STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SPINELLA ENTERPRISES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**OGC CASE NO. 08-0845**
	)	**DOAH CASE NO. 08-3380BID**
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

On October 2, 2008, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were served to counsel for the Department and to the Petitioner, Spinella Enterprises, Inc. ("Spinella"). The Department filed Exceptions to the RO on October 13, 2008. Spinella filed a response to the Exceptions on October 23, 2008. This matter is now before me for final agency action.

BACKGROUND

The Department issued an Invitation to Bid ("ITB") on January 10, 2008, which sought competitive bids from roofing contractors interested in performing roof repairs on several buildings located in a state park. After opening the bids on February 12, 2008, the Department deemed that ten (out of twelve) of the bids submitted were responsive.

Thereafter, the Department determined that the Petitioner Spinella had quoted the lowest price for the work. A notice of intent to award a contract to Spinella was posted on February 19, 2008. The second lowest bidder was The Bookhardt Group ("Bookhardt"). Bookhardt timely protested the intended award, raising several objections. On May 16, 2008, while this first protest was pending, the Department gave notice of its intent to reject all bids. Spinella timely protested the decision to abort the instant procurement. The Department referred the matter to DOAH on July 10, 2008. The final hearing took place as scheduled on August 7, 2008. Subsequently, the ALJ entered his RO.

RECOMMENDED ORDER

The ALJ determined, as a matter of ultimate fact, that the Department's intended rejection of all bids was arbitrary. (RO ¶32). He concluded that the Addendum at issue was not confusing, ambiguous, or fatally flawed. The Addendum clearly and plainly stated DEP's intent that bidders follow the Manual adopted in Rule 9B-3.0475, Florida Administrative Code ("F.A.C."), and not the Revised Manual that would ultimately be adopted by an amendment to Rule 9B-3.0475, F.A.C. (RO ¶¶ 19, 20, 34).

The ALJ found that the objective facts included the following. On January 10, 2008, the DEP issued an ITB to solicit competitive bids from qualified contractors on a project whose scope of work envisioned repairs to the wind-damaged roofs of several buildings, including single-family residences, located on the grounds of the Hugh Taylor Birch State Park in Fort Lauderdale, Florida. (RO ¶¶ 1 and 2). Work on single-family residences needed to conform to the requirements prescribed in the 2007 Manual of

Hurricane Mitigation Retrofits for Existing Site-Built Single Family Residential Structures (the "Manual"), recently adopted, by incorporative reference, as a rule, on November 17, 2007. See Fla. Admin. Code R. 9B-3.0475 (2007). (RO ¶ 3). Just before the Department issued the ITB, the Florida Building Commission had approved, at a meeting on January 8, 2008, a modified version of the Manual, which it called the 2007 Manual of Hurricane Mitigation Retrofits for Existing Site-Built Single Family Residential Structures, Version 2 (the "Revised Manual"). The Revised Manual would eventually be adopted by amendment to Rule 9B-3.0475, F.A.C., which amendment took effect in April, 2008. (RO ¶¶ 3, 4, 5 and 10). On February 5, 2008, the Department issued Addendum No. 4 to the ITB (the "Addendum"). The Addendum provided in pertinent part:

> Bidders shall bid the project as specified despite the recent change in Rule 9B-3.0475 relating to hurricane mitigation retrofits. Any additional water barrier will be accomplished by Change Order after award of the contract.

Thereafter, on February 12, 2008, the Department opened the bids it had received in response to the ITB. Ten out of twelve of the bids submitted were deemed responsive. On February 19, 2008, DEP posted notice of its intent to award a contract to the lowest bidder, namely Spinella, which had offered to perform the work for $94,150. (RO ¶¶ 6, 7, 8). The second lowest bidder was Bookhardt, who then timely protested the intended award. Subsequently, on May 16, 2008, DEP posted notice of its intent to reject all bids received in response to the ITB. (Bookhardt's protest, which remained pending, had never been referred to DOAH for a formal hearing.) Spinella timely protested the

Department's decision to reject all bids. In an email sent to Spinella on July 22, 2008, DEP's counsel explained the rationale behind the decision:

> The reason the Department rejected all bids follows. When the Department posted the notice of intent to award the contract to Spinella Enterprises, Inc., the second low bidder (Bookhardt Roofing) protested the intent to award. The second low bidder's basis for protesting the intended award was that Addendum 4 directed bidders to ignore certain rules of the Construction Industry Licensing Board [sic], which had become effective after the bid opening, which was not in accordance with the law. As a result, this may have caused confusion and the Department had no assurance that bidders were bidding the project correctly. In addition, the statement in Addendum 4 that the Department would add the required moisture barrier afterward by change order set up a situation where bidders had no idea how much the Department would be willing to pay for the change order. Further, the moisture barrier was not the only thing required by the new rules. Potential bidders may not have bid due to these uncertainties. The Department agreed with Bookhardt's assertions and rejected all bids . . . .

(RO ¶¶ 9, 11, 12).

The ALJ determined that the first sentence of the Addendum-at least when read literally-misstated a fact. It did so by assuming that adoption of the Revised Manual was legally effective. But even so, the ALJ found that the unambiguous thrust of the Directive was to tell bidders to rely upon the originally adopted Manual. (RO ¶¶ 16 and 17). Thus, the Addendum unambiguously instructed potential bidders to follow the Manual (the existing law), in preparing their bids. (RO ¶¶ 18, 19). The ALJ concluded that based on the objective facts, a reasonable bidder would not be confused, because its bid would be based on the Manual, just as the Addendum required. (RO ¶¶ 19 and 34).

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." § 120.57(1)(l), Fla. Stat. (2008); Wills v. Florida Elections Commission, 955 So.2d 61 (Fla. 1st DCA 2007); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985) (holding that agency may not reject an ALJ's findings of fact, which are supported by competent, substantial evidence, nor is it authorized to reweigh the evidence, resolve conflicts in testimony, draw inferences, judge credibility of witnesses, or otherwise interpret the evidence). 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).

Evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. See e.g., Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. See e.g., Collier Medical Center v. State, Dept. of HRS, 462 So.2d 83, 85 (Fla. 1st DCA 1985); Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So.2d 383, 389 (Fla. 5th DCA 1983). A reviewing agency 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. Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). 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 the provisions of Subsection 120.57(3), Florida Statutes, and 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).

Subsection 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. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

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 Subsection 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 intended action is illegal, arbitrary, dishonest, or fraudulent," and the burden of proof is on "the party protesting the proposed agency action."

RULINGS ON EXCEPTIONS

Preface

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. See Couch v. Commission on Ethics, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." Environmental Coalition of Florida, Inc. v. Broward County, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

Rulings on Respondent's Exceptions

Exception No. 1

The Department takes exception to paragraphs 14 through 22 of the RO (nine of the ALJ's ultimate factual findings), on the basis that they are not based on competent, substantial evidence in the record. However, the exception specifically presents arguments directed only at Findings of Fact ("FOF") 15 through 22. Essentially, the Department contends that there are contrary facts in the record that the ALJ ignored showing that there was confusion and the potential for confusion among bidders; and that the Department's interpretation of these facts is more reasonable than the ALJ's. Under the standard of review that I must apply to my review of this RO, I have 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. Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). In addition, I have no authority to reweigh the evidence, resolve conflicts in testimony, draw inferences, judge credibility of witnesses, or otherwise interpret the evidence. See Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

After reviewing the entire record, I conclude that the ALJ's challenged factual findings are supported by competent, substantial evidence. (FOF 15: Pet. Exh. 2, T. 34-35. FOF 16: Pet. Exh. 2, Resp. Exhs. 1 and 3, T. 72, 93, 96, Pet. Exh. 1. FOF 17: Pet. Exh. 2, T. 57, 95, 96, Resp. Exh. 10. FOF 18: Resp. Exh. 1, T. 27-29, RO endnotes 2, 3 and 4.[1] FOF 19: Pet. Exh. 2, T. 27-29, 110. FOF 20: Pet. Exh. 2, T. 27-29, 34-35, 110. FOF 21: Resp. Exh. 1 at 102-05. FOF 22: Resp. Exh. 1 at 102-05.). Based on the foregoing, the Department's Exception No. 1 is denied.

Exception No. 2

The Department takes exception to paragraph 23 of the RO, which is the ALJ's ultimate determination that the Department's action to reject all bids was arbitrary. The Department then requests that FOFs 14 through 23 be "stricken" and replaced with its proposed thirteen findings of fact. In addition to the reasons for my ruling in

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[1] Findings of Fact may be based on matters officially recognized. See § 120.57(1)(j), Fla. Stat. (2008).

Exception No. 1 above, I must reiterate that 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. Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). In addition, 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). Therefore, the Department's Exception No. 2 is denied.

Exception No. 3

The Department takes exception to conclusion of law paragraph 26, on the basis that the ALJ did not make a specific finding that Spinella sustained its burden. The Department does not argue that the ALJ's statement of the applicable law and burden of proof in paragraph 26 is incorrect. As such, this exception should be denied. A finding that Spinella sustained (or did not sustain) its burden would be a mixed finding of fact and law. As indicated above I have no authority to make independent or supplemental findings of fact. Id. In addition, the ALJ reiterated his ultimate factual and legal conclusions in paragraph 32 of the RO. The Department again argues that I should reject the ALJ's factual determinations. As outlined above, I've concluded that these factual findings are supported by competent, substantial evidence contained in the record of this administrative proceeding. Therefore, the Department's Exception No. 3 is denied.

Exception No. 4

The Department takes exception to conclusion of law paragraph 28. The Department does not argue that the ALJ's statement of the law is incorrect. Instead, the Department argues that the ALJ should have concluded that Spinella failed to show that the purpose or effect of the rejection was to "defeat the object and integrity of competitive bidding." Again the Department argues that I should reweigh the evidence and make findings on whether or not Spinella sustained its burden of proof, which are evidentiary issues exclusively in the province of the ALJ as the trier-of-fact. See §120.57(1)(l), Fla. Stat. (2008); Wills v. Florida Elections Commission, 955 So.2d 61 (Fla. 1st DCA 2007); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985). Therefore, the Department's Exception No. 4 is denied.

Exception No. 5

The Department takes exception to the last sentence of conclusion of law paragraph 31. The Department's argument raises no legally cognizable reason to strike the ALJ's reference to "affixing the rubber stamp." In the context of the ALJ's conclusions in paragraphs 31 and 32, the statement simply shows the ALJ's view that although an agency's determination must be given substantial deference owing to its wide discretion in procurement matters; such deference does not necessarily amount to a "rubber stamp" of the agency's determination. The Department again points to contrary testimony in the record that the ALJ allegedly "ignored." However, it is the ALJ's role in these types of proceedings to weigh the evidence, resolve conflicts in testimony, draw inferences, judge credibility of witnesses, or otherwise interpret the

evidence. See Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Therefore, based on the foregoing, the Department's Exception No. 5 is denied.

Exception No. 6

The Department takes exception to the first sentence in conclusion of law paragraph 32 and suggests that the ALJ's ultimate factual determination be replaced with "the Department's" ultimate factual determination. For all the reasons stated in my previous rulings above such a request violates the standards of review applicable to my review of the ALJ's recommended order. Therefore, the Department's Exception No. 6 is denied.

Exception No. 7

The Department suggests that conclusions of law paragraphs 33 through 36 should be deleted and replaced with its suggested paragraph 33. The Department's suggested paragraph 33 is simply a legal conclusion that would have flowed from the applicable case law (Caber Systems, Inc. v. Dept. of General Services, 530 So.2d 325 (Fla. 1st DCA 1988), if the ALJ had reached very different determinations than those reached in paragraphs 32 and 34 of the RO. Based on my previous rulings that the ALJ's factual findings were based on competent, substantial evidence in the record, I find no fault with and therefore adopt in this Final Order the ALJ's conclusion in paragraph 34:

> 34. In the instant case, the Addendum was not confusing, ambiguous, or fatally flawed. Rather, although the Directive as written, incorrectly suggested that there had been a recent change in Rule 9B-3.0475 (when in fact there recently

> had been published only a *proposed* amendment to the Rule), it nevertheless clearly and plainly stated DEP's intent that bidders follow the applicable, existing law. Caber, therefore, is distinguishable on this basis and hence inapposite.

Therefore, this exception is denied in part. However, as pointed out by the Department, the ALJ's conclusion of law in paragraph 35 is not supported by the applicable case law. In fact, Caber states that an agency is not precluded from initiating a new ITB after it rejects all bids. Caber at 336. An agency could not award a contract under a new ITB until the protest to its intended rejection of all bids is resolved. Id. Therefore, the Department's Exception No. 7 is granted in part and conclusion of law paragraph 35 is not adopted in this Final Order. In addition, the ALJ's conclusion of law paragraph 36 is not adopted in this Final Order, since its purpose appears to be providing legal advice to Spinella regarding remedies that are not currently within the jurisdiction of the ALJ or the Department.

CONCLUSION

Based on the underlying factual findings of the ALJ adopted in this Final Order, I concur with his ultimate conclusion that the Department's rejection of all bids was arbitrary.

It is therefore ORDERED:

A. The Recommended Order (Exhibit A) is adopted, except as modified in this Final Order, and incorporated by reference herein.

B. Petitioner, Spinella Enterprises, Inc.'s, protest to the Department's decision to reject all bids, is sustained.

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 Rules 9.110 and 9.190, 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 3rd day of November, 2008, 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.

CLERK

11/3/08
DATE

CERTIFICATE OF SERVICE

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

Cas Spinella
Spinella Enterprises, Inc.
2016 Sacramento
Weston, FL 33326

Claudia Llado, Clerk and
John G. Van Laningham, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Suzanne Brantley, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 3rd day of November, 2008.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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SPINELLA ENTERPRISES INC.

LICENSED GENERAL CONTRACTOR SINCE 1985 CGC 028491
2016 SACRAMENTO WESTON FL 33326
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DEPT OF ENVIRONMENTAL PROTECTION

OCT 23 2008

OFFICE OF GENERAL COUNSEL

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
RE SPINELLA ENTERPRISES VS DEPARTMENT OF ENVIRONMENTAL PROTECTION
CASE NO 08-3380 BID
RE D.E.P.EXCEPTIONS TO RECOMMENDED ORDER .

I HOPE THAT YOU WILL UNDERSTAND THAT THIS STATEMENT IS NOT COMPROMISED BY SUCH LEGAL MUMBO JUMBO AS TO TRY TO CONFUSE THE ISSUES. I WOULD HOPE TO MAKE CLEAR THAT I AM NOT AN ATTORNEY WITH THE POWER TO WRITE 24 PAGES ON ISSUES THAT I DO BELIEVE ARE UNDISPUTED . I WOULD STIPULATE THAT MY LIFETIME OF APPLYING CONTRACTING STANDARDS AND IN PARTICULAR THE 23 YEARS AS A LICENSED GENERAL CONTRACTOR WITH NOT ONE BLEMISH ON MY RECORD.SPINELLA ENTERPRISES HAS COMPLETED WORK FOR COUNTLESS LOCAL STATE COUNTY AND FEDERAL AGENCIES IN THIS PERIOD TO SAY WE ARE NOT FAMILIAL WITH THE PROCEEDINGS FROM A CONSTRUCTION STANDPOINT IS INCORRECT.
I WOULD LIKE TO POINT OUT A NUMBER IF ISSUES THAT ARE SO OBVIOUS AS TO BE RESTATED.
1- IT IS UNDISPUTED THAT WE WERE THE LOW BIDDER ON THIS PROJECT.
2- IT IS UNDISPUTED THAT AS GENERAL CONTRACTORS IT IS OUR OBLIGATION TO MEET THE REQUIREMENTS AND SPECIFICATIONS OF THE STATED AGENCY AND THE LOCAL AUTHORITY AND THE STATE OF FLORIDA. ANY STATEMENT FROM ANY AGENCY TO IGNORE THESE REGULATIONS SIMPLY CANNOT PREVAIL.
3- IT IS UNDISPUTED THAT IN THE BIDDING PROCESS IT WAS CLEARLY STATED THAT WE MUST MEET THESE STANDARDS. WHICH CLEARLY REQUIRED A GENERAL CONTRACTOR TO BID THIS PROJECT. AS GENERAL CONTRACTOR WE DO NEED TO BE AWARE OF THE STANDARDS IMPOSED BY THE GOVERNING AGENCIES. ANY QUALIFIED CONTRACTOR HAD TO BE AWARE OF THESE STANDARDS AND WOULD HAVE BEEN WELL AWARE OF THESE REQUIREMENTS.
4- IT IS UNDISPUTED THAT ALL SPECIFICATION WEATHER WRITTEN BY ANY CITY , COUNTY STATE OR FEDERAL AGENCY HAVE A CLAUSE WRITTEN INTO THEM WHICH CLEARLY STIPULATE THAT IF A BIDDER ACKNOWLEDGES THAT THERE IS A REQUIREMENT THAT IS IN CONFLICT WITH THEIR ABILITY TO PROPERLY BID THIS PROJECT THEY ARE REQUIRED TO ADVISE THAT AGENCY OF THAT CONFLICT AND AN ADDENDUM MUST BE ISSUED CLARIFYING THAT AMBIGUITY. NO SUCH REQUEST WAS EVER MADE BY ANY OF THE BIDDING ENTITIES INCLUDING BURKHART. IT WAS OUR ASSUMPTION ,AS WE ARE SURE OF THE OTHER BIDDERS ,THAT THESE DIFFERENCES WERE UNDERSTOOD AND THAT AS KNOWLEDGEABLE CONTRACTORS KNEW THAT ALL OF THE REQUIREMENTS OF ALL OF THE AGENCIES MUST BE MET.
5- MY FIRST QUESTION IS IF BURKHART WAS AWARE OF THE POSSIBILITY OF AMBIGUITY WITHIN THE CONTRACT WORDING WHY DID THEY NOT CONTACT THE AGENCY AND MAKE THEM AWARE OF THIS POTENTIAL QUESTION BEFORE THE BIDDING PROCEDURE.
6- MY SECOND QUESTION WOULD BE THAT IF BURKHART WERE THE LOW BIDDER WOULD THEY HAVE QUESTIONED THIS ISSUE.

7- IF YOU WILL LOOK AT THE STATEMENT FROM BURKHART THE CHALLENGE AND THE QUESTIONS AROSE AFTER THE BECAME AWARE OF THE FACT THAT THEY WERE THE SECOND LOWEST BIDDER AND REQUESTED THAT WE IN PARTICULAR SHOULD BE ELIMINATED FROM THE BID AND THAT I ASSUME THE PROJECT BE AWARDED TO THEM.
8- ONE WOULD CONCLUDE THAT THEY SEEM TO BE STATING THAT WE WERE IGNORANT OF THE ISSUE AT HAND BUT BURKHART WERE NOT. WHY THE AGENCY SHOULD CONCLUDE THIS WITHOUT ANY WRITTEN STATEMENT PRIOR TO THE BID WAS INCORRECT.
9- I WOULD MAKE THE COMPARISON TO A JUDGE MAKING A DECISION ON A CASE OF LAW AND THE DEFENDANT TELLING YOU THAT YOU SHOULD IGNORE WHAT YOU KNOW TO BE LAW AND SEE THINGS FROM A PROSPECTIVE OF THEIRS.
10 I WOULD CONCLUDE THAT IF BURKHART HAD BEEN THE LOW BIDDER THIS ISSUE WOULD NOT HAVE BEEN BROUGHT UP BY THEM OR THE AGENCY.
11- IN A SUBSEQUENT TELEPHONE CONVERSATION WE CLEARLY STATED OUR REPUTATION, WORK EXPERIENCE, AND KNOWLEDGE OF THE ISSUES. STATING THAT WE DID ANTICIPATE FOLLOWING THE LAWS AS THEY APPLY NOT ONLY TO D.E.P. BUT ALSO ALL APPLICABLE AGENCIES. SO HERE IS THE NEXT QUESTION WHY WOULD ANY AGENCY WITH THIS KNOWLEDGE , OUR BACKGROUND AND EXPERIENCE DECIDE TO FORGO ALL OF THIS UNLESS THERE WERE A DIFFERENT AGENDA.

THE CHANGE THAT SEEMS TO AFFECT THIS DECISION.
A- I WOULD LIKE TO AGAIN MAKE THE COMPARISON TO THE LEGAL END OF LAW AS IT APPLIES TO THE COURT SYSTEM AND THE CONTRACTING PORTION. NEEDLES TO SAY SINCE ANDREW THERE HAVE INDEED BEEN MANY CHANGES IN THE LAWS GOVERNING HURRICANE PROTECTION. ALL OF SOUTH FLORIDA ARE PRESENTLY GOVERNED BY WHAT IS CALLED THE MIAMI DADE STANDARD. WHICH IS THE MOST STRINGENT SET OF RULES IN THE UNITED STATES. THE CHANGES TO THIS LAW MOST SPECIFICALLY APPLIED TO HOME CONSTRUCTION OF A SQUARE FOOTAGE REQUIREMENTS AND PRICE QUALIFICATIONS THAT HAVE NO BEARING OR APPLICATION TO THE BID AT THE HUGH TAYLOR PROJECT SINCE WE WERE TO FOLLOW THE MOST STRINGENT OF THE RULES AS THEY APPLY , AS WE AS GENERAL CONTRACTORS, AS ALL OTHER GENERAL CONTRACTORS AND CERTAINLY AS BURKHART MUST CERTAINLY BEEN AWARE OF. AT THE SAKE OF REPETITION WHY DID BURKHART NOTE THIS AFTER THE WERE THE SECOND LOWEST BIDDER AND NOT PRIOR.

IT IS UNDISPUTED THAT THE DECISION BY JUDGE VAN LANINGHAM AND RECOMMENDATION TO STIPULATE THESE ISSUES IN OUR FAVOR.

ONE WOULD THINK THAT GIVEN THE COMPLETE INFORMATION THAT JUDGE VAN LANINGHAM HAD. MS BRANTLEY WAS GIVEN SUFFICIENT OPPORTUNITY TO PRESENT HER CASE. AD AS YOU CAN CLEARLY SEE BY THIS WRITERS LACK OF KNOWLEDGE OF THE LAW GOING INTO THE HEARING I COMPARED MYSELF AS DAVID AGAINST GOLIATH. IT WOULD NOT HAVE BEEN REASONABLE TO CONCLUDE THAT GIVEN THE LEGAL BACKGROUND THE WAS AVAILABLE TO HER AND MY LIMITED KNOWLEDGE THAT I WOULD HAVE NOT PREVAILED. AND YET IT IS UNDISPUTED THAT THIS RECOMMENDATION WAS MADE IN MY FAVOR. I WOULD CONCLUDE IT WAS NOT MY ORATORY SKILL OR MY LEGAL PRESENCE THAT WON THE DAY BUT THE MERE FACT THAT I WAS RIGHT.

RESPONDENTS EXCEPTIONS TO RECOMMENDED ORDER.
AS I HAVE MENTIONED ABOVE THERE WERE 24 PAGES OF IF'S ANDS AND BUTS TO JUDGE VAN LANINGHAMS RECOMMENDATION. I GUESS THAT GIVEN THE FULL AVAILABILITY OF LEGAL COUNCIL WITH AN UNLIMITED BUDGET AND WITH THE UNLIMITED TIME ONE WONDERS WHY THE EXCEPTION WAS NOT LONGER.

TIME SEQUENCE

IT IS IMPORTANT TO NOTE THE TIME SEQUENCES THAT HAVE TAKEN PLACE IN THIS CASE ARE CRITICAL TO THE THINKING OF THE D.E.P.
1 IT IS UNDISPUTED THAT WE WERE THE LOW BIDDER
2- IT IS UNDISPUTED THAT THE AGENCY JUDGED THAT WE DID MEET THEIR REQUIREMENTS
3- IT IS UNDISPUTED THAT THE AGENCY FURTHER JUDGED THAT WE DID QUALIFY AS APPROVED GENERAL CONTRACTORS IN GOOD STANDING TO AWARD THIS PROJECT TO US.
4-IT IS UNDISPUTED THAT THE AGENCY POSTED A NOTICE TO AWARD TO SPINELLA ENTERPRISES
5- BURKHART WAS OBVIOUSLY PRIVY ENOUGH TO THE BIDDING DOCUMENTS AND THE BID PROCEDURE ITSELF TO MAKE THEIR COMPLAINT TO THE D.E.P. WHILE SPINELLA ENTERPRISES WAS REFUSED ACCESS TO THESE DOCUMENTS UNTIL THE DAY OF THE HEARING. THIS IS CLEARLY A VIOLATION OF OUR RIGHTS AS THE LOW BIDDER.
6- IN SPITE OF THE FACT THAT THE AGENCY HAD DECIDED TO PROCEED WITH A NEW BID WHILE THIS ISSUE WAS TO BE DETERMINED WOULD INDICATE TO ME THAT THE AGENCY HAD ALREADY CONCLUDED THAT MY OBJECTIONS WOULD BE SWEPT UNDER THE CARPET AND THAT THEY COULD DO WHATEVER THEY WANTED TO IN TERMS OF MAKING A FINAL DECISION. ONE MIGHT ELUDE THAT A CERTAIN AMOUNT OF FAVORITISM WAS GIVEN TO BURKHART RELATIVE TO ALL OF THESE ISSUES.

ACTION ON THE PART OF LEGAL COUNSEL RELATIVE TO EXCEPTIONS TO RECOMMENDED ORDER.
ON OR ABOUT OCTOBER 13 2008 WE RECEIVED AN E MAIL STATING TO US THAT OUR RESPONSE WAS DUE IN BY OCTOBER 23 ,2008 ALONG WITH WHAT APPEARED TO BE AN ATTACHMENT. THIS ATTACHMENT COULD NOT BE OPENED AND I REQUESTED THAT IT SHOULD BE SENT TO ME. TO THIS DATE I HAVE NOT RECEIVED BY MAIL, FAX, OR E MAIL THE RESPONDENT'S EXCEPTION TO RECOMMENDED ORDER. ON MONDAY OCTOBER 20,2008 I CONTACTED SUSAN BRANTLEY OFFICE AND STATED THAT I HAD NOT YET RECEIVED THE ATTACHMENT. I HAVE NOT HEARD FROM SUSAN BRANTLEY OR HER OFFICE AS OF THIS WRITING AS A RESULT I HAVE RETAINED LEGAL COUNSEL MS WENDY DELVECCHIO TO INQUIRE AS TO WHAT THIS ATTACHMENT WAS. THIS MORNING OCTOBER 23,2008 I FINALLY RECEIVED THIS EXCEPTION THROUGH MY COUNSEL.
THROUGHOUT THIS PROCESS THERE SEEMS TO BE THE ILLUSION OF OPENNESS WHILE AT EVERY TURN THE ONE-SIDEDNESS OF HOLDING TO THE HOW CAN WE WIN THIS ARGUMENT INSTEAD OF WONDERING ABOUT THE GOOD , BOTH FROM A QUALITY CONSTRUCTION STANDPOINT AND THE MOST RESPONSIBLE THING TO FOR THE STATE AS A WHOLE.

THE TIMING AND THE HEARINGS ITSELF
THE NEW BID DATE WAS ORIGINALLY SCHEDULED 3 DAYS PRIOR TO THE HEARING ITSELF AS A RESULT OF MY LETTER OF COMPLAINT IT WAS RESCHEDULED FOR APPROXIMATELY ONE WEEK LATER
IN MY QUESTIONING OF MR. RENARD I HAD POSED THE QUESTION HOW CAN YOU BID A PROJECT WITH THE INTENT TO AWARD IF THIS ISSUE IS NOT SETTLED. AS I RECALL THERE WAS NO ANSWER.
QUITE CONTRARY TO MS BRANTLEY STATEMENT THAT THERE WAS NO AWARD MADE ON THIS PROJECT THIS BID WAS FORMALLY OPENED THERE EXISTS A RECORD SHOWING THAT THERE WAS AN INTENT TO AWARD.
IN MY ORIGINAL STATEMENT MY CLAIM WAS THAT THERE WAS A CLEAR PREJUDICE AGAINST SPINELLA SINCE ANY BIDDER THAT WISHED TO BID THIS PROJECT WOULD HAVE TO CONSIDER 2 PROPOSITIONS.

1- BID THE PROJECT LOWER THAN SPINELLA ENTERPRISES
2- DO NOT BID THE JOB.
IT IS INTERESTING TO NOTE THAT THE LOWEST BIDDER IS BURKHART. IT IS ALSO INTERESTING TO NOTE THAT THEIR BID WAS LOWER THAN OUR ORIGINAL BID. AS I ASSUMED WOULD HAVE TO HAPPEN.
HOW IS IT POSSIBLE TO ASSUME THAT THERE IS NO CONFLICT IN THIS CASE. THAT THERE IS NOT AN INTENT TO SPECIFICALLY EXCLUDE SPINELLA ENTERPRISES.

SINCE THIS EXCEPTION IS WRITTEN THE SAME DAY THAT IT IS DUE AND THE INABILITY OF THE OFFICE OF MS BRANTLEY TO LEGALLY FORWARD THESE EXCEPTIONS. I FORMALLY REQUEST THE FOLLOWING
A- THAT IF THIS RECOMMENDATION IS NOT DECIDED IN THE FAVOR OF SPINELLA AS PER THE RECOMMENDATION OF JOHN G VAN LANINGHAM A REASONABLE PERIOD OF TIME BE GIVEN TO ME TO CLARIFY MY POSITION WITH MY ATTORNEY.

IT IS MY UNDERSTANDING THAT IN REVIEWING THE EXCEPTIONS SUBMITTED BY DEP THE CORRECT STANDARD OF REVIEW TO BE APPLIED TO THE RECOMMENDED ORDER ENTERED BY JUDGE VAN LANINGHAM COMES FROM SECTION 120.57(1)(1) FLORIDA STATUTES:
THE AGENCY MAY ADOPT THE RECOMMENDED ORDER AS THE FINAL ORDER OF THE AGENCY. THE AGENCY IN IT'S FINAL ORDER MAY REJECT OR MODIFY THE CONCLUSIONS OF LAW AND INTERPRETATION OF ADMINISTRATIVE RULES OF WHICH IT HAS SUBSTANTIVE JURISDICTION. REJECTION OR MODIFICATION OF CONCLUSIONS OF LAW MAY NOT FORM THE BASIS OF REJECTION OF FINDINGS OF FACT. THE AGENCY MAY NOT REJECT OR MODIFY THE FINDINGS OF FACT UNLESS THE AGENCY FIRST DETERMINES FROM A REVIEW OF THE ENTIRE RECORD, AND STATE WITH PARTICULAR IN THE ORDER, THAT THE FINDINGS WERE NOT BASED UPON COMPETENT SUBSTANTIAL EVIDENCE OR THAT THE PROCEEDINGS ON WHICH THE FINDINGS WERE BASED DID NOT COMPLY WITH ESSENTIAL REQUIREMENTS OF THE LAW.
DEP'S EXCEPTIONS REGARDING JUDGE VAN LANINHAMS'S FACTUAL FINDINGS ONLY REARGUE THEIR CASE AND DO NOT POINT OUT ANY INSTANCE WHERE THE FACTUAL FINDINGS ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD. LIKEWISE ,THE JUDGE PROPERLY APPLIED THE LAW BASED ON THE AGENCY'S PRIOR INTERPRETATION OF THE LAW AND APPLICABLE CASE LAW ON THIS SUBJECT. THE AGENCY SHOULD REJECT ALL EXCEPTIONS FILED BY DEP'S ATTORNEY AND ENTER A FINAL ORDER THAT ADOPTS THE RECOMMENDED ORDER ENTIRELY.

SINCERELY

CAS SPINELLA PRESIDENT SPINELLA ENTERPRISES
DATED 10/23/2008