEPARTMENT** withheld documents that were requested and should have been produced. New evidence withheld by the **DEPARTMENT**



warrants a reopening of this bid protest with DOAH, and this matter should be re-referred to the DOAH for a resolution of this matter.

Having read the record in its entirety in conjunction with the Recommended Order, it became apparent to the **DEPARTMENT** that Conclusion of Law 41 contained a scrivener's error. That potential scrivener's error was brought to the administrative law judge's attention in the **DEPARTMENT'S** Emergency Motion for Clarification. Prior to filing the emergency motion, counsel for **AMEC** and counsel for **SUPERIOR** were contacted and both indicated they had no objection to the filing of the motion. No response or objection to the emergency motion was filed by any party and the administrative law judge entered an Order Correcting Scrivener's Error in Recommended Order. **AMEC** filed no objection or exception to the corrected Conclusion of Law 41 contained in the administrative law judge's order. As such, the exception raised by the **DEPARTMENT** is rendered moot by the administrative law judge's order, thereby rendering **AMEC's** response to the exception moot.

In its response to the **DEPARTMENT'S** exception, **AMEC** also requests this matter to be re-referred to DOAH so that new evidence can be obtained and presented to support its response to the **DEPARTMENT'S** exception to Conclusion of Law 41 . This new evidence, according to **AMEC's** response, consists of e-mails from **DEPARTMENT** employees, Ananth Prasad and Juanita Moore, that were allegedly related to the **DEPARTMENT'S** rejection of bids in the instant case, and that were allegedly responsive to "requests for production and notices of deposition duces tecum" previously served by **AMEC**. The **DEPARTMENT** asserts in its motion to strike **AMEC's** response and request for re-referral that there were no public record requests, document requests, or notices of deposition duces

tecum that would have required the **DEPARTMENT** to produce any documents requested of Ms. Moore or Mr. Prasad that had not been previously produced.

**AMEC's** response to the **DEPARTMENT'S** exception does not warrant re-referral. **AMEC's** request for re-referral is presented as part of its response to the **DEPARTMENT'S** exception to Conclusion of Law 41 and forms part of its argument that the **DEPARTMENT** should reject the exception to Conclusion of Law 41. As previously noted, the **DEPARTMENT'S** exception to the original Conclusion of Law 41 and **AMEC's** response to the **DEPARTMENT'S** exception were rendered moot by the administrative law judge's January 14, 2005, order.

Further, **AMEC's** suggestion that the alleged new evidence would reveal a nexus the administrative law judge found lacking and somehow result in a different ruling is without merit, since the evidence in the record established that the **DEPARTMENT'S** Contract Awards Committee made the decision to reject all bids as opposed to Mr. Prasad and Ms. Moore.

The **DEPARTMENT'S** exception and **AMEC's** assertions regarding the **DEPARTMENT'S** exception to Conclusion of Law 41 are rejected. Conclusion of Law 41, as corrected in Judge Dean's January 14, 2005, order, is hereby accepted.

**AMEC's** first exception is to the Preliminary Statement of the Recommended Order. In this exception, **AMEC** objects to the administrative law judge's failure in the preliminary statement to recognize **AMEC's** proper submission, and acceptance thereof by the administrative law judge, of the deposition transcripts of Mr. Lewis Harper and Mr. Thomas Stoner into evidence. According to **AMEC**, these depositions transcripts were submitted at

(Tr. 812-16)<sup>2</sup> without objection. AMEC further contends that (Tr. 932-35) indicates an objection was raised only to the deposition transcripts of Messrs. Prasad and Ayers.

After review of the record in its entirety, it is determined that AMEC's assertion is not supported by the record. The record in its entirety and, specifically, the transcript citations provided in AMEC's exception, do not support modification of the Recommended Order and do not support a determination that the administrative law judge's preliminary statement is inaccurate in this regard. AMEC correctly notes that at (Tr. 812-816) an entire box of deposition transcripts was proposed to be introduced into evidence by AMEC. However, after counsel for the DEPARTMENT and counsel for SUPERIOR objected to their introduction, no deposition transcripts were admitted at that time. Moreover, the deposition transcripts were never identified by deponent, date, or any other identifying information. Thereafter, when the issue was re-addressed (Tr. 932-935), the administrative law judge ruled on the admissibility of deposition transcripts in general, and specifically did not allow admission of the transcripts of Mr. Prasad and Mr. Ayers. However, AMEC again failed to identify any deposition transcript it wished to introduce by deponent, date, or any other pertinent information; failed to formally move to have them admitted into evidence; and failed to receive a ruling from the administrative law judge on their admission. As such, it cannot be said that the Recommended Order erroneously fails to identify the admission of the deposition transcripts of Mr. Harper and Mr. Storer into evidence. As a general rule, "a party must obtain a ruling from the trial court in order to preserve an issue for appellate review." Carratelli v. State, 832 So. 2d 850,

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<sup>2</sup> Citation to the transcript of the hearing will be in the form of (Tr.) followed by the appropriate page number(s).

856 (Fla. 4th DCA 2002)(citations omitted); Blackman v. State, 588 So. 2d 662, 663 (Fla. 1st DCA 1991)(citations omitted).

AMEC's first exception is rejected.

AMEC's second exception is to Finding of Fact No. 4 to the extent that it fails to indicate that Mr. Prasad then instructed District II to look for problems with the MOT. (Tr. 880-888)

The record in this case reveals that Finding of Fact 4 is supported by competent, substantial evidence. Although the record also reflects that Mr. Prasad advised District II of the Maintenance of Traffic issues and that he instructed the District to look into the issues, the **DEPARTMENT** is without authority to make findings of fact.

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 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, reinterpret the evidence, or create findings of fact. 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.

AMEC's second exception is rejected.

AMEC's third exception is to Finding of Fact No. 5 insofar as it states that Mr. Richard Ayers discovered "MOT issues." Mr. Ayers testified that the only matter he brought to Mr. Henry Haggerty's attention was the eleven (11) foot lanes presented in the plans. (Tr. 953) According to AMEC, Finding of Fact 5 also fails to state that Mr. Ayers' purpose in raising this matter with Mr. Haggerty was to convince the DEPARTMENT to "rebid the job." (Tr. 950)

Review of the record reveals that the issue of eleven (11) foot lanes is identified as an MOT issue as addressed by Mr. Hansgen in his Memorandum of June 1, 2004, and was addressed in his briefing of the District staff. (Tr. 87, 89; Respondent's Ex. 2). The record does not support modification of Finding of Fact 5 as requested by AMEC. More importantly, the administrative law judge and not the DEPARTMENT is authorized to consider the evidence, judge credibility, draw permissible inferences, and reach ultimate findings of fact based upon competent, substantial evidence. Heifetz, 475 So. 2d at 1281; Packer, 881 So. 2d at 1207.

AMEC's third exception is rejected.

AMEC's fourth exception is to Finding of Fact No. 7 to the extent it provides that Mr.

Robert Hansgen's memorandum dated June 1, 2004, outlines concerns related to the "safety" of the JTB project. Mr. Hansgen's memorandum dated June 1, 2004, is prefaced by the statement: "find below several issues related to MOT and constructability that will severely impact (both time and money) construction of the JTB Interchange." (Tr. 150; Petitioner's Ex. 104)<sup>3</sup> According to AMEC, "safety" is not mentioned in the memorandum.

The record in this regard supports AMEC's position that the referenced June 1, 2004, memorandum does not specifically use the word "safety." However, the memorandum notes therein that at least one problem with the plans creates "a hazardous situation," clearly implying safety concerns. (Petitioner's Ex. 104) Moreover, the record in its entirety supports the DEPARTMENT'S position that safety was of paramount importance in the DEPARTMENT'S decision to reject all bids.

AMEC's fourth exception is accepted in part to the extent that the words "and safety" should be omitted from Finding of Fact 7; AMEC's fourth exception is otherwise rejected.

AMEC's fifth exception is to Finding of Fact No 8. In this exception, AMEC contends that Mr. Hansgen's memorandum was not completed until June 1, 2004, at 5:43 p.m. (Petitioner's Ex. 104), and there is no evidence in the record that Mr. Hansgen's memorandum was forwarded to Mr. Mohammed Majboor on that date.

Review of the record in its entirety, and specifically Mr. Majboor's testimony and (Petitioner's Ex. 104 and 106), establishes that the date of June 1, 2004, is a scrivener's

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<sup>3</sup> Citations to exhibits introduced into evidence will be in the form of a parenthetical containing first the proponent of the exhibit followed by the exhibit number, e.g., (Petitioner's Ex. 1).

error and should read June 2, 2004. It is undisputed that (Petitioner's Ex. 104) establishes that Mr. Hansgen's memorandum was sent to Henry Haggerty and Allan Moyle on June 1, 2004, at 5:43 p.m., and that on June 2, 2004, Mr. Moyle forwarded the memorandum to Kathy Thomas and copied Mr. Majboor and Mr. Hansgen. (Petitioner's Ex. 104) Thereafter, Mr. Majboor received responses from the designer, H. W. Lochner, and forwarded them to Mr. Hansgen and others within the **DEPARTMENT**. (Petitioner's Ex. 106)

It is apparent from its context and content that the importance of Finding of Fact 8 is not in the date of June 1, 2004, but in the substance of the finding that Mr. Hansgen's concerns were quickly sent to Mr. Majboor and to H. W. Lochner.

AMEC's fifth exception is accepted to the extent that June 1, 2004, is incorrectly noted and should read June 2, 2004. AMEC's fifth exception is otherwise rejected.

AMEC's sixth exception is to Finding of Fact No. 9. AMEC argues that this Finding of Fact confuses the timing of events. AMEC asserts that H. W. Lochner, Inc. (Lochner), the designer of record, provided a response to Mr. Hansgen's memorandum on June 3, 2004, to Mr. Majboor, who in turn provided it to Mr. Hansgen. (Petitioner's Ex. 106) However, according to AMEC, Mr. Hansgen did not respond to Lochner's comments until June 16, 2004, two weeks later. (Petitioner's Ex. 106) AMEC asserts that neither event preceded Mr. Hansgen's e-mail to Mr. Haggerty.

The record establishes that Finding of Fact 9 is supported by competent, substantial evidence. First, Lochner did review its plans in light of Mr. Hansgen's memorandum and Lochner did forward its responses to Mr. Hansgen who "reviewed the responses and added his comments." (Petitioner's Ex. 106) In addition, Mr. Hansgen did "e-mail[ ] Henry Haggerty

seven concerns he had with the MOT plans.” (FoF 9)(Petitioner’s Ex. 104) The two statements comprising Finding of Fact 9 are separate and distinct and each supported by competent, substantial evidence.

AMEC’s sixth exception is rejected.

AMEC’s seventh exception is to Finding of Fact No. 10 to the extent it indicates that Mr. Moyle relied on Lochner’s responses to Mr. Hansgen’s memorandum in determining that the project plans needed revisions. AMEC asserts that Mr. Moyle did not review Lochner’s responses to Mr. Hansgen’s memorandum prior to deciding that the project plans needed revisions. Instead, according to AMEC, Mr. Moyle received Mr. Hansgen’s memorandum no earlier than Tuesday, June 1, 2004, at 5:43 p.m. (Tr. 147-48; Petitioner’s Ex. 104) The very next morning, at 9:46 a.m., Mr. Moyle forwarded Mr Hansgen’s memorandum to Kathy Thomas, District II design coordinator, indicating that District II would need to meet with the engineer of record to discuss Mr. Hansgen’s concerns, and that District II would “need the design revisions at the earliest possible date.” (Tr. 697; Petitioner’s Ex. 104) AMEC asserts that Mr. Moyle was not provided Lochner’s comments until almost two (2) days after this decision, on June 3, 2004, at 4:09 p.m. (Petitioner’s Ex. 106) Mr. Moyle could not have used Lochner’s responses regarding Mr. Hansgen’s memorandum in making this determination that the project plans needed revisions because Lochner’s response had not as yet been created and Mr. Moyle had not received it. (Petitioner’s Ex. 106)

AMEC also takes exception to Finding of Fact No. 10 insofar as it states that Mr. Moyle determined that the project plans needed revisions because of “safety issues.” Mr. Moyle’s e-mail to Kathy Thomas indicates only that pursuant to Mr. Hansgen’s e-mail,



design revisions would be needed. (Petitioner's Ex. 104) Mr. Hansgen's e-mail is prefaced only by the statement: "[please] find below several issues related to MOT and constructability that will severely impact (both time and money) construction of the JTB Interchange." (Tr. 150; Petitioner's Ex. 104) Safety is not mentioned. Mr. Moyle's recommendation that the bids be rejected was considered within District II and ultimately District II sent a recommendation to Tallahassee that all bids be rejected. (Tr. 698) The District II recommendation to Tallahassee stated that it was "based on the need to clarify uncertainties within the phasing of the Maintenance of Traffic (MOT) plans which could result in significant additional cost to the project." (Petitioner's Ex. 105; Tr. 701) Safety was not mentioned. Mr. Moyle's recommendation was based on the potential for additional cost, because if an award was made, "we would have a potentially very significant delay for idle equipment, idle workers, and so forth." (Tr. 699)

AMEC correctly notes that Mr. Moyle had not received Lochner's response on June 2, 2004. However, the record establishes that when requesting a meeting to discuss plan revisions, Mr. Moyle had received Mr. Hansgen's memo. AMEC also correctly notes that Mr. Moyle's e-mail to Kathy Thomas (Petitioner's Ex. 104) does not expressly use the word "safety." However, Finding of Fact 10 does not attribute "safety" issues to Mr. Moyle's e-mail. The record is replete with competent, substantial evidence that safety issues were of paramount importance to Mr. Moyle, and the DEPARTMENT in the decision to reject all bids. (Tr. 126, 724, 728, 729).

AMEC's seventh exception is accepted in part and rejected in part.

AMEC's eighth exception is to Finding of Fact No. 13. According to AMEC, Mr.

Hansgen's "concerns" as stated in his e-mail to Mr. Haggerty was a "sever[e] impact (both time and money) [in the] construction of the JTB Interchange." (Tr. 150; Petitioner's Ex. 104) In Mr. Hansgen's memorandum, his "concern" regarding the barrier walls identified the potential for "extensive back ups and delays for both eastbound and westbound JTB commuters." (Petitioner's Ex. 104) AMEC asserts that Mr. Hansgen's memorandum makes no reference to access of emergency vehicles or "a major hospital complex." Id.

Upon a review of the record in its entirety, and specifically Mr. Hansgen's testimony, it is uncontroverted that Mr. Hansgen's memorandum did not identify all potential issues or problems with the project plans. Mr. Hansgen testified unequivocally that safety, length of travel lanes, and access of emergency vehicles were among his concerns. Finding of Fact 13 is not limited to what was stated in Mr. Hansgen's e-mail to Mr. Haggerty, or otherwise. Mr. Hansgen's testimony detailed all of his concerns and potential problems with the plans. While Mr. Hansgen did not use the phrase "major hospital complex," he did provide detailed testimony regarding accident victims and access to victims by emergency vehicles when he responded to a question regarding the transport of patients to nearby "St. Luke's Hospital." (Tr. 196-197) As such, there is sufficient record testimony to conclude that the administrative law judge understood "St. Luke's Hospital" to be a "major hospital complex." As such, Finding of Fact 13 is supported by the record.

AMEC's eighth exception is rejected.

AMEC's ninth exception is to Finding of Fact No 15 on the basis that there was no competent, substantial evidence presented to support this finding.

AMEC's ninth exception is rejected.

AMEC's tenth exception is to Finding of Fact No. 17 to the extent it states that the Technical Review Committee recommended rejection of all bids "based upon MOT safety issues." The Technical Review Committee recommended rejecting all bids "due to the need to clarify uncertainties within the phasing of the Maintenance of Traffic (MOT) plans which could result in significant additional cost to the project." (Respondent's Ex. 3) According to AMEC, evidence that the Technical Review Committee recommended rejection of all bids "based upon MOT safety issues" was not presented.

To the extent that AMEC takes exception to Finding of Fact 17, because Respondent's Ex. 3 does not mention "safety," AMEC is correct. However, there is competent, substantial evidence in the record that prior to the vote of the Technical Review Committee, the District had investigated the MOT issues and recommended rejection based in part on safety issues. (Tr. 126, 132, 724 - 726).

AMEC's tenth exception is accepted in part to the extent use of the word "safety" is not supported by competent, substantial evidence, and is otherwise rejected.

AMEC's eleventh exception is to Finding of Fact No. 18 to the extent it states that the Contract Award Committee rejected all bids "based upon MOT safety issues." Mr. Freddie Simmons, Chairman of the Contract Awards Committee, testified that the Contract Awards Committee had no knowledge of whether the alleged maintenance of traffic problems were significant or insignificant. (Tr. 380) Mr. Simmons testified that the Contract Awards Committee spent "ten minutes probably or less discussion on this project." (Tr. 375) During the Contract Awards Committee process, the Committee did not discuss the alleged "uncertainties" in any detail, and Mr. Simmons did not review the plans for the Duval

Project. (Tr. 375) According to AMEC, Mr. Simmons did not know what the alleged error in the phasing of the maintenance of traffic plans for the Duval Project was. (Tr. 379) The Contract Awards Committee meeting minutes, prepared to reflect what was discussed at the meeting as to this particular project (Tr. 377), state that the Contract Awards Committee rejected all bids “due to the need to clarify uncertainties within the phasing of the Maintenance of Traffic (MOT) plans which could result in significant additional cost to the project.” (Respondent’s Ex. 3)

In responding to AMEC’s eleventh exception, it is noted that the record establishes that the Contract Award Committee relied on the recommendation of the Technical Review Committee to reject all bids based upon the need to clarify uncertainties within the phasing of the MOT plans. The record also contains competent, substantial evidence that prior to the Contract Review Committee’s vote, the District had investigated the MOT issues and based its recommendation to reject all bids based on safety concerns. (Tr. 126, 132, 724 - 726). Nevertheless, AMEC is correct to the extent that “safety” is not mentioned as a basis for the Contract Award Committee’s adoption of the Technical Review Committee’s recommendation to reject all bids. (Respondent’s Ex. 3)

AMEC’s eleventh exception is accepted in part to the extent that use of the word “safety” is not supported by competent, substantial evidence; AMEC’s eleventh exception is otherwise rejected.

AMEC’s twelfth exception is to Finding of Fact No. 21 to the extent it indicates that the DEPARTMENT met with Lochner prior to the decision to reject all bids. AMEC asserts that Mr. Box testified that the meeting between the DEPARTMENT and Lochner did not take

place until after the decision to reject all bids had been made. (Tr. 766) Mr. Moyle did not have any communications with Lochner prior to forming his conclusion that the bids should be rejected. (Tr. 699) Mr. Hansgen did not have any communications with Lochner prior to preparing his memorandum. (Tr. 151-152).

Competent, substantial evidence supports Finding of Fact 21, which correctly states that **DEPARTMENT** engineers met with Lochner engineers to discuss the issues of concern raised in the Hansgen memorandum. Finding of Fact 21 does not specify when a meeting occurred and it does not state that it occurred prior to the decision to reject all bids as suggested by **AMEC**. As such, there is no record evidence to support **AMEC**'s exception.

**AMEC**'s twelfth exception is rejected.

**AMEC**'s thirteenth exception is to Finding of Fact No. 22 to the extent that it fails to indicate that Lochner was paid for almost all of the issues raised in Mr. Hansgen's memorandum. (Tr. 775) According to **AMEC**, Lochner was paid for all issues addressed in Mr. Hansgen's memorandum with the exception of Issue #2, part of Issue #6, and for Issue #7. (Tr. 775) Lochner, **AMEC** asserts, was paid \$183,000.00 pursuant to supplemental agreement to make the changes requested by the **DEPARTMENT**. (Tr. 774-75) The **DEPARTMENT** does not pay for a designer's errors or omissions. (Tr. 775-76) As such, **AMEC** continues, Lochner did not make any design errors as to the "safety" issues asserted by Mr Hansgen at the final hearing.

There is competent, substantial evidence in the record to support Finding of Fact 22. The **DEPARTMENT** is without authority to make findings of fact; this authority is within the sole province of the administrative law judge. Heifetz, 475 So. 2d at 1281; Packer, 881 So. 2d

at 1207.

AMEC's thirteenth exception is rejected.

AMEC's fourteenth exception is to Finding of Fact No. 23 to the extent that it fails to address the sum of Mr. Kelly's testimony regarding the **DEPARTMENT'S** animus toward AMEC as set forth in Petitioner's Proposed Findings of Fact and Conclusions of Law, paragraphs 19 through 36, and the citations to the record set forth therein.

There is competent, substantial evidence in the record to support Finding of Fact 23. The **DEPARTMENT** is not authorized to make additional findings of fact; this authority is solely within the province of the administrative law judge. Heifetz, 475 So. 2d at 1281; Packer, 881 So. 2d at 1207.

AMEC's fourteenth exception is rejected.

AMEC's fifteenth exception is to Finding of Fact No. 24 to the extent it indicates that Mr. Prasad was not involved in AMEC's prequalification in 2002. According to AMEC, Mr. Prasad was involved in the 2002 application and Mr. Prasad ultimately signed an agreement with AMEC on this issue. (Tr. 442-43; Petitioner's Ex. 98).

The record evidence is uncontroverted that Mr. Prasad "was not involved with the initial decision to revoke the pre-qualification of AMEC in 2002," as stated by the administrative law judge in Finding of Fact 24. (emphasis added) The record establishes that Mr. Prasad testified that he became involved after his predecessor initiated the subject action. Finding of Fact 24 is supported by competent, substantial evidence.

AMEC's fifteenth exception is rejected.

AMEC's sixteenth exception is to Finding of Fact No. 25 because Mr. Prasad has Mr.

David Sadler sit on the Technical Review Committee and Mr. Sadler works for Mr. Prasad.  
(Tr. 916)

Finding of Fact 25 is supported by uncontroverted competent, substantial evidence. By its exception, AMEC seeks to add a finding of fact based upon an inference that because Mr. Sadler sits on the Technical Review Committee and because Mr. Sadler works for Mr. Prasad, Mr. Prasad therefore sits on the Technical Review Committee. (Tr. 820) There is no evidence to support such an inference and the DEPARTMENT is without authority to make finding of fact based upon inferences or otherwise. Heifetz, 475 So. 2d at 1281; Packer, 881 So. 2d at 1207.

AMEC's sixteenth exception is rejected.

AMEC's seventeenth exception is to Finding of Fact No. 27 because based on its argument regarding Finding of Fact 25, the Contract Awards Committee was operating under a faulty premise and a pretext and therefore lacked statutory authority.

Review of the record in its entirety reveals that there is no competent, substantial evidence to support a finding as suggested by AMEC. Finding of Fact 27 is supported by competent, substantial evidence and the law.

AMEC's seventeenth exception is rejected.

AMEC's eighteenth exception is to Conclusion of Law No. 37 to the extent that the reference to the District II analysis determined "that the MOT problems would create safety issues for workers and travelers within construction zones" is inconsistent with Mr. Hansgen's memorandum and the subsequent recommendation of District II. (Petitioner's Ex. 104, 105).

Conclusion of Law 37, which is mixed with factual findings and conclusions of law, is consistent with the competent, substantial record evidence. The statements in Conclusion of Law 37 are consistent with the evidence and testimony presented at the hearing. Conclusion of Law 37 is not limited to the information contained in Mr. Hansgen's memorandum, but is based upon the totality of the evidence and accurately reflects the evidence presented.

AMEC's eighteenth exception is rejected.

AMEC's nineteenth exception is also to Conclusion of Law No. 37. According to AMEC, the evidence it introduced showed that from the beginning, Mr. Hansgen was looking for problems because he was instructed to do so by Mr. Haggerty who was directed to do so by Mr. Prasad.

In analyzing this exception, it is noted that AMEC provided no record citations to support this position. Moreover, AMEC is asking the DEPARTMENT to make additional findings of fact; the DEPARTMENT has no authority to make findings of fact. Heifetz, 475 So. 2d at 1281; Packer, 881 So. 2d at 1207. Competent, substantial evidence in the record and the law establish the accuracy of Conclusion of Law 37.

AMEC's nineteenth exception is rejected.

### **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 6, 8, 9, 15, 16, and 19 through 27 are supported by competent, substantial evidence. As such, they are adopted and incorporated as if fully set forth herein.

2. Findings of Fact in paragraphs 7, 10, 17, and 18 are modified in part as hereinabove



set forth. As such, they are adopted and incorporated as modified, as if fully set forth herein.

3. A total of \$6,950.15 of taxable costs has been incurred by the **DEPARTMENT** for the record of the proceedings.

### CONCLUSIONS OF LAW

1. The **DEPARTMENT** has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapter 120 and 337, Florida Statutes.

2. The Conclusions of Law in paragraphs 1 through 40 of the Recommended Order are fully supported in law. As such, they are adopted and incorporated as if fully set forth herein.

3. The Conclusion of Law in paragraph 41 is adopted as modified by the administrative law judge's January 14, 2005, Order Correcting Scrivener's Error as set forth hereinabove, and adopted and incorporated as if fully set forth herein.

4. 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

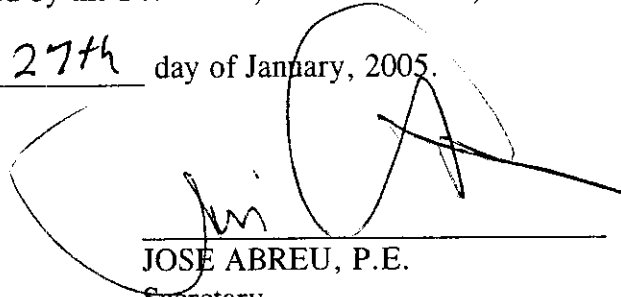
**ORDERED** that the Recommended Order dated December 28, 2004, is hereby adopted as modified herein. It is further

**ORDERED** that the **Respondent, DEPARTMENT OF TRANSPORTATION**, shall proceed to readvertise the project for bid. It is further

**ORDERED** that the motion of the **RESPONDENT, DEPARTMENT OF**

**TRANSPORTATION** to assess costs in the amount of \$6,950.15 is granted and said amount is hereby assessed against the bond posted by the **Petitioner, AMEC CIVIL, LLC.**

**DONE AND ORDERED** this 27<sup>th</sup> day of January, 2005.



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

FILED D.O.T. CLERK  
2005 JAN 27 PM 1:54

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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