

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

FILED
2011 JAN -3 A 11:55
DIVISION OF
ADMINISTRATIVE
HEARINGS

AMERICAN LIGHTING AND
SIGNALIZATION, INC.,

Petitioner,

vs.

DOT CASE NO.: 10-076
DOAH CASE NO.: 10-7669BID

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

MILLER ELECTRIC COMPANY,

Intervenor.

FINAL ORDER

By formal written protest dated July 2, 2010, Petitioner, American Lighting and Signalization, Inc. (ALS) protested Respondent, Department of Transportation's (Department) decision to award a design-build contract to Miller Electric Company (Miller). The contract involves the design and construction of the SR 5 (U.S. 1) Intelligent Transportation System (ITS) from SR 9 north to Wister Street in Duval County, Florida, Contract Number E2077 (Project).

The Department referred this matter to the Division of Administrative Hearings (DOAH) on August 17, 2010. Miller filed its Petition to Intervene on August 26, 2010, and an order granting the petition was entered on September 1, 2010. The matter proceeded to hearing before Suzanne F. Hood, a duly appointed Administrative Law Judge (ALJ), on September 16, 2010.

The hearing could not be concluded in the allotted time and was continued to October 1, 2010.

Appearances on behalf of the parties and Intervenor were as follows:

For Petitioner: Karen D. Walker, Esquire
Holland and Knight
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301

For Respondent: C. Denise Johnson, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

For Intervenor: Charles R. Walker, Jr., Esquire
Regan Zebouni and Walker, P.A.
9905 Old St. Augustine Road
Jacksonville, Florida 32257

At the hearing, Stipulated Exhibits 1-21 were received into evidence. ALS called five witnesses and offered seven exhibits that were admitted in evidence. The Department called two witnesses and offered one exhibit that was admitted in evidence. Miller called two witnesses and offered one exhibit that was admitted in evidence.

The transcripts of the first and second days of the hearing were filed on September 30, 2010, and on October 14, 2010, respectively. The parties filed their Proposed Recommended Orders on October 28, 2010, and the ALJ issued her Recommended Order on December 1, 2010. Exceptions to the Recommended Order were timely filed by the Department and Miller on December 10, 2010. On December 17, 2010, ALS filed a response to the exceptions filed by the Department and Miller.

STATEMENT OF THE ISSUE

As stated by the ALJ in her Recommended Order:

The issue is whether Respondent Florida Department of Transportation's (the Department or FDOT) determination that Intervenor Miller Electric Company (Miller) is a responsive design-build proposer was clearly erroneous, contrary to competition, or arbitrary and capricious.

EXCEPTIONS

Pursuant to Section 120.57(1)(l), Florida Statutes (2010), an agency has the authority to reject or modify the findings of fact set out in the recommended order. However, the agency cannot do so unless it first determines from a review of the entire record, and states with particularity in its final 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 the essential requirements of law. Rogers v. Department of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005). The agency is not permitted to reweigh the evidence or judge the credibility of the witnesses. Id. If there is competent substantial evidence to support the administrative law judge's findings of fact, the agency may not reject them, modify them, or make new findings. Stokes v. State, Bd. of Professional Engineers, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007); Rogers, 920 So. 2d at 30.

Regarding an agency's treatment of conclusions of law, Section 120.57(1)(l), Florida Statutes (2010), provides:

The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with

particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

Miller's first exception is not directed to a particular finding of fact but suggests that the ALJ's references to a "Schedule of Values" in paragraphs 31 through 37 of the Recommended Order indicates that the ALJ mistakenly believed that a complete Schedule of Values was required by the Project RFP rather than a **preliminary listing of categories** for the Schedule of Values. The contents of paragraphs 30 through 37 and 75 of the Recommended Order demonstrate the contrary. The ALJ clearly understood that the RFP required a preliminary listing of categories of the Schedule of Values as opposed to a completed Schedule. She specifically concluded, in paragraph 75 of the Recommended Order:

... the omission of preliminary listing of the categories for the Schedule of Values was a mandatory requirement that the TRC overlooked. Miller's failure to include this information was fatal to the responsiveness of Miller's proposal.

Miller's first exception is rejected.

In its second exception Miller notes that a portion of Paragraph 32 of the Recommended Order contains a finding of fact that "the Department wanted to see a preliminary listing of the categories of the Schedule of Values so that it would know what the pay items would be and that they would cover the contract." Miller then asserts that the ALJ relied upon this finding to conclude, in paragraph 75 of the Recommended Order, that the Department was deprived of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements. As Miller sees it, inasmuch as the preliminary listing of categories was not the only place where pay items would be included in the technical proposal, the conclusion is not supported by competent substantial evidence. Miller is mistaken for at least two reasons.

First, no finding of fact set out in Paragraph 32 of the Recommended Order states that the preliminary listing of categories was the only place where pay items would be included in the technical proposal. Instead, Paragraph 32 sets out generally what a schedule of values is and why the Department wanted to see a preliminary listing of the categories that would be used in the Schedule of Value in this case. Those factual statements have the requisite record support.

Second, Paragraph 75 provides:

75. Miller's proposal contains a material variation from the RFP specifications that the Department could not waive. Specifically, the omission of preliminary listing of the categories for the Schedule of Values was a mandatory requirement that the TRC overlooked. Miller's failure to include this information was fatal to the responsiveness of Miller's proposal. In other words, it deprived FDOT of its assurance that the contract will be entered into, performed and guaranteed according to its "specified requirements."

No portion of Paragraph 75 mentions, much less relies upon the Paragraph 32 language referred to by Miller. The challenged conclusion was grounded upon the ALJ's determination that Miller's proposal contained a material variation that could not be waived which, in turn, rendered the proposal nonresponsive. Miller's second exception is rejected.

Miller's third exception again addresses Paragraph 75 of the Recommended Order and is premised upon its assertion that the paragraph "concludes that the omission of a preliminary listing of categories (without pricing) somehow deprived the Department of assurance that the project would be performed and guaranteed according to its specified requirements." Miller then advances argument that there is no evidence in the record to suggest that the Project could not be delivered by Miller for the bid amount; that there is no competent substantial evidence to support a conclusion that the Department was not guaranteed performance of the Project in accordance with the Design and Construction Criteria for the amount bid by Miller; that there is no

competent substantial evidence the preliminary listing of the Schedule of Values defined the scope of the work to be performed by Miller; and that there is no competent substantial evidence that the Department relied on the preliminary listing of categories for a Schedule of Values to evaluate or determine the actual scope of work proposed in the technical proposal. While Miller has certainly proffered a number of conclusions it assumes the ALJ made and which it believes lack the requisite record support, it has failed to address the fact that the challenged conclusion actually articulated in Paragraph 75 was based upon the ALJ's determination that Miller's proposal contained a material variation that could not be waived which, in turn, rendered the proposal nonresponsive. Miller's third exception is rejected.

Miller's fourth exception takes issue with those portions of Paragraphs 36 and 75 of the Recommended Order which contain the factual statement that the Technical Review Committee (TRC) overlooked Miller's omission of the preliminary listing of categories for the Schedule of Values. In Paragraph 36, the ALJ found that "[t]he most persuasive evidence indicates that the TRC overlooked the missing Schedule of Values in Miller's proposal." This factual finding was reiterated in the conclusions of law set out in Paragraph 75. Miller does not assert that the finding is not supported by competent, substantial evidence but instead argues for a contrary finding based upon its view of the evidence. The Department is not permitted to reject or modify a finding of fact based upon reweighing the evidence or judging anew the credibility of the witnesses. Rogers, 920 So. 2d at 30. Miller's fourth exception is rejected.

In its fifth and final exception, Miller challenges Paragraphs 72 through 76 of the Recommended Order to the extent that they suggest it is a requirement in the Department policy or guidelines that all mandatory information must be provided in a bid/proposal or the bid/proposal shall be deemed nonresponsive. Essentially, Miller takes the position that its

admitted failure to provide a preliminary listing of categories for the Schedule of Values was a minor irregularity which was properly waived by the TRC under Florida law, Department policy, and the terms of the RFP. In advancing this line of argument Miller took no exception to, and has apparently overlooked, the findings of fact contained in Paragraph 26 of the Recommended Order which provides:

26. There is nothing in the RFP, the guidelines or the policy that authorizes the Department to ask clarifying questions of a bidder or to ask the bidder to provide additional information not included in the technical proposal after the intended award has been posted and prior to the protest period running. It concerned Ms. Jones that the Department was asking Miller questions about its proposal during this time period.

The findings of fact in Paragraph 26, the undisputed findings in Paragraphs 23 and 24 showing that some two days after the Department posted its notice of intent to award the contract to Miller, Miller was contacted about and submitted its preliminary listing of categories for the Schedule of Values, and the absence of any record evidence showing that the Department has ever allowed any irregularity, much less the failure to provide required information, to be cured after posting of the intent to award, conclusively demonstrate that the Department's action in this case was contrary to the Department's "rules, policies, and/or the solicitation specifications." Miller's fifth exception is rejected.¹

FINDINGS OF FACT

After review of the record in its entirety, it is determined that the Administrative Law Judge's findings of fact in paragraphs 1 through 67 of the Recommended Order are supported by competent, substantial evidence and are adopted and incorporated as if fully set forth herein.

¹ The Department's exception to Paragraph 75 of the Recommended Order is rejected for the same reason.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapter 120, Florida Statutes.

2. On the instant record, the conclusions of law in paragraphs 68 through 77, of the Recommended Order are fully supported in law, and are adopted and incorporated as if fully set forth herein.

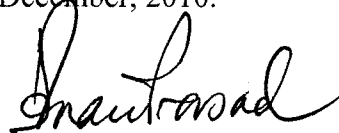
ORDER

Based upon the foregoing findings of fact and conclusions of law, it is

ORDERED that the proposal submitted by Miller Electric Company is nonresponsive and, it is further

ORDERED that the Department's notice of intent to award Contract Number E2077 to Miller Electric Company is rescinded and the Technical Review Committee is directed to proceed to determine the responsiveness of the proposal submitted by American Lighting and Signalization, Inc.

DONE AND ORDERED this 30th day of December, 2010.



Stephanie C. Kopelousos
Secretary
Department of Transportation
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NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.100(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

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