STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

TEXAS AQUATIC HARVESTING, INC.,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA, DEPARTMENT)
OF ENVIRONMENTAL PROTECTION,)
)
Respondent,)
)
and)
)
A&L AQUATIC WEED CONTROL,)
)
Intervenor.)
)

OGC CASE NO. 06-2223
DOAH CASE NO. 06-4217BID

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DIVISION OF ADMINISTRATIVE HEARINGS

FINAL ORDER

On February 27, 2007, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") to the Department of Environmental Protection ("DEP") in this administrative proceeding. Copies of the RO were served on counsel for the Petitioner, Texas Aquatic Harvesting, Inc. ("Texas Aquatic"), and the Intervenor, A&L Aquatic Weed Control ("A&L"). A copy of the RO is attached hereto as Exhibit A. Texas Aquatic and DEP filed Exceptions to the RO on March 9, 2007. The Intervenor A&L and DEP filed Responses to Texas Aquatic's Exceptions on March 19, 2007. The matter is now before the DEP Secretary for final agency action.

BACKGROUND

As a result of the drought of the late 1990's, lakes and rivers in Florida experienced an encroachment of vegetation in river and lake bottoms that were historically covered by water. Subsequently, when rain increased and the lakes and rivers regained their normal banks, organic sediments and vegetation popped up from the bottoms and became tussocks and floating islands.

Tussocks are floating masses of aquatic plants. Floating islands are comprised of mud or peat ranging in thickness from a few inches to several feet. Woody herbaceous plants grow on the floating islands, including trees up to 10 inches in diameter and up to 25 feet tall. In addition to degrading the general ecology of lakes and rivers, tussocks and floating islands can jam against bridges and flood control structures, which may cause flooding or structural damage. Accordingly, the DEP's Bureau of Invasive Plant Management, as well as water management districts and counties, have determined that the problem of tussocks and floating islands must be addressed.

One of the methods of reducing tussocks and floating islands is to shred them with mechanical shredders mounted on barge-like vessels. When DEP Contract SL825 was issued in 1999, addressing the shredding of tussocks and floating islands, only two shredders were available. At that time the problem of floating islands and tussocks was not as large as it subsequently became. By June 2005, six different shredders were operating under several different agency contracts in Florida's public waters.

When DEP Contract SL825 came to an end in 2004, the DEP determined that floating islands and tussocks continued to present a problem that must be addressed.

He determined that shredding could solve or reduce the problem. Because there were so many variables between the floating islands and tussocks, and because he was aware of the various machines that could reduce the floating islands and tussocks, the section administrator suggested to the DEP's procurement section, that a Request For Proposals ("RFP") was the appropriate vehicle to seek contractors to propose methods to resolve the problem.

DEP issued a request for proposal (RFP) on October 25, 2005. This document solicited proposals for addressing the problem of the tussocks and floating islands that drift about in Florida's lakes and rivers. It called for a "cookie cutter" or similar barge-mounted device with rotating blades that could shred the plants and vegetable matter. The document required that the machinery be capable of operating beneath obstructions and in shallow shoreline waters, among other things.

The RFP sought a primary and secondary provider. Four companies responded to the RFP. Both A&L and Texas Aquatic were determined to be responsible and responsive vendors. On December 20, 2005, the DEP posted its Notice of Intended Award for DEP Solicitation 2006011C, announcing that A&L was selected as the primary provider. Texas Aquatic was selected as the secondary provider.

On December 30, 2005, Texas Aquatic timely protested the award to A&L as the primary provider. Discussions between Texas Aquatic, A&L, and the DEP on informally resolving the protest continued through October 2006. On November 1, 2006, subsequent to impasse, the DEP referred this matter to DOAH for assignment of an ALJ. On November 6, 2006, A&L filed its Petition to Intervene, which was granted.

Texas Aquatic's protest of the award to A&L alleged the following:

1. Texas Aquatic was the lowest responsible bidder for the contract, but the DEP awarded the contract to A&L.

2. The DEP's decision to award the contract to A&L was arbitrary and capricious; was based upon ignorance through lack of inquiry; was contrary to the DEP's solicitation as well as Florida's competitive bidding law, and the Sunshine Act, and had the appearance of favoritism, if not actual favoritism.

On January 8, 2007, Texas Aquatic filed a Motion for Attorney's Fees Pursuant to Section 57.105. This Motion was based on Texas Aquatic's assertion that DEP failed to comply with Subsection 287.057(2)(a), Florida Statutes, in that there was no writing supporting the basis upon which the decision to use an RFP was made. The ALJ denied the Motion in the RO.

The hearing was conducted on January 16-18, 2007. The hearing transcript was filed on January 25, 2007, and all the parties filed proposed recommended orders. Also on February 5, 2007, Texas Aquatic filed a Motion to Supplement Trial Record with Newly Discovered Material Evidence. The DEP's response indicated that the alleged newly discovered evidence concerned matters arising more than a year after the scoring of the RFP proposals. The ALJ determined that it was too remote in time to affect the outcome of the hearing. He further ruled that even if it were to be considered as part of the record, the matters addressed in the Motion were irrelevant. Thus, the ALJ denied Texas Aquatic's Motion.

THE RECOMMENDED ORDER

The ALJ issued his RO in this case on February 27, 2007. He ultimately concluded that DEP's actions were not contrary to its statutes, rules or policies, or to the

proposal specifications. (RO Conclusion of Law 97). In arriving at this conclusion the ALJ found that the evaluators fairly evaluated the four proposers and applied all criteria fairly and uniformly to them. (RO Findings of Fact 34, 42, 45, 50, 52, 54). He concluded in Finding of Fact 60 that:

> The scores assigned by the evaluators were made on their assessment of the RFP, the responses to the RFP, and their experience in the field. The evaluators themselves were conscientious, fair, and experienced. They independently arrived at the same basic conclusions. There is nothing in the record to indicate that their scores were arbitrary, capricious, or contrary to the requirements of the RFP. These scores represented the evaluators' honest judgment, which was unimpeded by extraneous input.

The ALJ found that although Texas Aquatic had the lower rates when judged on price alone, the evaluators properly considered efficiency, in addition to price, and concluded that A&L's machine was much more efficient. This was in keeping with the terms of the RFP and the Evaluation Criteria Scoresheet. (RO Finding of Fact 64). The ALJ found that when addressing the cost effectiveness criterion, the evaluators carefully and conscientiously considered productivity and cost in determining the cost effectiveness of the machines. (RO Finding of Fact 71).

The ALJ also determined that the evaluators were chosen based on their experience in floating island and tussock shredding. (RO Finding of Fact 73). He concluded that "the law seeks a knowledgeable and experienced selection team which will produce evaluations in which the merits of competing proposals are fairly and <u>competently</u> considered." (emphasis in original) (RO Finding of Fact 74).

The ALJ found that the writings evidencing support for the decision, as well as the testimony of record, taken as a whole, demonstrate that the decision to issue an

RFP rather than an ITB (Invitation to Bid) was a conscious one that was made with a consideration of the alternatives and of the practicality of an ITB. (RO Finding of Fact 16). The ALJ found that DEP did not determine in writing that the use of an ITB was not practicable. (RO Finding of Fact 17). However, the ALJ concluded that because the time for taking issue with DEP's decision to use the RFP method of procurement had passed, Texas Aquatic's challenge to the decision was waived. (RO Finding of Fact 18, Conclusion of Law 87).

STANDARDS OF REVIEW

The following rulings on the Exceptions to the RO are made in light of the standards governing the administrative review of DOAH recommended orders, and in particular in bid protests, by agencies having the authority and duty to enter final orders. Subsection 120.57(1)(l), Florida Statutes, provides that an agency final order "may reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules over which it has substantive jurisdiction." Subsection 120.57(1)(l) also prescribes that an agency reviewing a DOAH recommended order may not reject or modify the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the 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 essential requirements of law." However, if a finding of fact in a recommended order is improperly labeled by an administrative law judge, the label should be disregarded and the item treated as though it were properly labeled as a conclusion of law. Battaglia

Properties v. Fla. Land and Water Adjudicatory Commission, 629 So.2d 161, 168 (Fla. 5th DCA 1994).

There is no contention in any of the Exceptions filed in this case that the DOAH proceeding did not comply with essential requirements of law. Thus, the ALJ's findings of fact cannot be rejected unless it is demonstrated that they were not based on competent substantial evidence of record. Also, I have no authority to reweigh the evidence presented at the final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. See, e.g., Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands County School Board, 652 So.2d 894 (Fla. 2d. DCA 1995); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987). These evidentiary matters are within the province of the ALJ, as the trier of the facts in this administrative proceeding. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

A reviewing agency thus has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. Brogan v. Carter, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record in this case discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such finding in this Final Order. Bradley, 510 So.2d at 1123. In addition, a reviewing agency has no authority to make independent or supplemental findings of fact in construing the recommended order on review. See, e.g., North Port, Fla. v. Con. Minerals, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

The standard of review in this proceeding where a DEP procurement decision is being contested is also governed by established case law of Florida. The appellate courts have repeatedly held that public agencies have wide discretion in soliciting and accepting proposals through the competitive procurement process; and such decisions, when based on honest exercises of discretion, will not be overturned by the courts even if they may appear to be erroneous and even if reasonable persons may disagree. Dept. of Transportation v. Groves-Watkins Constructors, 530 So.2d 912, 913 (Fla. 1988); Liberty County v. Baxter's Asphalt and Concrete, 421 So.2d 505, 507 (Fla. 1982); Engineering Contractors v. Broward County, 789 So.2d 445, 450 (Fla. 4th DCA 2001); Scientific Games v. Dittler Brothers, 586 So.2d 1128, 1131 (Fla. 1st DCA 1991).

In addition, the 1996 revisions to the Administrative Procedure Act ("APA") included an amendment substantially rewriting Section 120.57(3), Florida Statues, now entitled "ADDITIONAL PROCEDURES APPLICABLE TO PROTESTS TO CONTRACT SOLICITATION OR AWARD." Current Section 120.57(3) reads, in pertinent part, as follows:

> (f) . . . Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

If there are disputed issues of material fact, the *de novo* hearing under Subsection 120.57(3)(f) is subject to the same procedural requirements as other formal

hearings held pursuant to Section 120.57(1). See § 120.57(3)(d)3, Fla. Stat. It is the responsibility of the administrative law judge under Subsection 120.57(3)(f), to "determine whether the agency's proposed [procurement] action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications," and the burden of proof is on "the party protesting the proposed agency action."

The Florida case law construing Subsection 120.57(3)(f) concludes, however, that the phrase "*de novo* proceeding" set forth therein is used to describe a somewhat different administrative proceeding from that normally conducted pursuant to Section 120.57(1), Florida Statutes. See State Contracting v. Dept. of Transportation, 709 So.2d 607 (Fla. 1st DCA 1998). In a typical Section 120.57(1) hearing, the administrative law judge essentially sits in the place of the agency being challenged; and this *de novo* proceeding is designed not to review prior agency action, but to actually formulate final agency action on the matter being contested. See, e.g., Hamilton County Commissioners v. Dept. of Environmental Regulation, 587 So.2d 1378, 1387 (Fla. 1st DCA 1991).

In contrast, the *de novo* proceeding described in Subsection 120.57(3)(f) has been construed by the First District Court of Appeal of Florida to be a "form of intra-agency review" where the object of the proceeding is to "evaluate the [prior] action taken by the agency," rather than to formulate final agency action. State Contracting, 709 So.2d at 609. The State Contracting opinion cites with approval to Intercontinental Properties, Inc. v. Dept. of Health & Rehab. Services, 606 So.2d 380 (Fla. 3d DCA 1992), interpreting the phrase "*de novo* hearing" as used in bid protest proceedings

before the 1996 revision of the APA. State Contracting, 709 So.2d at 609. On page 386 of its Intercontinental Properties opinion, the court concluded as follows:

> Although the hearing before the hearing officer was a *de novo* proceeding, that simply means that there was an evidentiary hearing during which each party had a full opportunity to develop an evidentiary record for administrative review purposes. It does not mean, as the hearing officer apparently thought, that the hearing officer sits as a substitute for the Department and makes a determination whether to award the bid *de novo*.

DOAH ALJ, John G. Van Laningham, has observed that the State Contracting "intra-agency review" interpretation of a Section 120.57(3)(f) *de novo* proceeding actually results in a proceeding having the "hybrid nature of an appellate trial." See Syslogic Technology Services v. South Florida Water Management District, 26 FALR 1368, 1382 (Fla. SFWMD 2002), appeal dismissed without a published opinion, 819 So.2d 771 (Fla. 2d DCA 2002); and R. N. Expertise, Inc. v. Miami-Dade County School Board, 2002 WL 185217 (Fla. Div. Admin. Hrgs.), adopted in toto March 14, 2002, affirmed without a published opinion, 875 So.2d 1251 (Fla. 5th DCA 2004).

The Syslogic Technology Services and R. N. Expertise Final Orders adopt a detailed analysis by ALJ Van Laningham of the "standard of review" issue under Subsection 120.57(3)(f). ALJ Van Laningham noted that, although designated as a "standard of proof" in Subsection 120.57(3)(f), the terms "clearly erroneous", "arbitrary," or "capricious" are actually recognized review standards, rather than standards of proof normally applicable in evidentiary hearings. Syslogic Technology Services, 26 FALR at 1380. The ALJ also concluded that it is highly unlikely that the Legislature intended to change the standard of proof in bid protest cases from the recognized "preponderance of the evidence standard" applicable to all other administrative proceedings. Id. at

1380. The ALJ further concluded that it is thus a reasonable interpretation of the term "standard of proof" in Subsection 120.57(3)(f) to mean "standard of review." Id. at 1380.

ALJ Van Laningham's "standard of review" interpretation of Subsection 120.57(3)(f) was adopted without any modifications by the South Florida Water Management District in its Final Order. Id. at 1368. I view this interpretation of Subsection 120.57(3)(f) in the Syslogic Technology Services case and the R.N. Expertise case to be reasonable and persuasive. Accordingly, in preparing this Final Order, the standard of review applied in determining the propriety of DEP's proposed award was whether this action was "clearly erroneous, contrary to competition, arbitrary, or capricious."

RULINGS ON EXCEPTIONS TO THE RECOMMENDED ORDER

Preface

Upon review of the Exceptions to the RO filed by Texas Aquatic, I conclude that the Exceptions will be addressed numerically to correlate with Texas Aquatic's subject headings and as suggested by A&L's Response. I will directly address and rule on Exceptions to specifically identified paragraphs with an identifiable legal basis for dispute. See § 120.57(1)(k), Fla. Stat. Thus, nine main Exceptions raised by Texas Aquatic will be addressed. Texas Aquatic's dispute of the ALJ's ruling on its attorney's fees motion will be addressed separately. DEP also filed Exceptions to which no Responses were filed. DEP's Exceptions will be addressed below.

Texas Aquatic's Exception No. 1

Texas Aquatic disputes the ALJ's Findings of Fact 10, 16, 17, and related Conclusion of Law 87 (Texas Aquatic Exceptions paragraphs 1, 3, 4, 5, 6, 7). It

appears that the basis for Texas Aquatic's exception to Findings of Fact 10 and 16 is that "[t]here is no evidence that any FDEP employee determined in any fashion that use of the ITB process was not practicable." (Texas Aquatic Exceptions paragraph 5). In support of this contention Texas Aquatic does not argue that the ALJ's findings are without support in the record. Instead, Texas Aquatic argues that I should reweigh the evidence in a manner that will support its contention.

As noted in the Standards of Review I have no authority to reweigh the evidence where, as here, the challenged factual findings are reasonable interpretations of and/or inferences drawn by the ALJ from competent substantial evidence of record. See Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1985). This competent substantial evidence supporting Findings of Fact 10 and 16, includes the ALJ's unchallenged Findings of Fact 11 through 15 and the final hearing testimony of Mr. Schardt, Ms. Kelly and Ms. Etheridge. (See, e.g., T 622: 10-13; T 639: 10 – 640:6; T 610: 21-24; T 628: 20-25; T 638: 16-22; T 630: 14-24; T 631: 2-12; Joint Exhibits J-1, J-4, J-23).

I conclude that Finding of Fact 17 is a mixed statement of fact and law. The ALJ cites the provision in Subsection 287.057(2)(a), Florida Statutes, and concludes that there "was no agency determination in writing that the use of an ITB was not practicable." According to paragraph 4 and the first sentence of paragraph 5 of the Exceptions, Texas Aquatic does not dispute this mixed statement of fact and law.

Texas Aquatic's dispute with the ALJ's related Conclusion of Law 87 will be addressed in Exception No. 9 below. Thus, Texas Aquatic's Exception to Findings of Fact 10, 16 and 17 is denied.

Texas Aquatic's Exceptions to paragraphs 2 and 8-11 dispute Findings of Fact 22 and 27. Essentially, Texas Aquatic disputes the ALJ's finding that the DEP could not determine annual cost because this was an "as needed" contract where the contractor might be asked to perform $12.5 million worth of work, or no work at all. The ALJ found that the "ultimate total cost figure will be weather-dependent, work-dependent, and appropriation-dependent." I conclude that there is competent substantial evidence in the record to support the ALJ's findings. (T 650: 9 – 653:17; T 604: 23 – 605: 4). Therefore, Texas Aquatic's Exception to Findings of Fact 22 and 27 is denied.

Texas Aquatic disputes the ALJ's Findings of Fact 1 through 7 that conditions had changed since 1999, thus warranting the use of the RFP process. (Texas Aquatic Exceptions paragraphs 12-17). Texas Aquatic argues that I should reweigh the evidence in a manner different than the ALJ, and make independent or supplemental findings that will support its contentions. See Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). In addition Texas Aquatic argues that I should resolve conflicting evidence and judge witness credibility, in direct contravention of the above Standards of Review. See North Port, Fla. v. Con. Minerals, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

I conclude that the ALJ's Findings of Fact 1 through 7 are supported by competent substantial evidence in the record including the final hearing testimony of Mr. Schardt at T 634 – 638. (See also Finding of Fact 1, T 635: 18-24, T 635 – 637; Finding of Fact 2, T 36: 12-14, T 635: 9-12, T 520: 12-14, T 276: 25 – 277: 2; Finding of Fact 3, T 634: 10-12, T 653: 4-7; Finding of Fact 4, T 635: 15-17, T 641: 24-25, T 635 – 637;

Finding of Fact 5, T 645: 2-5; Finding of Fact 6, T 625: 6-9, T 633: 22-25, T 638: 23 – 639: 5; Finding of Fact 7, T 662: 10-13).

Consequently, Texas Aquatic's Exception to Findings of Fact 1 through 7 is denied.

Texas Aquatic Exception No. 2

In Findings of Fact 34, 42, and 54, the ALJ finds that three evaluators (Mr. Jones, Mr. Hinkle and Mr. Phillips) fairly evaluated the four proposers and applied all criteria fairly and uniformly to them. I conclude that these findings are the ALJ's reasonable inferences that are supported by the competent substantial evidence of record. (See e.g., Finding of Fact 34, T 321: 17 – 323: 9, T 324: 11-20; Finding of Fact 42, T 375: 7 – 376: 6, Joint Exhibit J-16; Finding of Fact 54, T 521:5 – 525: 7). Texas Aquatic disputes these findings (and related Conclusion of Law 97) but does not assert that they are not supported by the record evidence. (Texas Aquatic Exceptions paragraphs 18-21). Consequently, Texas Aquatic's Exception to Findings of Fact 34, 42, and 54 is denied.

Texas Aquatic's Exception No. 3

Texas Aquatic disputes the ALJ's Findings of Fact 68, 69, 70, and 71 that the evaluators considered productivity and cost effectiveness of the machines. (Texas Aquatic Exceptions paragraphs 22-28, 31). Texas Aquatic again argues that I should reweigh the evidence in a manner different than the ALJ, and make independent or supplemental findings that will support its contentions. See Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). I conclude that these findings are reasonable inferences drawn by the ALJ from competent substantial evidence. (See e.g., Finding of Fact 68, Joint Exhibit J-7; Finding of Fact 69, Joint Exhibits J-2, J-

3, T 317: 1 – 318: 5, T 410: 6-16, T 346:16 – 347: 13, T 366: 4-24,T 515: 21 – 518, T 438: 17 – 440: 14; Finding of Fact 70, T 291: 14-24, T 362: 19 – 366, T 399 – 401: 7, T 441: 11 – 442: 5; Finding of Fact 71, Id.). Texas Aquatic's Exceptions to Findings of Fact 68, 69, 70, and 71 are denied.

Texas Aquatic disputes the ALJ's Finding of Fact 63 that A&L's additional hourly rates for airboats and "Go Devil" boats would only be charged if they were to be used for purposes not in connection with actually shredding vegetation. I conclude that the ALJ's finding is based on competent substantial evidence in the record found in A&L's proposal. (Joint Exhibit J-3, DEP00324). Therefore, Texas Aquatic's Exception to Finding of Fact 63 is denied.

Texas Aquatic's Exception No. 4

Texas Aquatic disputes the ALJ's Findings of Fact 33, 39, 65, and 66 that the evaluators considered the machines equal with regard to draft and height. (Texas Aquatic Exceptions paragraphs 32-41). Texas Aquatic contends that I should reweigh the evidence in a manner different than the ALJ, and make independent or supplemental findings that will support its view of the evidence. See Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

I conclude that these findings are reasonable inferences drawn by the ALJ from competent substantial evidence and I have no authority to reject them. See § 120.57(1)(l), Fla. Stat. (Finding of Fact 33, T 301: 5 – 302: 3; Finding of Fact 39, T 347: 21 – 348: 6; Findings of Fact 65 and 66, T 299: 19 – 300: 18, T 301: 5 – 302: 3, T 347: 21 – 348: 6, T 404: 4 – 405: 7, T 442: 25 – 443: 3, T 445: 9-15, T 508: 12 – 512: 8).

Consequently, Texas Aquatic's Exception to Findings of Fact 33, 39, 65 and 66, is denied.

Texas Aquatic's Exception No. 5

In this Exception Texas Aquatic does not identify any "disputed portion of the recommended order by page number or paragraph." See § 120.57(1)(k), Fla. Stat. Accordingly, I decline to rule on this Exception.

Texas Aquatic's Exception No. 6

Texas Aquatic disputes the ALJ's Findings of Fact 40, 60, and 71 that the evaluators scored the proposals and not the vendors, that their actions were not arbitrary, capricious, or contrary to the requirements of the RFP, and that their judgment was honest, fair and unimpeded by extraneous input. (Texas Aquatic Exceptions paragraphs 43-54). Findings of Fact 40, 60, and 71 appear to be permissible inferences from the competent substantial evidence of record. (Finding of Fact 40, T 369: 12-15; Findings of Fact 60 and 71, T 321: 17 – 323: 9, T 324: 11-20, T 375: 7 – 376: 6, T 419: 24 – 420: 21, T 423: 5-23, T 424: 12-19, T 458: 22 – 459: 8, T 463: 5 – 465: 18, T 466: 22- 467: 4, T 521: 15 – 525: 7).

As previously discussed above, I have no authority to substitute my judgment for that of the trier of fact, reweigh the evidence, and make independent or supplemental findings favorable to Texas Aquatic's contentions. As ALJ Van Laningham stated in R. N. Expertise, Inc. v. Miami-Dade County School Board, 2002 WL 185217 (Fla. Div. Admin. Hrgs.), at paragraph 84:

> Because a bid protest is fundamentally a *de novo* proceeding, it is concluded that the agency is entitled to no deference in connection with the resolution of disputes involving objective facts. It is exclusively the judge's job, as

> the trier of facts, to ascertain from the competent, substantial evidence in the record what actually happened in the past or what reality presently exists, as if no decision previously had been made.

Texas Aquatic also contends that the evaluators used their experience and knowledge of the vendors and their equipment capabilities in the evaluation of the proposals. (Texas Aquatic Exceptions paragraph 47). Under Section 287.057(17), Florida Statutes, evaluators are selected for their experience and knowledge in the program areas and service requirements for which the contractual services are sought. (Finding of Fact 74). Clearly the law seeks a knowledgeable and experienced selection team which will produce evaluations in which the merits of competing proposals are fairly and competently considered. (Finding of Fact 74). In this case, the ALJ found that the evaluators were chosen by Mr. Schardt based on their experience in floating island and tussock shredding. (Finding of Fact 73).

Evaluators are not required to be blank slates, but must apply their knowledge and expertise, including their familiarity with other people and entities operating in the industry, to successfully accomplish their duties. See e.g., Old Tampa Bay Enterprises, Inc. v. Dept. of Transportation, Case No. 98-5225BID, paragraphs 158-162 (DOAH May 27, 1999); Morall & Carey v. Dept. of Revenue, Case No. 95-3029BID, paragraphs 47-52 (DOAH August 31, 1995) (holding that the pre-existing relationship between the evaluators and Intervenor did not transform the honest exercise of the evaluator's discretion into an arbitrary exercise of agency discretion).

Consequently, Texas Aquatic's Exceptions to Findings of Fact 40, 60, and 71 are denied.

Texas Aquatic's Exception No. 7

Texas Aquatic disputes the ALJ's Findings of Fact 20, 75, and 76, which determined that A&L's proposal was responsive. (Texas Aquatic Exceptions paragraphs 55-64 and 83-85). I conclude that these findings appear to be reasonable inferences from the competent substantial evidence in the record of this proceeding. (See e.g., T 601: 15 – 602:17; T 612:11 – 613: 15; T 621: 11- 623: 2; Joint Exhibits J-1, J-2, J-3).

Consequently, Texas Aquatic's Exceptions to Findings of Fact 20, 75, and 76 are denied.

Texas Aquatic's Exception No. 8

Texas Aquatic disputes the ALJ's Findings of Fact 41, 61, and 62 that Chester Catterton's purchase of inexpensive lunches from time to time, over a period of years, for some of the evaluators, did not cause them to be biased in favor of A&L. (Texas Aquatic Exceptions paragraphs 65-67 and 75). Texas Aquatic does not challenge whether these findings are based on competent substantial evidence. Instead, Texas Aquatic suggests that I make an additional finding that the facts constitute an "appearance of favoritism." I have no authority to make independent or supplemental findings of fact in construing the recommended order on review. See, e.g., North Port, Fla. v. Con. Minerals, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

Texas Aquatic's Exception to Findings of Fact 41, 61, and 62 is denied.

Texas Aquatic's Exception No. 9

Texas Aquatic Exceptions to the ALJ's Conclusions of Law are essentially set forth in paragraphs 68-85 of its Exceptions document. As pointed out by DEP's

Response, Texas Aquatic essentially makes three arguments in support of its conclusion that DEP must either award the contract to Texas Aquatic as the only responsive proposer, or reject all proposals and re-advertise the project utilizing the procedures specified by Section 287.057, Florida Statutes, and Florida competitive procurement law. (Texas Aquatic Exceptions, page 32).

First, Texas Aquatic disputes Conclusions of Law 80-87 and disagrees with the conclusion that it has waived its right under Subsection 120.57(3)(b), Florida Statutes, to complain about the proposed method of procurement, including the absence of a "written determination" that use of an ITB was not practicable and that "total annual cost" was not required in the RFP. In its Exceptions, Texas Aquatic devoted many paragraphs (12 through 16) in an attempt to persuade me that there was no need to change from an ITB method of procurement to the RFP method of procurement. This assertion is contrary to the ALJ's Findings of Fact 1 through 7, which I've ruled are supported by competent substantial evidence. See Exception No. 1 above.

Texas Aquatic did not file a challenge to the decision to use the RFP method of procurement within 72 hours after the posting of the solicitation. (RO Finding of Fact 18). The ALJ properly concluded in Conclusion of Law 86 that:

> The policy underlying this requirement and the waiver provision is obvious: If a would-be offeror takes issue with the State's proposed method of procurement, it should challenge that method at the inception, so that any legal or other element of the state's request can be remedied in a timely fashion, rather than at the end of the process. A late challenge to the method of procurement in which an offeror has participated without objection cannot affect the validity of the procurement process nor the ultimate award.

Correctional Services Corporation v. Dept. of Juvenile Justice, Case Nos. 02-2966BID and 02-2967BID (DOAH October 29, 2002), adopted in toto in Case No. 02-0008 (Fla. Dept. of Juvenile Justice, November 16, 2002).

Texas Aquatic had the opportunity to protest the terms, conditions and specifications contained in the RFP solicitation, including the requirement that each vendor quote an hourly rate that would be binding for 12 months, subject to an escalation/de-escalation clause (Joint Exhibit J-1, DEP00108). This is the mechanism used by DEP to address annual cost estimates where no minimum amount of work is guaranteed under a contract (T 613: 16 – 614: 21). Thus, Texas Aquatic was required to challenge this specification within 72 hours of the initial solicitation and cannot now complain that "total annual cost" was not required by the RFP. See § 120.57(3)(b), Fla. Stat.

The ALJ also concluded that Texas Aquatic had waived its right to challenge the absence of a "written determination" that use of an ITB was not practicable. In Humana Health Care Plan v. Dept. of Administration, 1988 WL 617038 (Final Order entered April 28, 1988), the agency concluded in paragraph 50 of the Final Order that:

> While the Department did not make a written determination, failure to do so does not invalidate the competitive process under these circumstances. All of the proposers knew when they received the RFP's that no written determination was included or they could have discovered that fact by the exercise of due diligence. None of the proposers made inquiry within the 72 hours protest period . . ., and any protest to the failure to make a written documentation is therefore waived.

Based on the foregoing and on the ALJ's conclusions, Texas Aquatic's Exceptions to Conclusions of Law 80-87 are denied.

Second, Texas Aquatic disputes the ALJ's Conclusion of Law 97 that DEP's award was not arbitrary and capricious. (Texas Aquatic Exceptions paragraphs 76-82). Many of the factual findings supporting Conclusion of Law 97 were addressed in my ruling on Texas Aquatic's Exception No. 6. It is noteworthy that Texas Aquatic did not take exception to Conclusion of Law 89. In a mixed statement of fact and law, the ALJ concluded that the object of this proceeding is to evaluate the action taken by the agency at the time it took the action. He found that "[t]he RFP specifications provide broad discretion as to the evaluation and scoring process."

Therefore, the ALJ essentially concluded that based on the evidence, Texas Aquatic did not prove a specific instance or instances where DEP violated a standard of conduct, that is, its actions were not contrary to the DEP's statutes, rules or policies, or to the proposal specifications.

Third, Texas Aquatic asserts that A&L's proposal was not responsive. (Texas Aquatic Exceptions paragraphs 83-85). I've ruled on this contention in Texas Aquatic's Exception No. 7 above.

In paragraph 78 of its Exceptions, Texas Aquatic disputes the ALJ's Findings of Fact 32, 33, 36, 38, 39, 44, 47, 48, 53, 60 and 71, on the basis that the evaluators were allowed to base their decisions on extrinsic evidence obtained from their personal observations of the proposers. Texas Aquatic does not contend that these findings are not supported by competent substantial evidence. In fact, some of these findings are "disputed" elsewhere by Texas Aquatic and I've ruled on them in the above Exceptions. Under the authority of Subsection 120.57(1)(k), Florida Statutes, I decline to rule on

Texas Aquatic's "disputes" with these findings as described in their Exceptions paragraph 78.

Consequently, based on the foregoing, Texas Aquatic's Exceptions to ALJ's Conclusions of Law are denied.

RULINGS ON DEP'S EXCEPTIONS TO THE RECOMMENDED ORDER

DEP's Exception Nos. 1 and 2

The DEP takes exception to that portion of Finding of Fact 17 which states that "the writings are insufficient to proved[sic] compliance with Subsection 287.057(2)(a)." DEP contends that there is no competent substantial evidence to support this finding.

The ALJ's Findings of Fact 10 through 16 describe the existence of writings in the form of e-mails, undated memorandum, Contract Initiation Form and RFP scope of services, which evidence support for the decision to issue an RFP rather than an ITB. (RO Finding of Fact 16). However, sitting as the trier of fact the ALJ determined that none of these writings were sufficient to comply with Subsection 287.057(2)(a). (RO Finding of Fact 17). Additionally, the ALJ reiterated his determination in Conclusion of Law 81, to which the DEP did not take exception. I conclude that I have no authority to draw an inference from the evidence that is different from that drawn by the ALJ. (See Standards of Review). Additionally, the ALJ describes in Finding of Fact 15 the type of writing that would be sufficient to comply with the statute. The ALJ found that a series of e-mails were exchanged between Kat Etheridge and Ms. Kelley that discussed the RFP. "However, these emails did not contain a discussion of the practicability of an ITB vis-à-vis an RFP." (RO Finding of Fact 15).

Order as required by Section 120.595(1). Unlike trial judges, agency heads do not have authority to enter separate orders awarding or denying attorney's fees and costs after final orders have been entered in administrative cases. The award of attorney's fees and costs by an agency pursuant to Section 120.595(1) must be made in "the final order in a [s. 120.57(1)] proceeding." See § 120.595(1)(b), Fla. Stat.

Sections 57.105(1) and 57.105(5), Florida Statutes, also require that the ALJ make a determination that the losing party or the losing party's attorney knew or should have known that a claim or defense would not be supported by the material facts or by the application of the existing law to the material facts. These determinations and any related award of attorney's fees must be made by the ALJ in a separate order, which is directly reviewable by the appropriate district court of appeal. See § 57.105(5), Fla. Stat.

Therefore, Texas Aquatic's request for an award of attorney's fees in a separate DEP order is denied.

CONCLUSION

In 2005, the DEP's Bureau of Invasive Plant Management determined that floating masses of aquatic and woody plants (tussocks and floating islands) are a continuing problem in Florida's lakes and rivers. These tussocks and floating islands degrade the general ecology of Florida's water bodies and can jam against bridges and flood control structures, which may cause flooding or structural damage.

DEP issued an RFP seeking proposals from vendors for mechanical shredding of these floating islands and tussocks, on October 25, 2005. The RFP sought a primary and secondary contractor. After four companies responded and the responses were

evaluated, scored and ranked, DEP posted its notice of intended award. The notice stated that A&L was selected as the primary contractor and Texas Aquatic as the secondary contractor. Texas Aquatic timely protested the award to A&L. Subsequent to almost a year of unsuccessful discussions, Texas Aquatic's protest was referred to DOAH for an administrative hearing. DOAH assigned an ALJ who conducted a bid protest administrative hearing in accordance with Section 120.57(3), Florida Statutes. The ALJ issued his RO on February 27, 2007.

Based on the many underlying findings of the ALJ adopted in this Final Order, I concur with his ultimate conclusion that DEP's actions were not contrary to its statutes, rules or policies, or to the RFP specifications.

It is therefore ORDERED:

A. To the extent that the Recommended Order (Exhibit A) has not been modified by the above rulings in this Final Order, it is adopted and incorporated by reference herein.

B. Petitioner Texas Aquatic Harvesting, Inc.'s petition is dismissed.

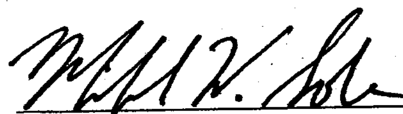
C. DEP's Notice of Intended Award for DEP Solicitation 2006011C announcing A&L Aquatic Weed Control as the primary contractor and Texas Aquatic Harvesting, Inc., as the secondary contractor, is hereby AFFIRMED.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal

accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 29th day of March, 2007, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



MICHAEL W. SOLE
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Syndie Kinsey, Deputy CLERK

3.29.07
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

George E. Spofford, IV, Esquire
Glenn Rasmussen Fogarty & Hooker, P.A.
100 South Ashley Drive
Suite 1300
Tampa, Florida 33602

E. Gary Early
Albert T. Gimbel
Messer, Caparello & Self, P.A.
2618 Centennial Place
Tallahassee, Florida 32308

Claudia Llado, Clerk and
Harry L. Hooper, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Marshall G. Wiseheart, Esquire
Jonathan H. Alden, Esquire
Reagan Roane, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 30th day of March, 2007.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

FRANCINE M. FFOLKES
Senior Assistant General Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242