STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUNSHINE TOWING @ BROWARD, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 10-0134BID
DEPARTMENT OF TRANSPORTATION,	)	
Respondent,	)	
and	)	
ANCHOR TOWING AND MARINE OF BROWARD, INC.,	)	
Intervenor.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on February 22, 2010, in Fort Lauderdale, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this bid protest are, first, whether, as Petitioner alleges, Intervenor's failure to attach copies of "occupational licenses" to its proposal was a deviation from the requirements of the Request for Proposal; second, whether any such deviation was material; and third, whether Respondent's preliminary decision to award Intervenor the contract at issue was clearly erroneous, arbitrary or capricious, or contrary to competition.

PRELIMINARY STATEMENT

On September 18, 2009, Respondent Department of Transportation issued Request for Proposal No. RFP-DOT-09/10-4007FS for the purpose of soliciting proposals on a contract for towing and emergency roadside services. The Department received four proposals, including one from Petitioner and one from Intervenor. On November 30, 2009, the Department announced its intent to award the subject contract to Intervenor, whose proposal, though slightly more expensive than Petitioner's, had received the highest total score during the evaluation.

Petitioner filed a formal written protest of the intended award on December 10, 2009, alleging that Intervenor's proposal should be rejected as nonresponsive. The case was referred to the Division of Administrative Hearings ("DOAH"), where the protest petition was filed January 12, 2010. Several days later, the undersigned granted Intervenor's Petition to Intervene on the side of Respondent.

The final hearing took place on February 22, 2010, as scheduled with the agreement of the parties. At hearing, the parties stipulated to a number of facts as set forth in their Joint Pre-Hearing Statement.

In its case, Petitioner elicited testimony from Fernicia Smart, who was the Department's purchasing agent for the instant procurement. In addition, Petitioner's Exhibits 1-9, 11, and 13-15 were received in evidence. The Department presented the testimony of Gaetano Francese, the project manager, and offered no exhibits. Intervenor called one witness: Ann Margaret Ramos, one of Petitioner's principals. Intervenor also introduced Intervenor's Exhibits 5, 6, and 8, which were admitted. Finally, at Intervenor's request, the undersigned took official recognition of the Amended Recommended Order entered in Sunshine Towing, Inc. v. Department of Transportation and Anchor Towing, Inc., DOAH Case No. 06-2451BID, 2006 Fla. Div. Adm. Hear. LEXIS 550 (Fla.Div.Admin.Hrgs. Nov. 27, 2006).

The final hearing transcript was filed on March 10, 2010, making the Proposed Recommended Orders due on March 22, 2010, pursuant to the schedule established at the conclusion of the final hearing. Each party timely filed a Proposed Recommended Order. All of the parties' post-hearing submissions were carefully considered during the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2009 Florida Statutes.

FINDINGS OF FACT

1. On September 18, 2009, Respondent Department of Transportation ("Department") issued Request for Proposal No. RFP-DOT-09/10-4007FS (the "RFP"). Through the RFP, which is entitled, "Treasure Coast Road Ranger Service Patrol," the Department solicited written proposals from qualified providers who would be willing and able to perform towing and emergency roadside services on Interstate 95 in Martin County, St. Lucie County, and Indian River County.

2. The Department intended to award a three-year contract to the "responsive and responsible Proposer whose proposal is determined to be the most advantageous to the Department." The Department anticipated that the contract would have a term

beginning on December 1, 2009, and ending on November 31, 2012. The annual contract price was not to exceed $1.59 million. Proposals were due on October 13, 2009.

3. Four firms timely submitted proposals in response to the RFP, including Petitioner Sunshine Towing @ Broward, Inc. ("Sunshine") and Intervenor Anchor Towing and Marine of Broward, Inc. ("Anchor"). An evaluation ensued, pursuant to a process described in the RFP, during which the Department rejected two of the four proposals for failing to meet minimum requirements relating to technical aspects of the project. As a result, Sunshine and Anchor emerged as the only competitors eligible for the award.

4. Sunshine offered to perform the contractual services for an annual price of $1,531,548. This sum was less than the price that Anchor proposed by $46,980 per year. Despite Sunshine's lower cost, Anchor nevertheless edged Sunshine in the final score, receiving 92.86 points (out of 100) from the Department's evaluators, to Sunshine's 87.75. On November 30, 2009, the Department duly notified the public of its intent to award the contract to Anchor.

5. Sunshine promptly initiated the instant protest, whereby Sunshine seeks to have Anchor's proposal disqualified as nonresponsive, in hopes that the Department will then award the contract to Sunshine as the highest-ranked (indeed the sole)

responsive proposer. Sunshine alleges that Anchor's proposal failed to conform strictly to the specifications of the RFP, principally because Anchor did not attach copies of its "occupational licenses" to the proposal. Anchor insists that its proposal was responsive but argues, alternatively, that if its proposal deviated from the specifications, the deviation was merely a minor irregularity which the Department could waive. Anchor further contends that Sunshine's proposal contains material deviations for which *it* should be deemed nonresponsive. The Department takes the position that Anchor's failure to attach "occupational licenses" was a minor irregularity that could be (and was) waived.[1]

6. The RFP includes a "Special Conditions" section wherein the specifications at the heart of this dispute are located. Of particular interest is Special Condition No. 8, which specifies the qualifications a provider must have to be considered qualified to perform the services called for under the contract to be awarded. Special Condition No. 8 provides as follows:

> **8) QUALIFICATIONS**
>
> 8.1 General
>
> The Department will determine whether the Proposer is qualified to perform the services being contracted based upon their proposal demonstrating satisfactory experience and capability in the work area. The Proposer shall identify necessary experienced personnel and facilities to

support the activities associated with this proposal.

8.2 Qualifications of Key Personnel

Those individuals who will be directly involved in the project should have demonstrated experience in the areas delineated in the scope of work. Individuals whose qualifications are presented will be committed to the project for its duration unless otherwise excepted by the Department's Project Manager. Where State of Florida registration or certification is deemed appropriate, a copy of the registration or certificate should be included in the proposal package.

8.3 Authorized To Do Business in the State of Florida

In accordance with sections 607.1501, 608.501, and 620.169, Florida Statutes, foreign corporations, foreign limited liability companies, and foreign limited partnerships must be authorized to do business in the State of Florida. Such authorization should be obtained by the proposal due date and time, but in any case, must be obtained prior to the posting of the intended award of the contact. For authorization, [contact the Florida Department of State].[[2]]

8.4 Licensed to Conduct Business in the State of Florida

If the business being provided requires that individuals be licensed by the Department of Business and Professional Regulation, such licenses should be obtained by the proposal due date and time, but in any case, must be obtained prior to the posting of the intended award of the contract. For licensing, [contact the Florida Department of Business and Professional Regulation].

8.5 References and experience must entail a minimum of **three (3)** years of experience in the towing industry in Florida.

NOTE: Copies of occupational licenses must also be attached to the back of Form 'F'.

(Boldface in original.)

7. Special Condition No. 19, which defines the term "responsive proposal," provides as follows:

19) RESPONSIVENESS OF PROPOSALS

19.1 Responsiveness of Proposals

Proposals will not be considered if not received by the Department on or before the date and time specified as the due date for submission.

All proposals must be typed or printed in ink. A responsive proposal is an offer to perform the scope of services called for in this Request for Proposal in accordance with all the requirements of this Request for Proposal and receiving fifty (50) points or more on the Technical Proposal.[[3]] Proposals found to be non-responsive shall not be considered.

Proposals may be rejected if found to be irregular or not in conformance with the requirements and instructions herein contained. A proposal may be found to be irregular or non-responsive by reasons that include, but are not limited to, failure to utilize or complete prescribed forms, conditional proposals, incomplete proposals, indefinite or ambiguous proposals, and improper and/or undated signatures.

(Emphasis and boldface in original.)

8. In the "General Instructions to Respondents" section of the RFP there appears the following reservation of rights:

> **16. Minor Irregularities/Right to Reject.** The Buyer reserves the right to accept or reject any and all bids, or separable portions thereof, and to waive any minor irregularity, technicality, or omission if the Buyer determines that doing so will serve the State's best interests. The Buyer may reject any response not submitted in the manner specified by the solicitation documents.

9. Anchor did not attach copies of any "occupational licenses" to the back of Form 'F' in its proposal. Anchor contends that it did not need to attach such licenses because none exists. This position is based on two undisputed facts: (1) The Florida Department of Business and Professional Regulation ("DBPR") does not regulate the business of providing towing and emergency roadside assistance; therefore, neither Anchor nor Sunshine held (or could hold) a state-issued license to operate, and neither company fell under DBPR's regulatory jurisdiction. (2) The instrument formerly known as an "occupational license," which local governments had issued for decades, not for regulatory purposes but as a means of raising revenue, is presently called (at least formally) a "business tax receipt," after the Florida Legislature, in 2006, amended Chapter 205 of the Florida Statutes, changing the name of that

law from the "Local Occupational License Tax Act" to the "Local Business Tax Act." See 2006 Fla. Laws ch. 152.

10. Sunshine asserts that the terms "occupational license" and "business tax receipt" are synonymous and interchangeable, and that the RFP required each offeror to attach copies of its occupational licenses/business tax receipts to the proposal. Sunshine insists that Anchor's failure to do so constituted a material deviation from the specifications because, without such documentation, the Department could not be sure whether an offeror was authorized to do business in any given locality.

11. Sunshine presses this argument a step further based on some additional undisputed facts. As it happened, at the time the proposals were opened, Anchor held a local business tax receipt from the City of Pembroke Pines, which is the municipality in which Anchor maintains its principal place of business. Anchor had not, however, paid local business taxes to Broward County when they became due, respectively, on July 1, 2008, and July 1, 2009. Anchor corrected this problem on December 14, 2009, which was about two weeks after the Department had posted notice of its intent to award Anchor the contract, paying Broward County a grand total of $248.45 in back taxes, collection costs, and late penalties. As of this writing, all of Anchor's local business tax obligations are paid in full.

12. Sunshine contends, however, that during the period of time that Anchor's Broward County business taxes were delinquent, Anchor was not authorized to do business in Broward County and hence was not a "responsible" proposer eligible for award of the contract. In support of this proposition, Sunshine relies upon Section 20-15 of the Broward County, Florida, Code of Ordinances ("Broward Code"), which states:

> Pursuant to the authority granted by Chapter 205, Florida Statutes, no person shall engage in or manage any business, profession or occupation, as the same are contemplated by Chapter 205, Florida Statutes, unless such person first obtains a business tax receipt as required by this article, unless other exempt from this requirement . . . .

13. On this latter point regarding Anchor's authority to operate in Broward County, Sunshine appears to be correct, at least in a narrow legal sense. It is abundantly clear, however, and the undersigned finds, that, as a matter of fact, Anchor was never in any danger of being shut down by the county. Indeed, even under the strict letter of the local law, Anchor was entitled to continue operating in Broward County unless and until the county took steps to compel the payment of the delinquent taxes. Broward Code Section 20-22, which deals with the enforcement of the business tax provisions, provides:

> Whenever any person who is subject to the payment of a business tax or privilege tax provided by this article shall fail to pay the same when due, the tax collector, within

> three (3) years from the due date of the tax, may issue a warrant directed to the Broward County Sheriff, commanding him/her to levy upon and sell any real or personal property of such person liable for said tax for the amount thereof and the cost of executing the warrant and to return such warrant to the tax collector and to pay him/her the money collected by virtue thereof within sixty (60) days from the date of the warrant. . . . The tax collector may file a copy of the warrant with the Clerk of the Circuit Court of Broward County[, which shall be recorded in the public records and thereby] become a lien for seven (7) years from the due date of the tax. . . . Any person subject to, and who fails to pay, a business tax or privilege tax required by this article, shall, on petition of the tax collector, be enjoined by the Circuit Court from engaging in the business for which he/she has failed to pay said business tax, until such time as he/she shall pay the same with costs of such action.

14. There is no evidence suggesting that the county ever sought to enjoin, or that a court ever issued an injunction prohibiting, Anchor from engaging in business, nor does it appear, based on the evidence, that a tax warrant ever was issued, filed, or executed to force Anchor to pay its back taxes. Given the relatively small amount of tax due, the likelihood of such enforcement actions being taken must reasonably be reckoned as slim to none. While paying taxes when due is certainly the obligation of a good corporate citizen, it would not be reasonable, based on the facts established in this case, to infer that Anchor is a scofflaw for failing to timely

pay a local tax amounting to about $80 per year. Anchor, in short, was a responsible proposer.

15. Sunshine's other argument has more going for it. The RFP clearly and unambiguously mandated that "occupational licenses" be attached to a proposal. If, as Sunshine maintains, the terms "occupational license" and "business tax receipt" are clearly synonymous, then Anchor's proposal was noncompliant.

16. For reasons that will be explained below, however, the undersigned has concluded, as a matter of law, that the term "occupational license" does not unambiguously denote a "business tax receipt"——at least not in the context of Special Condition No. 8. The specification, in other words, is ambiguous.

17. No one protested the specification or otherwise sought clarification of the Department's intent. The evidence shows, and the undersigned finds, that the Department understood and intended the term "occupational license" to mean the instrument now known as a "business tax receipt." The Department simply used the outdated name, as many others probably still do, owing to that facet of human nature captured by the expression, "old habits die hard."

18. The Department's interpretation of the ambiguous specification is not clearly erroneous and therefore should not be disturbed in this proceeding. Based on the Department's interpretation of Special Condition No. 8, the undersigned finds

that Anchor's failure to attach copies of its occupational licenses was a deviation from the requirements of the RFP.

19. That is not the end of the matter, however, for a deviation is not necessarily disqualifying unless it is found to be material. The letting authority may, in the exercise of discretion, choose to waive a minor irregularity if doing so will not compromise the integrity and fairness of the competition.

20. There is no persuasive direct evidence in the record that the Department made a conscious decision to waive the irregularity in Anchor's proposal. Documents in the Department's procurement file show, however, that the Department knew that Anchor's proposal lacked copies of occupational licenses, and in any event this was a patent defect, inasmuch as nothing was attached to the back of Anchor's Form 'F'. It is therefore reasonable to infer that the Department elected to waive the irregularity, and the undersigned so finds. Necessarily implicit in the Department's action (waiving the deficiency) is an agency determination that that the irregularity was a minor one.

21. The question of whether or not Anchor's noncompliance with Special Condition No. 8 was material is fairly debatable. Ultimately, however, the undersigned is unable to find, for reasons more fully developed below, that the Department's

determination in this regard was clearly erroneous. Because the Department's determination was not clearly erroneous, the undersigned accepts that Anchor's failure to submit occupational licenses was a minor irregularity, which the Department could waive.

22. The Department's decision to waive the minor irregularity is entitled to great deference and should be upheld unless it was arbitrary or capricious. The undersigned cannot say that waiving the deficiency in question was illogical, despotic, thoughtless, or otherwise an abuse of discretion; to the contrary, once it has been concluded that the irregularity is minor and immaterial, as the Department not incorrectly did here, waiver seems the reasonable and logical course of action.

23. The upshot is that the proposed award to Anchor should be allowed to stand.

24. The foregoing determination renders moot the disputed issues of fact arising from Anchor's allegation that Sunshine's proposal was nonresponsive. It is unnecessary, therefore, for the undersigned to make additional findings on that subject.

CONCLUSIONS OF LAW

25. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, 120.57(1), and 120.57(3), Florida Statutes, and the parties have standing.

26. Pursuant to Section 120.57(3)(f), Florida Statutes, the burden of proof rests with the party opposing the proposed agency action, here Sunshine. See State Contracting and Engineering Corp. v. Department of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Sunshine must sustain its burden of proof by a preponderance of the evidence. Florida Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

27. Section 120.57(3)(f), Florida Statutes, spells out the rules of decision applicable in bid protests. In pertinent part, the statute provides:

> In a competitive-procurement protest, other than a rejection of all bids, 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 bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

28. The First District Court of Appeal has construed the term "de novo proceeding," as used in Section 120.57(3)(f), Florida Statutes, to "describe a form of intra-agency review. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." State Contracting, 709 So. 2d at 609. In deciding State Contracting, the court

followed Intercontinental Properties, Inc. v. State Dep't of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 1st DCA 1992), an earlier decision——it predates the present version of the bid protest statute——in which the court had reasoned:

> 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 and fair 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.* Instead, the hearing officer sits in a review capacity, and must determine whether the bid review criteria . . . have been satisfied.

29. In framing the ultimate issue to be decided in this de novo proceeding as being "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications," the statute effectively establishes a *standard of conduct* for the agency, which is that, in soliciting, evaluating, and accepting bids or proposals, the agency must obey its governing statutes, rules, and the project specifications. If the agency breaches this standard of conduct, its proposed action is subject to (recommended) reversal by the administrative law judge in a protest proceeding.

30. Consequently, the party protesting the intended award must identify and prove, by the greater weight of the evidence, a specific instance or instances where the agency's conduct in taking its proposed action was either: (a) contrary to the agency's governing statutes; (b) contrary to the agency's rules or policies; or (c) contrary to the bid or proposal specifications.

31. It is not sufficient, however, for the protester to prove merely that the agency violated the general standard of conduct. By virtue of the applicable standards of "proof," which are best understood as standards of review,[4] the protester additionally must establish that the agency's misstep was: (a) clearly erroneous; (b) contrary to competition; or (c) an abuse of discretion.

32. The three review standards mentioned in the preceding paragraph are markedly different from one another. The abuse of discretion standard, for example, is more deferential (or narrower) than the clearly erroneous standard. The bid protest review process thus necessarily entails a decision or decisions regarding which of the several standards of review to use in evaluating a particular action. To do this requires that the meaning and applicability of each standard be carefully considered.

33. The clearly erroneous standard is generally applied in reviewing a lower tribunal's findings of fact. In Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518, 528 (1985), the United States Supreme Court expounded on the meaning of the phrase "clearly erroneous," explaining:

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a [trial] court may be derived from our cases. The foremost of these principles . . . is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." . . . . This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a [trial] court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*" . . . . If the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the

> evidence, the factfinder's choice between them cannot be clearly erroneous. . . . .

(Citations omitted)(emphasis added).

34. The Florida Supreme Court has used somewhat different language to give this standard essentially the same meaning:

> A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law. A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion. . . . . When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous' and the appellate court will reverse because the trial court has 'failed to give legal effect to the evidence' in its entirety.

Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956)(citation omitted).

35. Because administrative law judges are the triers of fact charged with resolving disputed issues of material fact based upon the evidence presented at hearing, and because bid protests are fundamentally de novo proceedings, the undersigned is not required to defer to the letting authority in regard to

any findings of objective historical fact that might have been made in the run-up to preliminary agency action. It is exclusively the administrative law judge's responsibility, as the trier of fact, to ascertain from the competent, substantial evidence in the record what actually happened in the past or what reality presently exists, as if no findings previously had been made.

36. If, however, the challenged agency action involves an ultimate factual determination——for example, an agency's conclusion that a proposal's departure from the project specifications was a minor irregularity as opposed to a material deviation——then some deference is in order, according to the clearly erroneous standard of review.[5] To prevail on an objection to an ultimate finding, therefore, the protester must substantially undermine the factual predicate for the agency’s conclusion or convince the judge that a defect in the agency's logic led it unequivocally to commit a mistake.

37. There is another species of agency action that also is entitled to review under the clearly erroneous standard: interpretations of statutes for whose administration the agency is responsible, and interpretations of the agency's own rules. See State Contracting and Engineering Corp. v. Department of Transp., 709 So. 2d 607, 610 (Fla. 1st DCA 1998). In deference

to the agency's expertise, such interpretations will not be overturned unless clearly erroneous. Id.[6]

38. This means that if the protester objects to the proposed agency action on the ground that it violates either a governing statute within the agency's substantive jurisdiction or the agency's own rule, and if, further, the validity of the objection turns on the meaning, which is in dispute, of the subject statute or rule, then the agency's interpretation should be accorded deference; the challenged action should stand unless the agency's interpretation is clearly erroneous (assuming the agency acted in accordance therewith).

39. The same standard of review also applies, in a protest following the announcement of an intended award, with regard to preliminary agency action taken upon the agency's interpretation of the project specifications——but for a reason other than deference to agency expertise. Section 120.57(3)(b), Florida Statutes, provides a remedy for badly written or ambiguous specifications: they may be protested within 72 hours after the posting of the specifications. The failure to avail oneself of this remedy results in a waiver of the right to complain about the specifications per se.

40. Consequently, if the dispute in a protest challenging a proposed award turns on the interpretation of an ambiguous, vague, or unreasonable specification, which could have been

corrected or clarified prior to acceptance of the bids or proposals had a timely specifications protest been brought, and if the agency has acted thereafter in accordance with a permissible interpretation of the specification (i.e. one that is not clearly erroneous), then the agency's intended action should be upheld——not out of deference to agency expertise, but as a result of the protester's waiver of the right to seek relief based on a faulty specification.[7]

41. The statute requires that agency action (in violation of the applicable standard of conduct) which is "arbitrary, or capricious" be set aside. Earlier, the phrase "arbitrary, or capricious" was equated with the abuse of discretion standard, see endnote 4, supra, because the concepts are practically indistinguishable——and because use of the term "discretion" serves as a useful reminder regarding the kind of agency action reviewable under this highly deferential standard.

42. It has been observed that an arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chemical Co. v. State Dep't of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979). Thus, under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have

support in substantial evidence." Adam Smith Enterprises, Inc. v. State Dep't of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Nevertheless,

> the reviewing court must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of each of these factors to its final decision.

Id.

43. The second district framed the "arbitrary or capricious" review standard in these terms: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious." Dravo Basic Materials Co., Inc. v. State Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992). As the court observed, this "is usually a fact-intensive determination." Id. at 634.

44. Compare the foregoing "arbitrary or capricious" analysis with the test for reviewing discretionary decisions:

> "Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it

> cannot be said that the trial court abused its discretion."

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980), quoting Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942). Further,

> [t]he trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.

Canakaris, 382 So. 2d at 1203.

45. Whether the standard is called "arbitrary or capricious" or "abuse of discretion," the scope of review, which demands maximum deference, is the same. Clearly, then, the narrow "arbitrary or capricious" standard of review cannot properly be applied in evaluating *all* agency actions that might be challenged in a bid protest; rather, this highly deferential standard appropriately applies only to those decisions which are committed to the agency's discretion.

46. Therefore, where the protester objects to agency action that entails the exercise of discretion, but only in such

instances, the objection cannot be sustained unless the agency abused its discretion, i.e. acted arbitrarily or capriciously.

47. The third standard of review articulated in Section 120.57(3)(f) is unique to bid protests. The "contrary to competition" test is a catch-all which applies to agency actions that do not turn on the interpretation of a statute or rule, do not involve the exercise of discretion, and do not depend upon (or amount to) a determination of ultimate fact.

48. Although the contrary to competition standard, being unique to bid protests, is less well defined than the other review standards, the undersigned concludes that the set of proscribed actions should include, at a minimum, those which: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. See, e.g., R. N. Expertise, Inc. v. Miami-Dade County School Bd., et al., Case No. 01-2663BID, 2002 Fla. Div. Adm. Hear. LEXIS 163, *58 (Fla.Div.Admin.Hrgs. Feb. 4, 2002); see also E-Builder v. Miami-Dade County School Bd. et al., Case No. 03-1581BID, 2003 WL 22347989, *10 (Fla.Div.Admin.Hrgs. Oct. 10, 2003).

49. Turning to the merits of this case, Sunshine's protest hinges largely on the objection that Anchor failed to attach

copies of its "occupational licenses" to its proposal, in contravention of a clear directive in the RFP. That being the case, asserts Sunshine, Anchor's proposal deviated materially from the provisions of Special Condition No. 8 and hence must be rejected as nonresponsive.

50. Whether Anchor's proposal was irregular turns on the meaning of Special Condition No. 8. Because no one timely protested the specifications, the Department's interpretation of this provision should stand if (a) the specification at issue is unclear, vague, or ambiguous; and (b) the Department's interpretation is not clearly erroneous. On the other hand, if the provision were unambiguous and otherwise lawful, then the Department's interpretation would be entitled to no deference (for plain language requires no interpretation); the question, in that event, would be whether the Department implemented the clear and unambiguous language of the RFP. If not, then the Department's action would be clearly erroneous or contrary to competition.

51. As found above, Special Condition No. 8 includes the following instruction:

> **NOTE: Copies of occupational licenses must also be attached to the back of Form 'F'.**

This language seems clear on its face, but it suffers, potentially, from a latent ambiguity stemming from the use of the term "occupational license," which, as discussed previously, was used historically to describe documents issued by local governments as a means of raising revenue from businesses operating within their jurisdictions. Following the enactment, in 2006, of amendments to the statutes governing such business taxes, the instruments formerly known as "occupational licenses" have been (or properly should be) referred to as "business tax receipts."

52. If this were the only source of potential uncertainty, the instruction to attach copies of occupational licenses might be considered unambiguous. It seems likely, after all, that many people still use the term "occupational license" when speaking about a "business tax receipt" and would understand what was meant. At a minimum, it is reasonable to interpret the instruction to attach copies of "occupational licenses" as a directive concerning the instruments historically known by that name, which is the meaning that the Department meant to convey.

53. In Special Condition No. 8, however, the note concerning "occupational licenses" is situated close below Paragraph 8.4, which requires that offerors be licensed by DBPR if the contractual services under consideration cannot lawfully be performed without such a license. Because the term "occupational license" is no longer a term of art denoting a source of local tax revenue, the "note" in Special Condition No.

8 reasonably can be read as requiring the attachment of any relevant *regulatory* occupational licenses issued by DBPR and held by the offeror. This is how Anchor understood the specification. Under this interpretation, it was not necessary, in this procurement, for an offeror to attach anything to Form 'F' because DBPR does not regulate the business of providing towing services and roadside assistance.

54. Because the relevant language of the RFP is susceptible to more than one reasonable interpretation, the undersigned concludes that it is ambiguous. See, e.g., Saunders v. Bassett, 923 So. 2d 546, 548 (Fla. 1st DCA 2006)("Ambiguity exists where more than one literal interpretation is reasonable.").

55. As we have seen, the Department interprets the ambiguous specification at issue as a mandate that offerors attach their occupational licenses/business tax receipts. The undersigned concludes that the Department's interpretation of it's own specification is within the range of permissible interpretations of the ambiguous language and hence is not clearly erroneous.

56. Accordingly, it is concluded that Anchor's proposal deviated from the requirements of Special Condition No. 8.

57. It has long been recognized that "although a bid containing a material variance is unacceptable, not every

deviation from the invitation to bid is material. [A deviation] is material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. State Dep't of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986). "The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders." Harry Pepper & Assocs., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

58. In addition to the foregoing rules, courts have considered the following criteria in determining whether a variance is material and hence nonwaivable:

> [F]irst, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.
>
> [S]ometimes it is said that a bid may be rejected or disregarded if there is a material variance between the bid and the advertisement. A minor variance, however, will not invalidate the bid. In this context a variance is material if it gives the bidder a substantial advantage over the

> other bidders, and thereby restricts or
> stifles competition.

Robinson Electrical Co. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982), quoting 10 McQuillan, Municipal Corporations § 29.65 (3d ed. rev. 1981)(footnotes omitted).

59. The touchstone of these tests for materiality——substantial advantage——is an elusive concept, to say the least, easier to state than to apply. Obviously, waiving *any* defect that might disqualify an otherwise winning bid gives the beneficiary of the waiver an advantage or benefit over the other bidders. In practice, differentiating between, on the one hand, "fair" advantages——i.e. those that are tolerable because they do not defeat the object and integrity of the competitive procurement process——and "unfair" (or intolerable) advantages, on the other, is exceptionally difficult; and, making matters worse, there are not (as far as the undersigned is aware) many generally recognized, consistently applied, neutral principles available for the decision-maker's use in drawing the distinction between a "substantial" advantage and a "mere" advantage.

60. That said, the undersigned believes that a bidder's noncompliance with a specification which was designed to winnow the field——especially one which prescribes particular characteristics that the successful bidder must possess——should

rarely, if ever, be waived as immaterial. This is because such a provision acts as a barrier to access into the competition, potentially discouraging some would-be participants, namely those who lack a required characteristic, from submitting a bid. See Syslogic Technology Services, Inc. v. South Florida Water Management District, Case No. 01-4385BID, 2002 Fla. Div. Adm. Hear. LEXIS 235, *77 n.23 (Fla.Div.Admin.Hrgs. Jan. 18, 2002)("Of course, it will usually not be known how many, if any, potential proposers were dissuaded from submitting a proposal because of one project specification or another. That is why specifications that have the capacity to act as a barrier to access into the competition . . . should generally be considered material and non-waivable[.]"); Cf. City of Opa-Locka v. Trustees of the Plumbing Industry Promotion Fund, 193 So. 2d 29, 32 (Fla. 3d DCA 1966)(Permitting city to waive necessity that bidder have a certificate of competency prior to bidding would give that bidder "an unfair advantage over those who must prequalify. . . . [I]t would [also promote] favoritism by allowing some bidders to qualify after their bids are accepted while refusing to consider bids of others on the ground that they did not prequalify.").

61. The "occupational licenses" requirement resembles the sort of "gatekeeper" provision that should not ordinarily be waiveable. But this is because the term "license" frequently

refers to a regulatory instrument that is held only by those who have demonstrated some degree of proficiency or competence as a condition of becoming licensed. An "occupational license"——as the Department used and understood the term——is not such a regulatory instrument. Rather, it is available to anyone who pays the local business tax, regardless of qualifications or fitness.[8] The tax in question, moreover, is a relatively small one as compared to the value of the subject contract; it is highly improbable that any serious, would-be competitor for this project, which is worth about $1.5 million per year, would have declined to submit a proposal because of the RFP's requirement that proposers demonstrate payment of local business taxes totaling, probably, in the hundreds of dollars annually, at most.

62. The undersigned concludes, therefore, that the Department did not unequivocally make a mistake when it determined that Anchor's failure to attach copies of occupational licenses was an immaterial defect; the Department's decision in this regard was not, in other words, clearly erroneous.

63. Finally, the undersigned concludes that the Department's decision to waive the minor irregularity in Anchor's proposal was neither arbitrary nor capricious; it was, rather, a reasonable response under the circumstances, one that

is justifiable both factually and logically, for reasons discussed above.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a Final Order consistent with its preliminary decision to award Anchor the contract at issue.

DONE AND ENTERED this 6th day of April, 2010, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of April, 2010.

ENDNOTES

[1]/ The Department likewise views any deficiencies in Sunshine's proposal as minor matters and has shown little interest in Anchor's counterpunches, which of course are practically

irrelevant if, as both the Department and Anchor maintain, Anchor's proposal should not be rejected as nonresponsive.

[2]/ Anchor, which is a Florida corporation, did not attach to its proposal any proof that it is authorized to do business in Florida. Sunshine argues that Anchor's proposal was noncompliant as a result, urging that Paragraph 8.3 should be read as implicitly requiring Florida corporations to demonstrate their authority to operate in this state. This specification, however, clearly and unambiguously applies only to foreign business associations. Anchor therefore was not obligated to prove its authority to do business in Florida.

[3]/ Paragraph 28.1 of Special Condition No. 28 states that "Proposing firms must attain a score of **seventy (70)** points or higher on the Technical Proposal to be considered responsive. Should a Proposer receive fewer than **seventy (70)** points for their Technical Proposal score, the Price Proposal will not be opened." The total number of points available for the Technical Proposal was 70. None of the offerors was awarded a perfect score for the Technical Proposal. The undersigned assumes that Paragraph 28.1 contains a typographical error, and finds that Paragraph 19.1 specifies the correct number of points that a proposal needed to earn to be considered responsive.

[4]/ The term "standard of proof" as used in § 120.57(3)(f) reasonably may be interpreted to reference standards of review. This is because, while the "standard of proof" sentence fails to mention any common standards of proof, it does articulate two accepted standards of review: (1) the "clearly erroneous" standard and (2) the abuse of discretion (="arbitrary, or capricious") standard. (The "contrary to competition" standard——whether it be a standard of proof or standard of review——is unique to bid protests.)

[5]/ An ultimate factual determination is a conclusion derived by reasoning from objective facts; it frequently involves the application of a legal principle or rule to historical facts: e.g. the driver failed to use reasonable care under the circumstances and therefore was negligent; and it may be infused with policy considerations. Reaching an ultimate factual finding requires that judgment calls be made which are unlike those that attend the pure fact finding functions of weighing evidence and choosing between conflicting but permissible views of reality.

[6]/ From the general principle of deference follows the more specific rule that an agency's interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of permissible interpretations. State Bd. of Optometry v. Florida Soc. of Ophthalmology, 538 So. 2d 878, 885 (Fla. 1st DCA 1988); see also Suddath Van Lines, Inc. v. Department of Envtl. Protection, 668 So. 2d 209, 212 (Fla. 1st DCA 1996). However, "[t]he deference granted an agency's interpretation is not absolute." Department of Natural Resources v. Wingfield Dev. Co., 581 So. 2d 193, 197 (Fla. 1st DCA 1991). Obviously, an agency cannot implement any conceivable construction of a statute or rule no matter how strained, stilted, or fanciful it might be. Id. Rather, "only a permissible construction" will be upheld by the courts. Florida Soc. of Ophthalmology, 538 So. 2d at 885. Accordingly, "[w]hen the agency's construction clearly contradicts the unambiguous language of the rule, the construction is clearly erroneous and cannot stand." Woodley v. Department of Health and Rehabilitative Services, 505 So. 2d 676, 678 (Fla. 1st DCA 1987); see also Legal Envtl. Assistance Found. v. Board of County Comm'rs of Brevard County, 642 So. 2d 1081, 1083-84 (Fla. 1994)("unreasonable interpretation" will not be sustained).

[7]/ If, on the other hand, the agency has followed a clearly erroneous interpretation of an ambiguous specification, then its proposed action ordinarily should not be implemented. Finally, if the agency has sought to proceed in a manner that is contrary to the plain language of a lawful specification, then the agency's proposed action should probably be corrected, for the preliminary agency action likely would be clearly erroneous or contrary to competition; in that situation, there should be no waiver, because a reasonable person would not protest an unambiguous specification that facially conforms to Florida procurement law.

[8]/ The statement in the text is true in general and true in this case. If, however, a first-time applicant for a business tax receipt is paying the tax to engage in a business or profession regulated by DBPR, that person must exhibit his state license as a condition of obtaining a business tax receipt. See § 205.194(1), Fla. Stat. There are similar requirements for a handful of other occupations in which one cannot lawfully engage without a state-issued license. See § 205.196, Fla. Stat. (pharmacies and pharmacists); § 201.1965, Fla. Stat. (assisted living facilities); § 201.1967, Fla. Stat. (pest control services); § 201.1969, Fla. Stat. (health studios); § 201.1971,

Fla. Stat. (sellers of travel); § 201.1973, Fla. Stat. (telemarketing businesses); § 201.1975, Fla. Stat. (household moving services). Thus, in some instances, an occupational license or business tax receipt might serve as a proxy for a regulatory license——but not in this case because the state does not regulate the business of providing towing services.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.