

BEFORE THE GOVERNING BOARD OF THE  
SOUTH FLORIDA WATER MANAGEMENT DISTRICT

RECEIVED  
DISTRICT CLERK'S OFFICE  
MAR 12 2010 3:38 PM

Close Construction, Inc.,  
Petitioner,

SOUTH FLORIDA  
WATER MANAGEMENT DISTRICT

vs.

Order No. 2010-041-FOF-CONT  
DOAH Case No. 09-4996BID

South Florida Water Management District,  
Respondent

and

Worth Contracting, Inc.,  
Intervenor.

FILED  
2010 MAR 15 P 1:14  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

FINAL ORDER

This matter came before the Governing Board of the South Florida Water Management District on February 11, 2010 and March 11, 2010, for consideration of the Recommended Order issued on January 5, 2010, attached and incorporated as Exhibit A, by the duly-appointed Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") P. Michael Ruff.

Summary of the Proceedings

On June 5, 2009, the District issued Request for Bid ("RFB") Number 6000000262 to procure refurbishment and automation of District-owned and operated water control structures G-123 and S-34. Subsequent to issuance of the RFB, the District issued two addenda to the RFB. Addendum Number Two, which is the subject of this dispute, was issued on June 30, 2009. Addendum Number Two required each bidder to add a \$40,000 discretionary owner-directed allowance for Florida Power and Light utility work to the base bid. Addendum Number Two also included a revised bid form that included an itemization of a \$40,000 discretionary owner-directed allowance

as an expressly identified itemization. Bidders were directed to replace the original bid form with the revised bid form.

Six bids were received in response to the RFB. The lowest bidder withdrew its bid. Petitioner was the next lowest bidder. The District determined that Petitioner was non-responsive for failing to comply with Addendum Number Two by not replacing the original Bid form with the revised bid form. Intervenor was determined to be the lowest responsive and responsible bidder and was awarded the contract.<sup>1</sup> Petitioner timely filed this bid protest and Intervenor joined in the proceeding.

The hearing was conducted on October 19, 2009 before ALJ P. Michael Ruff. On January 5, 2010, the ALJ entered his Recommended Order. District Staff and the Intervenor timely filed Exceptions to the Recommended Order and Petitioner timely filed responses to those Exceptions.

The issues considered at hearing were whether Close Construction was the lowest responsive and responsible bidder in the RFB, whether the subject contract should have been awarded to Close Construction and whether the District's decision to award the contract to Worth Contracting was clearly erroneous, contrary to competition, arbitrary or capricious.

The ALJ found that:

1. Close Construction's use of the original bid form rather than the revised form attached to Addendum No. Two was a non-material irregularity;
2. The error in the bid did not confer a competitive advantage on Close

---

<sup>1</sup> A responsive bid is a bid "submitted by a respondent, which conforms in all material respects to the Request for Bid." District Procurement Manual, 5-2. A responsible bidder is a bidder "who has the capability in all respects to perform fully the contract requirements and has the integrity and reliability to ensure good faith performance." District Procurement Manual, 5-3

Construction, affect the price of the bid or deprive the District of assurances that the contract would be executed and performed in strict accordance with all contract documents, including the addenda;

3. The District failed to follow its policies by not affording Close Construction an opportunity to correct its non-judgmental mistake after the bid opening;
4. The District failed to apply the applicable interpretative presumptions of the RFB;
5. Close Construction's bid was responsive to the RFB;
6. The District's determination that Close Construction's bid was nonresponsive was arbitrary, clearly erroneous and contrary to competition.

#### **Standard of Review**

Section 120.57(1)(l), Florida Statutes, provides that an agency reviewing a DOAH recommended order may not reject or modify the findings of fact of an ALJ, "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 on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." *Friends of Children v. Dep't of Health and Rehabilitative Servs.*, 504 So. 2d 1345, 1347-48 (Fla. 1st DCA 1987). Florida law defines "competent substantial evidence" as "such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1975); *Gulf Coast Elec. Co-op v. Johnson*, 727 So. 2d 259, 262 (Fla. 1999). Furthermore, an agency may

not create or add to findings of fact of a recommended order because the agency is not the trier of fact. *Friends of Children*, 504 So. 2d 1345.

The decision to accept one expert's testimony over that of another is left to the discretion of the administrative law judge and cannot be altered absent a complete lack of competent, substantial evidence from which the finding could reasonably be inferred. *Florida Chapter of Sierra Club v. Orlando Utility Commission*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). Furthermore, "[r]ejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact." Section 120.57(1)(l), Fla. Stat. In addition, an agency may not create findings of fact or add to findings of fact, since it is not acting in the capacity of the trier of fact. *Friends of Children*, 504 So. 2d 1345. The agency's role is to insure that the findings of fact made by the administrative law judge are based upon evidence contained in the record.

With respect to the standard of review regarding an ALJ's conclusions of law, Section 120.57(1)(l), Florida Statutes, provides that an agency may reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" whenever the agency's interpretation is "as or more reasonable" than the interpretation made by the ALJ. See *Deep Lagoon Boat Club Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). Florida Courts have consistently applied this section's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the ALJ's application of legal concepts such as collateral estoppel, *res judicata*, hearsay, but not from reviewing conclusions of law that are based upon the ALJ's application of an agency's administrative rules or procedures. *Id.*

The Governing Board has determined that the findings of fact made by the ALJ in this case are based on competent, substantial evidence that is sufficiently relevant and material such that a reasonable mind would accept it as adequate to support the conclusion reached. Further, the Governing Board, adopts the ALJ's conclusions of law as modified below.

### **Rulings on Exceptions**

The Governing Board, having carefully considered each of the parties' Exceptions and the Responses thereto, makes the following rulings:

#### **District Staff's Exceptions**

District Staff's Exceptions are only to Conclusions of Law. District Staff expressly states that the ALJ's Findings of Fact "need not be disturbed."

**District Staff Exception No. 1** takes exception to Conclusion of Law No. 38 which concluded that Close Construction's use of the original bid form, rather than the revised form, was a non-material deviation in the bid that could easily have been remedied through the bid verification process set forth in the District's Procurement Manual. The ALJ further concluded that even absent the bid verification process, Close Construction's bid document unequivocally stated on its face that they would comply with all the specifications and requirements of the RFB and contract documents, including Addendum No. Two. Finally, the ALJ concluded that, under contract principals, the District would be protected from Close Construction charging an additional \$40,000.00 for the discretionary cost allowance for the FPL work over and above their proposed contract price.

District Staff reargues the facts in order to support their contention that Close Construction's use of the original bid form was a material deviation. Conclusion of Law No. 38 is supported by Findings of Fact Nos. 8 through 14 and 24 through 28 of the ALJ's Recommended Order. Further, the ALJ expressly found that there was no material deviation in Close Construction's bid based upon the use of the original bid form. See, Finding of Fact No. 33. It is not possible to accept the ALJ's Findings of Fact, which the Governing Board must do if they are supported by competent, substantial evidence in the record, and still reach the conclusion District Staff advocates. The Governing Board may not reweigh the evidence or make additional findings of fact. Further, rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. For the reasons stated herein, the Governing Board need not address the correctness of the ALJ's interpretation of law in Conclusion of Law No. 38. Therefore, District Staff Exception No. 1 must be rejected.

**District Staff Exception No. 2** takes exception to Conclusions of Law Nos. 40 and 41 which concluded that Close Construction received and reviewed Addendum No. Two and incorporated the technical requirements therein, including the \$40,000.00 discretionary cost allowance into its bid. The ALJ further concluded that Close Construction agreed to the terms of Addenda Nos. One and Two. Finally, the ALJ rejected District Staff's testimony at the hearing that Close Construction's use of an obsolete form made its bid void, when compared to the testimony of how another bidder's submission was treated, as "intellectually inconsistent".

District Staff argues that the evidence allowed by the ALJ on this issue enabled Close Construction to supplement its bid. Conclusions of Law Nos. 40 and 41 are

supported by Findings of Fact Nos. 8 through 11, 14, 16, 25, 26, 29 and 31 of the ALJ's Recommended Order. The Governing Board is without authority to overturn the ALJ's evidentiary rulings. It is not possible to accept the ALJ's Findings of Fact, which the Governing Board must do if they are supported by competent, substantial evidence in the record, and still reach the conclusion District Staff advocates. In addition, the Governing Board may not reweigh the evidence or make additional findings of fact. Further, rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. For the reasons stated herein, the Governing Board need not address the correctness of the ALJ's interpretation of law in Conclusions of Law Nos. 40 and 41. Therefore, District Staff Exception No. 2 must be rejected.

**District Staff Exception No. 3** takes exception to Conclusion of Law No. 42 which concluded that Close Construction's bid mistake was a technical error that did not confer any competitive advantage. Further the ALJ concluded that, even assuming the \$40,000.00 discretionary allowance was not included in Close Construction's bid, there was no competitive advantage to Close Construction because the difference between the bids was too great to alter the competitive position of any of the bidders.

District Staff argues that Close Construction's deviation was material and that Close Construction gained a competitive advantage. District Staff argues that the competitive advantage Close Construction gained was: 1) the advantage to leave out the discretionary allowance amount of \$40,000.00 and later decide whether it wants the contract award, and 2) the advantage to later tell the District that the allowance was not

included and that it needs an additional \$40,000.00. District Staff further argues that the ALJ erred in using the comparison between Close Construction's price and the next lowest bidder's price to determine whether the deviation was material. Conclusion of Law No. 42 is supported by Findings of Fact Nos. 24 through 28 of the ALJ's Recommended Order. It is not possible to accept the ALJ's Findings of Fact, which the Governing Board must do if they are supported by competent, substantial evidence in the record, and still reach the conclusion District Staff advocates. Further, rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. For the reasons stated herein, the Governing Board need not address the correctness of the ALJ's interpretation of law in Conclusion of Law No. 42. Therefore, District Staff Exception No. 3 must be rejected.

**District Staff Exception No. 4** takes exception to Conclusion of Law No. 43 which concluded that Close Construction did not get a "look back" or the ability to supplement its bid due to the irregularity in its bid.

District Staff argues that Close Construction's deviation was material in that it allowed Close Construction to look at all of the bids and then determine whether it wanted the bid. District Staff further argues that, had the bid verification process been followed, it would have allowed Close Construction to supplement its bid. Finally, District Staff argues that the evidence allowed by the ALJ on the issue of whether Close Construction included the \$40,000.00 discretionary allowance enabled Close Construction to supplement its bid. As to the issue of materiality and the opportunity for a "look back," Conclusion of Law No. 43 is supported by Findings of Fact Nos. 24 through 28 of the ALJ's Recommended Order. As to supplementation of the bid,



Conclusion of Law No. 43 is supported by Findings of Fact Nos. 8 through 11, 14, 16, 25, 26, 29 and 31 of the ALJ's Recommended Order. The Governing Board is without authority to overturn the ALJ's evidentiary rulings. It is not possible to accept the ALJ's Findings of Fact, which the Governing Board must do if they are supported by competent, substantial evidence in the record, and still reach the conclusion District Staff advocates. In addition, the Governing Board may not reweigh the evidence or make additional findings of fact. Further, rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. For the reasons stated herein, the Governing Board need not address the correctness of the ALJ's interpretation of law in Conclusion of Law No. 43. Therefore, District Staff Exception No. 4 must be rejected.

**District Staff Exception No. 5** takes exception to Conclusion of Law No. 44 which concluded that District Staff's suggestion that Close Construction could gain a competitive advantage by being able to withdraw its bid without penalty through the use of the original bid form was not accepted and, moreover, insignificant in light of another bidder having been allowed to withdraw its bid without penalty.

District Staff reargues the facts in order to support their contention that, because Close Construction's submission of the original bid form was a material deviation that could not be supplemented or cured, it gained a competitive advantage over other bidders by being able to withdraw its bid without penalty. The issues of the ALJ's findings regarding the materiality of the deviation and supplementation of the bid are discussed fully above. As to the issue of withdrawing the bid, Conclusion of Law No. 44

is supported by Finding of Fact No. 28. The Governing Board is without authority to overturn the ALJ's evidentiary rulings. It is not possible to accept the ALJ's Findings of Fact, which the Governing Board must do if they are supported by competent, substantial evidence in the record, and still reach the conclusion District Staff advocates. In addition, the Governing Board may not reweigh the evidence or make additional findings of fact. Further, rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. For the reasons stated herein, the Governing Board need not address the correctness of the ALJ's interpretation of law in Conclusion of Law No. 44. Therefore, District Staff Exception No. 5 must be rejected.

**District Staff Exception No. 6** takes exception to Conclusion of Law No. 45 which concluded that Close Construction's use of the original bid form was a non-judgmental mistake as defined in the District's Procurement Manual. The ALJ further concluded that the mistake was apparent on the face of the bid, which, although submitted on the original bid form, expressly agreed to the terms of addenda. Finally, the ALJ concluded that the District must construe the bid submission as if all addenda are received and acknowledged by the bidder.

District Staff argues that Close Construction's use of the original bid form was not a mistake and that the ALJ misconstrued the District's policies regarding mistake. Conclusion of Law No. 45 is supported by Findings of Fact Nos. 16 through 23, 27 and 30, 31 and 33. It is not possible to accept the ALJ's Findings of Fact, which the Governing Board must do if they are supported by competent, substantial evidence in

the record, and still reach the conclusion District Staff advocates. Further, rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. For the reasons stated herein, the Governing Board need not address the correctness of the ALJ's interpretation of law in Conclusion of Law No. 45. Therefore, District Staff Exception No. 6 must be rejected.

**District Staff Exception No. 7** takes exception to Conclusion of Law No. 46 which concluded that the District did not follow the terms in Article 19.03 of the RFB in construing Close Construction's bid. The ALJ further concluded that the District did not follow its own policies in the Procurement Manual regarding bid verification and that a "simple yes or no" verification question would not have affected Close Construction's price nor affected its relative competitive position in relation to other bidders.

District Staff argues that the ALJ did not take into account all of the language of Article 19.03 of the RFB in reaching this conclusion and that the use of the original form made Close Construction non-responsive pursuant to the language the ALJ overlooked. District Staff further argues that the District does not have any policy allowing a bidder to supplement its bid and that obtaining the "simple yes or no" question would have been a supplementation of the bid. Conclusion of Law No. 46 is supported by Findings of Fact Nos. 18 through 22 and 29 through 33. It is not possible to accept the ALJ's Findings of Fact, which the Governing Board must do if they are supported by competent, substantial evidence in the record, and still reach the conclusion District Staff advocates. In addition, the Governing Board may not reweigh the evidence or make additional findings of fact. Further, rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. For the reasons

stated herein, the Governing Board need not address the correctness of the ALJ's interpretation of law in Conclusion of Law No. 46. Therefore, District Staff Exception No. 7 must be rejected.

**District Staff Exception No. 8** takes exception to Conclusion of Law No. 47 which concludes that the District's Procurement Manual contains a provisions allowing verification of a bid when a mistake is made. The ALJ further concluded that another bidder was afforded the opportunity to furnish additional information in the face of a mistake and that such verification process does not alter or supplement the bid.

District Staff argues that the District does not have a policy for verifying responsiveness and that the ALJ is incorrect in the statement that verification as set forth in the Conclusion of Law is not the same as supplementing a bid. Conclusion of Law No. 47 is supported by Findings of Fact Nos. 15, 19 through 22, 28, and 32. It is not possible to accept the ALJ's Findings of Fact, which the Governing Board must do if they are supported by competent, substantial evidence in the record, and still reach the conclusion District Staff advocates. In addition, the Governing Board may not reweigh the evidence or make additional findings of fact. Further, rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. For the reasons stated herein, the Governing Board need not address the correctness of the ALJ's interpretation of law in Conclusion of Law No. 47. Therefore, District Staff Exception No. 8 must be rejected.

**District Staff Exception No. 9** takes exception to Conclusion of Law No. 48 which takes the form of a summary of the other Conclusions of Law, concluding that, if

the District's position and action set forth in the Recommended Order persisted through the issuance of a final order, it would be clearly erroneous and contrary to competition.

District Staff again makes the same arguments as discussed above for District Staff Exceptions 1 through 8. As stated above in response to the individual Conclusions of Law summarized in Conclusion of Law No. 48, Conclusion of Law No. 48 is supported by Findings of Fact. It is not possible to accept the ALJ's Findings of Fact, which the Governing Board must do if they are supported by competent, substantial evidence in the record, and still reach the conclusion District Staff advocates. In addition, the Governing Board may not reweigh the evidence or make additional findings of fact. Further, rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. For the reasons stated herein, the Governing Board need not address the correctness of the ALJ's interpretation of law in Conclusion of Law No. 48. Therefore, District Staff Exception No. 9 must be rejected.

**District Staff Exception No. 10** takes exception to Conclusion of Law No. 49 which also takes the form of a summary of the other Conclusions of Law, concluding that, the District's proposed award to Worth Contracting would be clearly erroneous, contrary to competition and arbitrary.

District Staff argues that Close Construction failed to meet its burden of proof by a preponderance of the evidence. District Staff argues that the Close Construction's use of the original bid form was a material deviation that could not be cured through verification and therefore the ALJ's conclusion that the District's proposed award to Worth Contracting is not clearly erroneous, contrary to competition or arbitrary. Conclusion of Law No. 49 is supported by the totality of the Findings of Fact. The

Governing Board is without authority to overturn the ALJ's evidentiary rulings. It is not possible to accept the ALJ's Findings of Fact, which the Governing Board must do if they are supported by competent, substantial evidence in the record, and still reach the conclusion District Staff advocates. In addition, the Governing Board may not reweigh the evidence or make additional findings of fact. Further, rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. For the reasons stated herein, the Governing Board need not address the correctness of the ALJ's interpretation of law in Conclusion of Law No. 49. Therefore, District Staff Exception No. 10 must be rejected.

### **Intervenor's Exceptions**

Intervenor's Exceptions are to both Findings of Fact and Conclusions of Law.

**Intervenor's First Exception** takes exception to Findings of Fact Nos. 9 through 12 and 14.

Intervenor takes exception to these Findings of Fact by arguing that the ALJ considered evidence that was not allowed to be considered by the District and that provided an impermissible second look to Close Construction. Intervenor's exception is primarily directed to the ALJ's evidentiary rulings. By challenging the admission of testimony, Intervenor is merely rearguing evidentiary issues within the sole purview of the ALJ. Because the challenged Findings of Fact are supported by competent, substantial evidence in the record and the District cannot reweigh evidence or overturn the ALJ's evidentiary rulings, Intervenor's first exception must be rejected.

**Intervenor's Second Exception** takes exception to all or part of Findings of Fact Nos. 22, 23, 25 through 33 regarding: 1) the ALJ's finding that the District did not follow the procedures in its Procurement Manual regarding verification of bids; 2) the ALJ's finding that the irregularity in Close Construction's bid was a non-judgmental mistake; 3) the ALJ's finding that the irregularity in the bid forms was technical; and 4) the ALJ's finding that allowing Close Construction to verify its bid would not be allowing supplementation of the bid.

Intervenor takes exception to these Findings of Fact by rearguing the facts. These Findings of Fact are supported by competent, substantial evidence. Of note, Intervenor did not take exception to Finding of Fact No. 20 wherein the ALJ found that District Staff admitted in testimony that they did not follow the Procurement Manual procedure for verifying a bid. The ALJ, as the trier of fact, is responsible for weighing the credibility of witnesses. Because the challenged Findings of Fact are supported by competent, substantial evidence in the record and the District cannot reweigh evidence or overturn the ALJ's evidentiary rulings, Intervenor's second exception must be rejected.

**Intervenor's Third Exception** takes exception to Conclusions of Law 38 through 49. In support of its exceptions, Intervenor argues that: 1) the District followed its Procurement Manual and the RFB in reviewing the bids; 2) the District correctly determined that Close Construction's bid was non-responsive and contained a material deviation; 3) future use of the bid verification process as explained by the ALJ will lead to bidders seeking to supplement their bids after bid opening for any reason; and 4) contract principles were not raised at the hearing and are irrelevant.

As to the first two arguments, these Conclusions of Law are supported by Findings of Fact. Intervenor reargues the facts and asks the Governing Board to consider facts not found by the ALJ to support its exception. It is not possible to reach the conclusion the Intervenor advocates based upon the facts found by the ALJ. In addition, the Governing Board may not reweigh the evidence or make additional findings of fact. Further, rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

As to the third argument, the ALJ's conclusions applying the bid verification procedures in the District's Procurement Manual to the facts of this case are specific to the facts of this case. It is incorrect to assume that these conclusions will necessarily limit the District's future application of its procedures.

As to the fourth argument, as set forth in the ALJ's Recommended Order, one element used to determine whether a "material irregularity" exists is whether it deprives the District of the assurance that the contract would be performed in accordance with all bid documents. See, Findings of Fact Nos. 24 through 26. The ALJ's Conclusion of Law on this issue is supported by the record. Therefore, the Intervenor's fourth exception must be rejected.

### **Governing Board's Corrections to the Recommended Order**

The ALJ's Preliminary Statement, in part, sets forth the procedural background of the proceeding. On page 5 of the Recommended Order the ALJ lists the exhibits admitted into evidence. The ALJ failed to list the exhibits entered by the Petitioner, Close Exhibits 1, 2 and 5. The Petitioner listed those exhibits in their Proposed



Recommended Order and the transcript of the hearing reflects that those exhibits were admitted. Since the ALJ notes that he considered the parties' Proposed Recommended Orders in rendering his order, the failure to list the Petitioner's exhibits appears to be inadvertent. In the interest of the Final Order being complete, this error should be corrected.

In addition, although District Staff and Intervenor request the Governing Board to overturn the ALJ's Conclusions of Law declaring Close Construction's bid responsive, neither District Staff nor Intervenor specifically address the ALJ's conclusion that Close Construction was both responsive and responsible. The record clearly does not support such a conclusion. The ALJ did not enter any Findings of Fact regarding a responsibility determination for Close Construction. The only Findings of Fact remotely related to this issue actually support the conclusion that no review of Close Construction's responsibility was ever done. See, Findings of Fact Nos. 16 through 18 where the ALJ found that no further review of Close Construction's bid was done after District Staff determined that submission of the original bid form made them non-responsive. For the reason stated herein, the last sentence of Conclusion of Law No. 49 must be modified to delete the word "responsible."

### **Disposition of the ALJ's Recommendation**

Once the District forwards a Protest to the Division of Administrative Hearings an Administrative Law Judge conducts a de novo hearing on the protest.<sup>2</sup> In the context of a bid protest proceeding, a "de novo" hearing is a "form of intra-agency review" where

---

<sup>2</sup> See § 120.57(3)(f), Fla. Stat.; *GETCH Corp. v. State, Department of Lottery*, 737 So.2d 615 (Fla. 1<sup>st</sup> DCA 1999) citing *State Contracting and Eng'g Corp. v. Department of Transp.*, 709 So.2d 607 (Fla. 1<sup>st</sup> DCA 1998).

the object of the proceeding is to "evaluate the [prior] action taken by the agency," rather than to formulate final agency action.<sup>3</sup> The ALJ does not sit as a substitute for the agency and make a determination of whether to award the bid.<sup>4</sup> In other words, the role of the administrative law judge is not to decide the outcome of the proceeding, but rather to make a "recommended disposition" to the agency.<sup>5</sup> It is the District's responsibility to evaluate the bids and select the bidder to whom the contract should be awarded, not the ALJ's.<sup>6</sup>

The ALJ found that the failure of Close Construction to use the revised bid form attached to Addendum No. Two was a non-material irregularity. The District, under rule 40E-7.301, Fla. Admin. Code, may waive or not waive minor irregularities. The waiver of what the ALJ determined to be a minor irregularity is inappropriate under the circumstances of this procurement; therefore, the District elects to not waive the minor irregularity. In addition, given the ALJ's findings regarding the inconsistencies in the process for solicitation, the most appropriate action of the District would be to reject all bids submitted in response to the RFB.

### **ORDER**

Based upon the foregoing, the Governing Board, having considered the ALJ's Recommended Order, District Staff's and Intervenor's exceptions and the responses thereto, and being otherwise fully advised in the premises, hereby ORDERS:

1. District Staff's and Intervenor's Exceptions to the ALJ's Recommended Order are rejected for the reasons set forth above.

---

<sup>3</sup> *State Contracting and Eng'g Corp. v. Department of Transp.*, 709 So.2d 607 (Fla. 1st DCA 1998)

<sup>4</sup> *Id.*

<sup>5</sup> See § 120.57(1)(k), Fla. Stat.

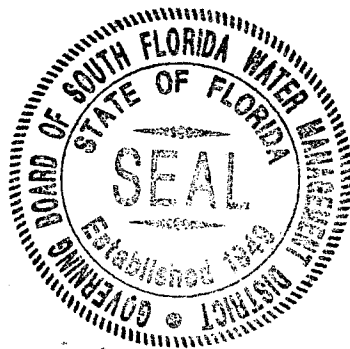
<sup>6</sup> See, *Procacci v. State Dept. of Health & Rehabilitative Services*, 603 So. 2d 1299 (Fla. 1st DCA 1992); *GTECH Corp. v. State Dept. of the Lottery*, 737 So. 2d 615 (Fla. 1st DCA 1999).

2. The preliminary matters addressed on pages 1 through 6 of the ALJ's Recommended Order are adopted except as corrected above regarding the minor corrections to the Preliminary Statement to correct the list of exhibits admitted into evidence;
3. All of the Findings of Fact contained in the ALJ's Recommended Order are adopted as they are supported by competent substantial evidence;
4. All of the Conclusions of Law contained in the ALJ's Recommended Order are adopted, except for that portion of Conclusion of Law No. 49 wherein the ALJ determined Close Construction to be a responsible bidder, as explained above;
5. The ALJ's Recommendation to award the contract to Close Construction, Inc. is rejected and all of the bids submitted in response to the RFB are rejected.
6. A Notice of Rights is attached as Exhibit B.

DONE AND SO ORDERED, this 11th day of March, 2010, at a public meeting held at the Brighton Seminole Indian Reservation, 800 E Harney Pond Road, Okeechobee, Florida.

SOUTH FLORIDA WATER  
MANAGEMENT DISTRICT,  
BY ITS GOVERNING BOARD

*Sheryl G. Wood*  
SHERYL G. WOOD, General Counsel



ATTEST:

BY: *Jackie McGinty*

DATE: 3/12/2010

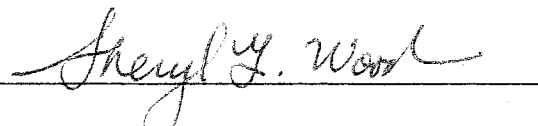
LEGAL FORM APPROVED:

BY *Sheryl G. Wood*

DATE: 3/11/10

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Final Order has been furnished  
this 12<sup>th</sup> day of March, 2010, by U.S. Mail to the following distribution list:



SHERYL G. WOOD, General Counsel

Andrew Baumann, Esq.  
Lewis, Longman & Walker, P.A.  
1700 Palm Beach Lakes Blvd.  
Suite 1000  
West Palm Beach, FL 33401

Robert L. Frye, Esq.  
Vezina, Lawrence & Piscitelli, P.A.  
300 S. W. 1<sup>st</sup> Avenue  
Suite 150  
Ft. Lauderdale, FL 33301

Joe Fiala, Esq.  
Office of Counsel  
So. Fla. Water Mgmt. District  
P. O. Box 24680  
West Palm Beach, FL 33416