

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

FILED
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DIVISION OF
ADMINISTRATIVE
HEARINGS

SUNSHINE TOWING, INC.,

Petitioner,

vs.

DOAH CASE NO.: 06-2451BID
DOT CASE NO.: 06-081

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

ANCHOR TOWING, INC.,

Intervenor/Respondent.

FINAL ORDER

This proceeding was initiated by the filing of a Notice of Intent to Protest on June 5, 2006, by Petitioner, SUNSHINE TOWING, INC. (hereinafter SUNSHINE TOWING), pursuant to Section 120.57(1), Florida Statutes, in response to a Notice of Intent to Award RFP-DOT-04/05-6063DS issued June 1, 2006, by the Respondent, DEPARTMENT OF TRANSPORTATION (hereinafter DEPARTMENT). SUNSHINE TOWING'S formal written protest was filed on June 15, 2006. On July 13, 2006, the matter was referred to the Division of Administrative Hearings (hereinafter DOAH) for a formal hearing and was assigned to Administrative Law Judge Robert S. Cohen. On July 17, 2006, an order was

issued granting the *ex parte* petition to intervene of **Intervenor/Respondent, ANCHOR TOWING, INC.** (hereinafter **ANCHOR TOWING**).

A formal administrative hearing was held in this case in Miami, Florida, on August 31, 2006, through September 1, 2006; September 18, 2006, through September 20, 2006; and September 28, 2006, through September 29, 2006, before Judge Cohen. Appearances on behalf of the parties were as follows:

For Petitioner: John C. Shawde, Esquire
 Kelly A. O'Keefe, Esquire
 Berger Singerman, P.A.
 200 South Biscayne Boulevard, Suite 1000
 Miami, Florida 33131-2398

For Respondents: C. Denise Johnson, Esquire
 Assistant General Counsel
 Department of Transportation
 Haydon Burns Building, MS 58
 605 Suwannee Street
 Tallahassee, Florida 32399-0458

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

At the hearing, **SUNSHINE TOWING** presented the testimony of Ann Margaret Ramos, Juan Masdeu, Edward Tosco, Derrick Charleston, Mark Chase, T. Monica Savits, Nancy Kay Lyons, Arnaldo Fernandez, Jr., Paul Clark, Sergio Bravo, Matthew O'Brien, and Alfred Nolton, and offered Petitioner's Exhibits 1 through 3, and 20 through 115, which were admitted into evidence, with the exception of Petitioner's Exhibits 22, 49 (included in Exhibit 50), 72, 73, 75, 81, 82, 83, and 110. The **DEPARTMENT** did not present testimony of any

witnesses, but did offer Respondent's Exhibits 1 and 2, which were admitted into evidence. **ANCHOR TOWING** did not present the testimony of any witnesses, but did offer Intervenor's Exhibits 1 through 14, which were admitted into evidence. Official recognition was taken of all relevant statutes and rules. The transcript of the hearing was filed October 11, 2006. On October 31, 2006, proposed recommended orders were filed by the **DEPARTMENT**, **SUNSHINE TOWING**, and **ANCHOR TOWING**. On October 31, 2006, the **DEPARTMENT** and **ANCHOR TOWING** also filed written closing arguments. On November 27, 2006, the Recommended Order and Amended Recommended Order were filed by Judge Cohen. On December 7, 2006, **SUNSHINE TOWING** filed its exceptions to the Amended Recommended Order. On December 14, 2006, **ANCHOR TOWING** filed its response to **SUNSHINE TOWING'S** exceptions. On December 18, 2006, the **DEPARTMENT** filed its response to **SUNSHINE TOWING'S** exceptions.

STATEMENT OF THE ISSUE

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

[W]hether the Department of Transportation's (the "Department") intended award of RFP-DOT-04/05-6063DS to Anchor Towing, Inc. ("Anchor Towing"), after the re-evaluation of the proposals pursuant to the Department's Final Order on Motion to Remand is contrary to the agency's governing statutes, rules, or policies, or the bid or proposal specifications.

EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Section 120.57(1)(l), Florida Statutes (2006), an agency has the authority to reject or modify the findings of fact set out in the recommended order. However, it cannot do

so unless the agency first determines from a review of the entire record, and states with particularity in its final order, that the findings of fact were not based upon competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Rogers v. Department of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005). The agency is not permitted to reweigh the evidence or judge the credibility of the witnesses. Id. If there is competent, substantial evidence in the record to support the Administrative Law Judge's findings of fact, the agency may not reject them, modify them, or make new findings. Id.

SUNSHINE TOWING takes exception to Findings of Fact 53, 62, 63, 64, 67, 86, 87, 97, 98, and 114. After a complete review of **SUNSHINE TOWING'S** exceptions, the responses thereto, and the entire record, the **DEPARTMENT** concludes that **SUNSHINE TOWING'S** exceptions to the above-noted findings of fact are grounded upon **SUNSHINE TOWING'S** view of the evidence which necessarily is the product of an impermissible re-visitation of the Administrative Law Judge's weight and credibility determinations. Moreover, **SUNSHINE TOWING** has failed to demonstrate that the challenged findings of fact are not supported by competent, substantial evidence or that the proceedings on which they were based did not comply with the essential requirements of law. The record conclusively demonstrates the contrary. Accordingly, **SUNSHINE TOWING'S** exceptions to Findings of Fact 53, 62, 63, 64, 67, 86, 87, 97, 98, and 114, are rejected.

SUNSHINE TOWING also takes exception to Conclusions of Law 132 through and including 137, 142, 143, 144, and 147 through and including 153. Additionally, **SUNSHINE TOWING** objects to the Administrative Law Judge's October 27, 2006, Order Granting, In

Part, Anchor Towing's Response and Objection To Sunshine Towing's Designation of Deposition Testimony, which resulted in the striking of certain deposition excerpts and excerpts of prior hearing testimony of the parties. After consideration of **SUNSHINE TOWING'S** exceptions and objection to the October 27, 2006, Order as well as the responses thereto, the **DEPARTMENT** finds that the above-challenged Conclusions of Law and the October 27, 2006, Order comport with the **DEPARTMENT'S** interpretation and application of controlling statutes and rules and are otherwise fully supported in law. Accordingly, **SUNSHINE TOWING'S** exceptions to Conclusions of Law 132 through and including 137, 142, 143, 144, and 147 through and including 153, and its objection to the October 27, 2006, order are 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 and including 123 are supported by competent, substantial evidence. As such they are adopted and incorporated as if fully set forth herein.
2. A total of \$8,413.75 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 337, Florida Statutes.
2. The Conclusions of Law in paragraphs 126 through and including 153 of the Recommended Order are fully supported in law. As such, they are adopted and incorporated

as if fully set forth herein.

ORDER

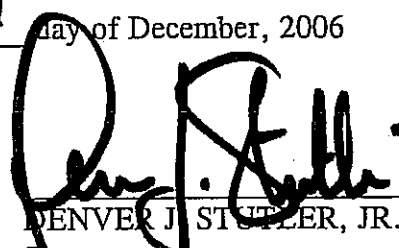
Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the Respondent, **DEPARTMENT OF TRANSPORTATION**, adopts the Administrative Law Judge's Amended Recommended Order in its entirety. It is further

ORDERED that the bid protest filed by Petitioner, **SUNSHINE TOWING, INC.**, is denied and that the Respondent, **DEPARTMENT OF TRANSPORTATION**, execute a contract for RFP-DOT-04/05-6063DS with the Intervenor/Respondent, **ANCHOR TOWING, INC.** It is further

ORDERED that the motion of the **RESPONDENT, DEPARTMENT OF TRANSPORTATION**, is granted and \$8,413.75 shall be deducted from the bond posted in the form of a check in the amount of \$17,784.60, and the balance returned to **PETITIONER, SUNSHINE TOWING, INC.**

DONE AND ORDERED this 22nd day of December, 2006



DENVER J. STUTLER, JR., P.E.
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

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

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY 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 9.100(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

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The Honorable Robert S. Cohen
Administrative Law Judge
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