

BEFORE THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA

SUN ART PAINTING CORPORATION,
A corporation organized under the laws of
Florida

Petitioner,

vs.

DOAH Case No.: 10-000376 BID
Honorable Stuart M. Lerner

THE SCHOOL BOARD OF PALM BEACH
COUNTY, FLORIDA

Respondent.

FINAL ORDER NO.: _____

FINAL ORDER

THIS CAUSE came before the School Board of Palm Beach County, Florida (the "School Board") on August 5, 2010, for the purpose of addressing Sun Art Painting Corporation ("Petitioner") and the Superintendent, Arthur C. Johnson, Ph.D.'s ("Superintendent") Exceptions to the Administrative Law Judge's Recommended Order, and on August 11, 2010, for adopting a Final Order in connection with the above-styled cause.

Stuart M. Lerner, the Administrative Law Judge, assigned by the Division of Administrative Hearings ("DOAH") in the above-styled cause, on May 27, 2010, entered a Recommended Order, which was furnished to the Petitioner and the School Board. In consideration of the School Board's decision regarding the Petitioner's and the Superintendent's Exceptions, the recommendations of Robert W. Erikson, the Superintendent, and the Recommended Order of the Administrative Law Judge ("ALJ") from DOAH, the School Board issues this Final Order:

**A. PROCEDURES FOR RULING ON EXCEPTIONS AND
ADOPTING FINAL ORDER**

Following the receipt of Petitioner's and Superintendent's Exceptions, the School Board

duly noticed a special meeting which was held on Wednesday, August 5, 2010, to address Petitioner's and the Superintendent's Exceptions to the Administrative Law Judge's Recommended Order. All parties were timely served notice of this meeting and received an Agenda.

The School Board ruled on the Exceptions to the Findings of Fact, Conclusions of Law, contained in the Recommended Order. These rulings are reflected in the body of this Final Order. Moreover, at the School Board special meeting on August 11, 2010, the School Board adopted this Final Order.

The School Board did, *en bane*, review and duly consider the Administrative Law Judge's Recommended Order and the Exceptions and Response submitted, as well as the complete record of this above-styled cause. This review was completed prior to voting on the Exceptions. The School Board had also been advised of the appropriate standards of its review of an Administrative Law Judge's findings of fact, and conclusions of law in the Recommended Order and consulted legal counsel to provide legal advice in the School Board's deliberations and voting on this matter on the Exceptions and adoption of this Final Order.

At the meeting on the Exceptions, both the representative of the Petitioner's and counsel for the Superintendent were entitled to and did make oral presentations to the Board of their arguments and references to the record as to each Exception, and an opportunity existed for School Board members' deliberations and discussions before voting.

A meeting for the adoption of a Final Order occurred at the Board's scheduled special meeting on August 11, 2010. This meeting was duly noticed, and the parties received notification that at this meeting the School Board would be considering adopting a Final Order in this matter.

The School Board, in ruling on the Exceptions and adopting this Final Order, was guided by the general principles applicable to an agency's review of a Recommended Order from an Administrative Law Judge, as found in Section 120.57(1)(1), Fla. Stat. (2009).

(1) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. Rejection or modification of conclusions of law may not form the basis for rejection or modification 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 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. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

The School Board also followed the appropriate sections of the Florida Administrative Code and School Board policies relating to this formal proceeding.

The Board recognized its legal standard of reviewing a recommended order:

An administrative agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. 'The agency is not authorized to weigh the evidence presented, judge the credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.' Greseth v. Department of Health and Rehabilitative Services, 573 So.2d 1004, 1006 (Fla. 4th DCA 1991). See also, Bay County School Bd. v. Bryan, 679 So.2d 1246 (Fla. 1st DCA 1996); Heifitz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Furthermore, the School Board recognized that the agency's responsibility to determine if substantial evidence supports the Administrative Law Judge's conclusions "cannot be avoided by merely labeling contrary findings as "conclusions of law." South Fla. Water Mgmt. Dist. v. Calawe, 459 So.2d 390, 395 (Fla. 4th DCA 1984).

The School Board recognized that it may not may not reject or modify the findings of fact in the ALJ's Recommended Order, unless it first determines from a review of the complete

record, and states with particularity in its Final Order, that the findings of fact reached by the ALJ 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. Section 120.57(1)(1), Fla. Stat. (2009). "Competent substantial evidence establishes a substantial basis of fact from which the fact at issue can be reasonably inferred ... such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

Additionally, the School Board recognized that in weighing the evidence, resolving evidentiary conflicts and making credibility assessments were within the province of the ALJ. Thus, the Board may not re-weigh evidence submitted to the ALJ, resolve conflicts in the evidence, judge the credibility of witnesses or otherwise interpret the evidence anew. See Bay County Bd. V. Bryan, 679 So. 2d 1246 (Fla. 1st DCA 1996); Heifitz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985).

The School Board also considered the principles of review by an agency of an ALJ's rulings on findings of fact as to substituted findings of fact. The Board may not make supplemental findings of fact on issues for which the Administrative Law Judge made no findings, Florida Power & Light Co. v. State, 693 So.2d 1025 (Fla. 1st DCA 1997), unless the ultimate facts are increasingly matters of opinion and the opinions are increasingly infused by policy considerations for which the School Board has special responsibility. McDonald v. Dept. of Banking & Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

Further, the School Board recognized that in this proceeding the evidentiary standard to have been applied by the Administrative Law Judge (ALJ) was the "preponderance of evidence" standard meaning that it is the greater weight of the evidence or evidence that "more likely than

not" tends to prove a certain proposition. K.P. v. Dept. of Children and Family Services, 2004 WL 179490 (2004); Gross v. Lyons, 763 So.2d 763 (Fla. 2000). Additionally, pursuant to Section 120.57(3)(f), the standard of proof for this rejection of all bids case is whether the School Board's proposed agency action was arbitrary. The Board had to review the findings and determine whether the findings met the preponderance of evidence standard of proof which requires a determination of whether the School Board's intended decision was arbitrary by preponderance of the evidence.

Still, the School Board recognized that if it deems it appropriate, the Board may adopt the Recommended Order as its own Final Order. Section 120.57(1)(f), Fla. Stat. (2009).

Furthermore, the School Board acknowledges that in its Final Order, the Board rejected or modified the conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules in the recommended order over which the School Board has substantive jurisdiction. When rejecting or modifying a conclusion of law or interpretation of administrative rule, the Board stated with particularity its reasons for rejecting or modifying the conclusion of law or interpretation of administrative rule, and made a finding that its substituted conclusion of law or interpretation of administrative rule was either as reasonable or more reasonable than that which it rejected or modified. Section 120.57(1)(f), Fla. Stat. (2009); MacPherson v. School Board, 505 So. 2d 682 (Fla. 3d DCA 1987).

Additionally, the School Board recognized its obligation to include in its final order an explicit ruling on each Exception, stating with particularity the grounds for the ruling. See, Lloyd v. Department of Professional Regulation, Florida Real Estate Comm'n, 473 So.2d 721 (Fla. 4th DCA 1985).

The outcome of the School Board's voting on the Exceptions is as stated below:

B. RULINGS ON EXCEPTIONS

SUN ART PAINTING, INC.'S EXCEPTIONS TO RECOMMENDED ORDER

Sun Art Painting, Inc.'s Exception Number 1

The Petitioner takes exception to paragraph 8 of the Recommended Order because it believes that there were instructions on the Revised Bid Summary Sheet directing that an authorized representative sign the document, and that there was a signature line. Sun Art then makes argument supporting its position.

The ALJ heard the testimony of both Sun Art and the School Board and found that there was no instruction. There exists competent substantial evidence to support the ALJ's finding of fact. (T 15, 16, 19, 60, 61) The School Board cannot re-weigh the evidence submitted to the ALJ. Therefore, the School Board denies this Exception.

Sun Art Painting, Inc.'s Exception Number 2

The Petitioner takes exception to paragraph 48 of the Recommended Order where it states that the ALJ cannot agree that the failure to have placed a signature on the Revised Bid Summary Sheet was a material deviation from the Invitation to Bid (ITB), and therefore, an immaterial variance. First, the Petitioner states that both parties were in agreement that the failure to provide a mandated signature on the Revised Bid Summary Sheet was a material irregularity. Additionally, the Petitioner makes reference to other paragraphs of the Recommended Order – paragraphs 34, 45, and 49 and summarizes those paragraphs. Finally, the Petitioner argues that the School Board is prohibited from changing its testimony.

As to the Petitioner's summaries and argument, the School Board cannot re-weigh this evidence submitted to the ALJ. Although the School Board does take exception to this paragraph (See Ruling on Superintendent's exception, *infra*), it does not do so for all of the reasons stated by Sun Art. Therefore, the School Board denies this Exception.

Sun Art Painting, Inc.'s Exception Number 3

The Petitioner takes exception to paragraph 48 of the Recommended Order where it states that, pursuant to General Condition 20 and Special Condition F of the ITB, the bidders that submitted signed Invitation to Bid Bidder Acknowledgement forms have made binding offers as to Items 1 and 2. Although the Petition states that this legal conclusion is incorrect, it offers no law that refutes the ALJ's position nor offers any information to support that the ALJ's statement is not supported by competent substantial evidence or that it did not comply with the essential requirements of law. Instead the Petitioner summarizes other paragraphs in the Recommended Order (RO paragraphs 5 and 6), makes argument as to why that portion of paragraph 48 is incorrect, and cites to law related to material variance and irregularity.

The School Board cannot re-weigh this evidence submitted to the ALJ. Although the School Board does take exception to this paragraph (See Ruling on Superintendent's exception, *infra*), it does not do so for the reasons stated by Sun Art. Therefore, the School Board denies this Exception.

Sun Art Painting, Inc.'s Exception Number 4

The Petitioner takes exception to paragraph 46 of the Recommended Order where it states that if the deviations were material, the School Board's rejection of all bids on Items 1 and 2 would not be without justifiable reason. Paragraph 46 then refers to endnote 17 which cites to Rule 6A-1.012(12)(c), Florida Administrative Code ("F.A.C."). The Petitioner restates Rule 6A-

1.012(12)(c), F.A.C., and then restates portions of the facts of this matter. The Petitioner then argues that the ALJ's reference to this Rule implies either a need or latent requirement to reject due to the fact that there is one responsive bidder or to permit the School Board to belatedly changes its testimony is erroneous.

The ALJ has correctly cited the law. The Petitioner has failed to provide any evidence that the ALJ's cite to the law is erroneous. As to the Petitioner's argument, the School Board cannot re-weigh this evidence submitted to the ALJ. Therefore, the School Board denies this Exception.

Sun Art Painting, Inc.'s Exception Number 5

The Petitioner takes exception to paragraph 51 of the Recommended Order where it states that "[i]n determining the 'lowest responsive and responsible bidder,' Respondent should find that a bidder's failure to have signed its Revised Bid Summary Sheet constituted a minor irregularity not vitiating the bidder's responsiveness." The Petitioner contends that this "finding/conclusion" is unsupported either by facts or by applicable law. The Petitioner takes exception to the second sentence of paragraph 51 of the Recommended Order, but not to the first sentence of same paragraph.

Sentence 2 of paragraph 51 is related to sentence 1 of same paragraph in that the ALJ's rationale for determining that the School Board's intended decision to reject all bids was based on the violation of the requirement that is considered a minor irregularity and should thereby be waived. The School Board cannot take exception to sentence 2 and not also take exception to sentence 1. Although the School Board does take exception to this paragraph (See Ruling on Superintendent's exception, *infra*), it does not do so for the reasons stated by Sun Art. Therefore, the School Board denies this Exception.

SUPERINTENDENT'S EXCEPTION TO RECOMMENDED ORDER

Superintendent Exception

The Superintendent takes exception to paragraphs 39, 48, 50, and 51 of the Recommended Order. These paragraphs represent the substance of the ALJ's conclusions of law that the School Board's intended action of rejecting all bids for Items 1 and 2 was arbitrary. The Superintendent takes exception to these paragraphs because the ALJ's conclusions of law are not supported by competent substantial evidence and by Florida Law. Additionally, there is no competent substantial evidence that the Petitioner met its burden of proving that the School Board's intended decision to reject all bids for Items 1 and 2 was arbitrary.

The School Board has substantive jurisdiction over matters involving rejection of all bids. Specifically, Rule 6A-1.012, F.A.C. states that each school board shall have the authority to reject any or all proposals submitted to any competitive solicitation. Additionally, School Board Policy 6.14(2)(ii) authorizes the School Board, the Superintendent and his designee to have the authority to reject any or all bids and request new bids.

At the final hearing, the School Board's position was essentially that there existed an ambiguity in the ITB that caused confusion and resulted in the vendors not having a fair opportunity to compete for the projects, thereby subverting the competitive bidding process. Testimony from both parties state that the word "execute" means signed. (T 22, 129, 130; paragraph 47 of Recommended Order) Testimony further supported, as stated in paragraph 42 of the Recommended Order that the School Board intended to require the bidders to sign their Revised Bid Summary Sheets, and that the ITB was ambiguous in that it did not clearly express the School Board's intent. Additionally, as stated in paragraph 44 of the Recommended Order

the School Board is free to find that the bidders who did not sign the Revised Bid Summary Sheets deviated from the ITB. The School Board further argued that if it were to eliminate the vendors who did not sign, there would be prejudice against the vendor's who did not sign (as they would be deemed non-responsive); and fair competition would, therefore, be subverted. (T 84) As a result, the Superintendent's designee rejected all bids in Items 1 and 2. (T 85, 86; paragraph 47 of Recommended Order)

After review of the complete record, the School Board finds that there exists a prudent, thoughtful and reasonable rationale for the School Board's analysis in rejecting all bids for Items 1 and 2. (R Ex 5; R Ex 6; T 10, 14, 28, 42, 60, 82, 84, 95, and 96) Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006) Additionally, the School Board finds that the evidence supports that the purpose of the competitive bidding was subverted. Department of Transportation v. Groves-Watkins Constructors, 530 So.2d 912 (Fla 1988). Furthermore, the evidence supports that the School Board participated in an honest exercise of its discretion to reject all bids in Items 1 & 2. Scientific Games, Inc. v. Dittler Bros., Inc., 586 So. 2d 1128, 1131 (Fla. 2nd DCA 1991) citing Department of Transp. V. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988).

The School Board has reviewed the Recommended Order and found it is void of any law that supports the ALJ finding in paragraph 48 that "Pursuant to General Condition 20. and Special Condition F. of the ITB, by having submitted bids which included signed Invitation to Bid Bidder Acknowledgement forms, these bidders have made binding offers as to Items 1 and 2 which they are, by virtue of their not having signed their Revised Bid Summary Sheets, no more

able than Petitioner to back out of.” Additionally, the Final Hearing Transcript is void of any testimony that supports same.

The ALJ participated in a *de novo* review (an incorrect standard of review for a rejection of all bid case) and found the School Board’s intended decision to be wrong. The ALJ’s finding is in direct contrast with Scientific Games, Inc. v. Dittler Bros., Inc., which states that “a ‘public body has wide discretion’ in the bidding process and ‘its decision, when based on an honest exercise’ of that discretion, should not be overturned ‘even if it may appear erroneous and even if reasonable persons may disagree.’” Scientific Games, Inc. v. Dittler Bros., Inc., 586 So. 2d 1128, 1131 (Fla. 2nd DCA 1991) citing Department of Transp. V. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988) and therefore, do not comply with the essential requirements of the law. Finally, the Petitioner failed to meet its burden of proving that the School Board’s intended decision to reject all bids for Items 1 and 2 was arbitrary.

Because paragraph 49 outlines the law that supports the ALJ rationale for stating that failure to place a signature on the Revised Bid Summary Sheet was a minor irregularity, the School Board finds that that affect of taking exception and deleting paragraphs 39, 48, 50, and 51 of the Recommended Order is negating this paragraph. Therefore, the School Board finds that paragraph 49 must be deleted.

Based on the statements above, the School Board hereby finds that the School Board accepts this Exception.

C. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Based upon a review of the record as a whole and the reasons expressed above, the

School Board makes these findings of fact and conclusions of law:

1. FINDINGS OF FACT

The Palm Beach County School Board, Florida, finds that the Findings of Fact in the Recommended Order of the ALJ are supported by competent substantial evidence in the record as a whole, except as indicated by the School Board's rulings on the Superintendent's Exception, and that the proceedings upon which the Findings of Fact were made complied with the essential requirements of law.

Sun Art Painting Corporation filed Exceptions to certain paragraphs set forth in the Recommended Order of the Administrative Law Judge, pursuant to Section 120.57, Fla. Stat. The School Board rejected Sun Art Painting Corporation's Exceptions to the Administrative Law Judge's Recommended Order at its hearing held on August 5, 2010, for the particular reasons stated herein.

The School Board hereby adopts the Findings of Fact of the Administrative Law Judge contained within the Recommended Order except where noted *supra*.

2. CONCLUSIONS OF LAW

1. The School Board of Palm Beach County, Florida, has jurisdiction over the subject matter and the parties hereto.

2. The School Board adopts the Conclusions of Law of the Administrative Law Judge in the Recommended Order as prescribed in Section 120.57(1)(1), Fla. Stat., except as set forth herein as to its ruling on the Superintendent's Exception, and except to paragraph 49, and finds that they are supported by competent substantial evidence in the record. The School Board further found that the proceedings upon which the adopted Conclusions of Law were based complied with the essential requirements of law.

3. Sun Art Painting, Inc. filed Exceptions to specified recommended Conclusions of Law and penalty in the Recommended Order pursuant to Section 120.57, Fla. Stat. The School Board rejected Sun Art Painting, Inc.'s Exceptions to the proposed Conclusions of Law, as set forth in its above stated rulings on the Exceptions, at its August 5, 2010 meeting, and has ruled on each Exception with particularity.

4. The Superintendent filed an Exception to the recommended Conclusion of Law, to Paragraphs 39, 48, 50, 51, set forth in the Administrative Law Judge's Recommended Order, pursuant to Section 120.57, Fla. Stat. The School Board at its August 5, 2010 meeting accepted Petitioner's Exceptions to the Administrative Law Judge's Conclusion of Law, as stated above, and rejected those determinations of the Conclusions of Law by the Administrative Law Judge, and stated herein its reasons with particularity and citations to the record.

5. Paragraphs 39, 48, 50, and 51 of the Recommended Order in the Conclusions of Law section has been deleted by the School Board's ruling on the Superintendent's Exception. The effect of the deleting these paragraphs negates paragraph 49 of the Recommended Order, therefore paragraph 49 is found to be deleted. In lieu thereof, the School Board hereby adopts the following Conclusion of Law as Paragraphs of its Final Order and substitutes the following conclusions of law as reasonable as or more reasonable than the paragraphs that are rejected:

38. Intentionally left blank.

48. Failure to place a signature on the Revised Bid Summary Sheet was a material deviation from the ITB.

49. Intentionally left blank.

50. There exists a prudent, thoughtful and reasonable rationale for the School Board's analysis in rejecting all bids for Items 1 and 2.

51. In view of the foregoing, Respondent should reject all bids on Items 1 and 2 and be free to readvertise these projects.

3. ORDER

IT IS THEREFORE HEREBY ORDERED AND ADJUDGED that the Administrative Law Judge's Recommended Order is incorporated by reference with respect to Findings of Fact, and Conclusions of Law, except for Paragraphs Numbers 39, 48, 49, 50, and 51, in this Final Order of the School Board of Palm Beach County, Florida.

IT IS HEREBY FURTHER ORDERED that all bids in Items 1: the Exterior Painting of Greenacres Elementary School Project, and Item 2: the Exterior Painting of South Olive Elementary School Project are rejected and the School District is free to rebid these projects.

DONE AND ORDERED this 11th day of August 2010.

The SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA

for  *COO*

ARTHUR C. JOHNSON, SUPERINTENDENT

 *MD*

MONROE BENAÏM, CHAIRMAN

Filed in the official School Board records with the Clerk of the School Board of Palm Beach County, Florida, this 11th day of August 2010.



ALICIA GENT

Clerk of the Palm Beach County School Board, Florida

NOTICE OF RIGHT TO APPEAL

This Final Order constitutes final agency action. Any party who is adversely affected by this Final Order has the right to seek judicial review of the Final Order pursuant to Section 120.68, Fla. Stat., by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the School Board of Palm Beach County, Florida, and a copy of the Notice of Appeal together with the applicable filing fee with the Florida Fourth District Court of Appeals, within thirty (30) days from the date this Final Order is filed with the Clerk of the School Board.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by US Mail this 12th day of August 2010 to Robert W. Erikson, Co-Owner and Chairman, Chief Administrative Officer, Sun Art Painting Corporation, 1966 W. 9th Street, Suite A, Riviera Beach, Florida 33404, Kathelyn Jacques-Adams, P.O. Box 19239, West Palm Beach, Florida 33416-9239, and Stuart M. Lerner, Administrative Law Judge, State of Florida Division of Administrative Hearings, 1230 Appalachee Parkway, Tallahassee, Florida 32399-3060.

THE SCHOOL BOARD OF PALM
BEACH COUNTY, FLORIDA

Bruce A. Harris, Esq.
Interim Chief Counsel
P.O. Box 19239
West Palm Beach, FL 33416-9239
Telephone: 561-434-8562
Facsimile: 561-357-7699

By: Bruce A. Harris
BRUCE A. HARRIS, ESQ.
Fla. Bar No.: 219010