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

UNIVERSAL ENGINEERING
SCIENCES, INC.,

Petitioner,

vs.

DOT CASE NO.: 11-023
DOAH CASE NO.: 11-03284BID

STATE OF FLORIDA, DEPARTMENT
OF TRANSPORTATION,

Respondent,

and

ELIPSIS ENGINEERING AND
CONSULTING, L.L.C.,

Intervenor.
_____/

FINAL ORDER

Respondent, Department of Transportation (Department) issued a Request for Proposals (RFP) for a multi-year, continuing services contract (CSC) for professional materials testing and geotechnical services for its District 5 headquartered in Deland. The RFP was designated as "Financial Project ID Nos: 241084-2-32-09 & 241084-2-62-09."

After initial responses were reviewed, three proposers were short-listed to submit proposals: Ellipse Engineering and

Consulting, L.L.C. (Intervenor), Universal Engineering Sciences, Inc. (Petitioner), and Ellis & Associates (Ellis). All proposers were well-known to the Department, and all three are qualified to perform as the prime consultant with the use of sub-consultants.

A Technical Evaluation Committee (TEC), consisting of three Department employees, reviewed the proposals and each employee separately assigned scores to the proposals. The RFP explained to the proposers the areas that would be scored and the maximum value of each area. The scores were added together. The TEC ranked Intervenor first, Petitioner second, and Ellis third. The selection committee thereafter decided to award the CSC to Intervenor.

On March 21, 2011, the Department posted its notice of intent to award the CSC to Intervenor. Petitioner timely filed a notice of protest and then timely filed a petition with the Department on March 29, 2011. On June 28, 2011, an Amended Petition challenging the proposed award was filed with the Department and referred to the Division of Administrative Hearings (DOAH) along with Intervenor's Motion to Intervene, which was granted. Ellis did not participate in the proceeding.

The parties waived the requirement that the hearing be scheduled within 30 days of referral to DOAH and the matter was set for hearing on September 8 and 9, 2011. Intervenor's Motion

to Dismiss filed on August 25, 2011, was denied on September 1, 2011.

The matter proceeded to hearing on September 8, 2011, before Claude B. Arrington, a duly appointed administrative law judge (ALJ). Appearances on behalf of the parties were as follows:

For Petitioner: Thomas H. Justice, III, Esquire
Thomas H. Justice, III, P.A.
1435 Lake Baldwin Lane, Suite A
Orlando, Florida 32814

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

For Intervenor: Thornton J. Williams, Esquire
Williams McMillian, P.A.
119 South Monroe Street, Suite 200
Tallahassee, Florida 32301

At the hearing, the parties submitted four joint exhibits which were admitted into evidence. Petitioner also offered three exhibits which were admitted into evidence and presented the testimony of John Barker, P.E., Kathy Gray, P.E., Roger Schmitt, P.E., and the telephonic testimony of Frank Smith. The Department and Intervenor offered no additional exhibits or witnesses.

In its Amended Petition Petitioner raised scoring issues with respect to TEC members Jeremy Wolcott and Kathy Gray. However, Petitioner both at the hearing and in its Proposed

Recommended Order did not address the alleged deficiencies in Mr. Wolcott's scoring. As a result, the ALJ concluded that Petitioner abandoned its allegations pertaining to Mr. Wolcott and focused on Ms. Gray's scoring.

A transcript of the proceedings was filed on September 22, 2011, and Petitioner and Respondent filed Proposed Recommended Orders. The ALJ entered his Recommended Order on October 24, 2011, wherein he recommended the Department enter a final order denying Petitioner's bid protest and upholding award of the procurement to Intervenor. Petitioner timely filed exceptions to the recommended order on November 7, 2011, and the Department filed responses thereto on November 14, 2011.

STATEMENT OF THE ISSUES

As stated by the ALJ in his Recommended Order:

> Whether, in making a preliminary decision to award a contract for the subject services, the Florida Department of Transportation (Respondent) acted contrary to a governing statute, rule, policy, or project specification; and, if so, whether such misstep(s) was/were clearly erroneous, arbitrary or capricious, or contrary to competition.

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).[1]

"Competent, substantial evidence," in the context of an administrative proceeding, has been defined as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). In determining whether an administrative law judge's findings of fact have the requisite record support, neither an agency nor a reviewing court may re-weigh the evidence presented, judge the credibility of witnesses, or otherwise interpret the evidence to fit its desired conclusion. Bill Salter Advertising, Inc. v. Department of Transportation, 974 So. 2d 548, 551 (Fla. 1st DCA 2008);

[1] Petitioner does not contend that the proceedings on which the challenged findings were based did not comply with the essential requirements of law.

Rogers, 920 So. 2d at 30; Heifetz, 475 So. 2d at 1281; Section 120.68(7)(b), Florida Statutes (2010).

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.

Paragraphs 1, 2, 3, and 16 of Petitioner's exceptions contain prefatory language and general legal argument which the Department is not required to address. Section 120.57(1)(k), Florida Statutes (2010).

In paragraphs 4 and 9, Petitioner takes exception to the following statement set out in Finding of Fact 4: "the RFP contemplated that the prime consultant would have to use sub-consultants for certain services." Petitioner finds this statement objectionable because it believes the statement expresses the view that the use of sub-consultants was required by the RFP. The full text of Finding of Fact 4 provides:

> 4. Due to the nature of the services to be provided, the RFP contemplated that the prime consultant would have to use sub-consultants for certain services. Each proposer was required to list the sub-consultants it would use and identify the fields of work the sub-consultants would perform.

Rather than an articulated requirement to use sub-consultants, the ALJ's finding accurately indicates that the RFP recognized that there may be circumstances where a prime consultant would have to rely upon a sub-consultant and that such reliance was permitted by the RFP. As Petitioner noted, the RFP provides:

> Services assigned to sub-consultants must be approved in writing in advance by the Department. The sub-consultants must be qualified to perform all work assigned to them. Information on proposed sub-consultants should be included in the firm's proposal indicating which work items are to be performed by the sub-consultants.

(Joint Exhibit 1, Scope of Services (Exhibit A), p. 13) This language and TEC committee member Roger Schmitt's testimony that the use of sub-consultants was contemplated by the RFP afford the requisite record support for the finding. Petitioner's exception to Finding of Fact 4 is rejected.

Paragraph 5 of Petitioner's exceptions is directed to Finding of Fact 7, which states: "All three members of the TEC made an affirmative finding that all three proposers are qualified to perform the required services as the prime

consultant." Petitioner suggests the finding that all three proposers were qualified is erroneous because the record testimony was that each of the TEC members found that each firm's proposal was suitable for the handling of the project and TEC summary found that each of the three firms is capable of administering the contract. The ALJ's finding is fully supported by record evidence noted by Petitioner and the fact that all three proposers had initially been short-listed in accordance with the procedure for moving forward with the most qualified firms responding to the RFP. Petitioner's exception to Finding of Fact 7 is rejected.

In paragraph 6, Petitioner takes exception to that portion of Finding of Fact 16 which states that "[e]ach TEC member scored each proposer pursuant to the terms of the RFP." Petitioner contends that the finding is erroneous because "the ALJ himself concluded that Ms. Gray, on at least three occasions, introduced a grading criterion not set forth in the RFP." Initially, the Department is not required to rule on this exception because it fails to include appropriate and specific citations to the record. Section 120.57(1)(k), Florida Statutes (2010). Moreover, the exception is moot inasmuch as Petitioner has failed to challenge Finding of Fact 45 which provides:

> 45. There was no evidence that Ms. Gray was biased in favor or against any proposer. Ms. Gray based her evaluation of Petitioner

> on the basis of the criteria established by the RFP using her background and experience dealing with the proposers. There was no evidence that the methodology she employed in weighing the merits of the three proposals was improper.

Contrary to Petitioner's assertion, the ALJ did not **conclude** that Ms. Gray introduced a "grading criterion" not set forth in the RFP.

Petitioner takes exception to Finding of Fact 44 arguing that the ALJ made a patently incorrect conclusion of law when he found that Petitioner had failed to establish that Ms. Gray's consideration of whether the asphalt plant supervisor was plant certified in comparing proposals was arbitrary or capricious. (Exceptions, paragraph 7) Finding of Fact 44 provides:

> 44. There is no requirement for the supervisor to be "Plant Certified." Petitioner failed to establish that it was inappropriate for Ms. Gray to consider whether the supervisor was plant certified in comparing proposals. Petitioner failed to establish that Ms. Gray's scoring of this So. 2d subheading, compared with the other two proposals, was arbitrary or capricious.

Whether the proposed supervisor of VT asphalt technicians was "plant certified" was a reasonable consideration in comparing the qualifications of the short-listed firms' supervisory personnel. See Dravo Basic Materials v. State DOT, 602 So. 2d 632, 634 n. 3 (Fla. 2d DCA 1992)("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."). There is no record evidence that Ms. Gray employed this consideration in a discriminatory fashion to favor one firm over another. Petitioner's exception to the conclusion of law in Finding of Fact 44 is rejected.

In Paragraph 8 of its exceptions Petitioner looks to Finding of Fact 43 and contends that "the ALJ erroneously concluded that Ms. Gray's insertion of a 'quality assurance' element into the scoring of the asphalt plant technician VT program was not arbitrary or capricious, by concluding that the term 'oversight activities' was broad enough to encompass 'quality assurance.'" Ms. Gray essentially testified that she believed that quality assurance was included within the RFP oversight and supervision requirements. On the other hand, Petitioner's Vice President, John Barker, was of the opinion that oversight and quality assurance are two distinct concepts. The ALJ evidently accepted Ms. Gray's testimony. The Department cannot revisit the ALJ's resolution of the conflicting testimony, Bill Salter Advertising, Inc., and Ms. Gray's testimony provides ample support for the ALJ's finding. Petitioner's exception to Finding of Fact 43 is rejected.

In paragraph 10, Petitioner takes exception to a portion of Finding of Fact 36 but has neither alleged nor demonstrated that

the finding complained of is not supported by competent substantial evidence. Petitioner's exception to Finding of Fact 36 is, therefore, rejected.

Paragraphs 11 and 12 of Petitioner's exceptions contain no reference to a Finding of Fact or Conclusion of Law as required by Section 120.57(k), Florida Statutes (2010). However, the context suggests that they are directed to Findings of Fact 36 and 37 which provide:

> 36. Ms. Gray deducted points from Petitioner under the subheading "Approach to providing PDA testing and engineering" because of its "reluctance" to use sub-consultants and because it failed to include URS as a sub-consultant. Ms. Gray's use of the term "reluctance" was not supported by the evidence. While there was sufficient evidence to establish that Petitioner had a strong preference to use its in-house resources when it could, there was insufficient evidence to establish Petitioner's "reluctance" to use sub-consultants when necessary. Her testimony explained that her concern was Petitioner's strong preference to use in-house resources, when the use of a sub-consultant would better serve the interests of District 5. She was of the opinion that Petitioner's failure to include URS as a sub-consultant signaled that Petitioner was not as committed as the other proposers to using sub-consultants.
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> 37. Petitioner failed to establish that Ms. Gray's scoring for this category, compared with the other proposers, was arbitrary or capricious.

Petitioner first suggests that the ALJ's finding that there was insufficient evidence to support its "reluctance" to use sub-consultants amounts to satisfaction of its burden to show that Ms. Gray's scoring was arbitrary or capricious. (Exceptions, paragraph 11) The full text of Finding of Fact 36 shows that although Ms. Gray had used the term "reluctance" her concern was Petitioner's preference to use in-house personnel when the use of a sub-consultant might better serve the interests of the District. Ms. Gray's testimony fully supports this finding. Additionally, Ms. Gray's consideration of a firm's preference to use in-house personnel in the process of evaluating the proposals was not improper. A proposer's preference to use in-house staff is a reasonable consideration that goes directly to the evaluation of a proposer's ability to deliver a quality product under the contract. See Dravo Basic Materials, 602 So. 2d at 634 n. 3. Petitioner has not carried its burden to show that Ms. Gray's scoring was arbitrary or capricious in this instance. To the extent paragraph 11 could be viewed as a proper exception, it is rejected.

In addition to re-arguing its position with respect to Ms. Gray's consideration of its preference to use in-house personnel, Petitioner contends that: "The ALJ also erred in finding that Elipsis' [sic] inclusion of URS as a proposed sub-consultant, and Universal's non-inclusion of URS, justified Ms.

Gray to score Elipsis five (5) points higher in the 'Approach to PDA testing and engineering' category." (Exceptions, paragraph 12) The ALJ did not find that the URS issue, standing alone, justified the scoring differential. Instead, it was found to be a factor supporting Ms. Gray's belief that Petitioner had a strong preference for the use of in-house personnel. As noted above, Ms. Gray's consideration of this preference in evaluating the proposals was appropriate. To the extent paragraph 12 could be viewed as a proper exception, it is rejected.

Paragraph 13 of Petitioner's exceptions is directed to Finding of Fact 23. Petitioner contends that the ALJ erred "in concluding that Ms. Gray was justified in relying on purported statements by program manager Frank Smith that Universal had a preference to use its in-house resources." Finding of Fact 23 provides:

> 23. Mr. Smith gave advice to the TEC. Prior to the review, Mr. Smith related to the TEC members that Mr. Barker had, in the past, expressed a strong preference on the part of Petitioner to use in-house resources rather than sub-consultants when it could. It was reasonable for Ms. Gray to rely on Mr. Smith's advice, particularly when she was familiar with Petitioner and the way Petitioner operated.

Petitioner, who had the burden of proof, elicited Ms. Gray's testimony in this regard and did not put on any testimony from Mr. Smith or any other witness to clarify or refute her

testimony. However, the record reflects that only Universal, and not Mr. Barker, was identified as the source of Mr. Smith's information. Finding of Fact 23 is modified accordingly. Petitioner's exception to Finding of Fact 23 is otherwise rejected. Ms. Gray's consideration of Petitioner's preference to use in-house personnel was appropriate.

In paragraph 15, Petitioner takes exception to Findings of Fact 25, 27, and 38 claiming that the ALJ erred in finding "that Ms. Gray's scoring was not arbitrary or capricious because she testified that it was not in accordance with the RFP and included a criterion not mentioned or clearly defined in the bid documents." (Exceptions, paragraph 15) Neither Finding of Fact 27 nor Finding of Fact 38 contains a finding that Ms. Gray's scoring was not arbitrary or capricious. Petitioner's exception to Findings of Fact 27 and 38 is, therefore, rejected.

Finding of Fact 25, addresses Ms. Gray's scoring under the 'Management Plan for Contract" portion of the RFP. The "criteria" that Petitioner refers to are apparently DBE participation, Petitioner's preference to use in-house staff, and the proposers' potential for conflicts of interest. In addition to the fact that Petitioner had not plead an issue concerning DBE participation, Petitioner failed to demonstrate that any of these considerations were used in a discriminatory manner to favor one proposer over the others or to provide a

vehicle for implementation of the evaluator's personnel preference for one firm over another. Furthermore, a proposer's preference to use in-house staff and the potential for conflicts of interest are reasonable considerations that go directly to the evaluation of a proposer's ability to perform under the contract. See Dravo Basic Materials, 602 So. 2d at 634 n. 3. Petitioner's exception to Finding of Fact 25 is rejected.[2]

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 22, 23 as modified, and 24 through 46 of the Recommended Order are supported by competent, substantial evidence and are adopted and incorporated as if fully set forth herein.

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.

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[2] Although Petitioner, in paragraph 14 of its exceptions, has failed to identify a particular Finding of Fact or Conclusion of Law with the specificity required by Section 120.57(1)(k), Florida Statutes (2010), to the extent it can be viewed as raising a proper exception, it should be rejected for the reasons stated as a basis for rejecting Petitioner's exception to Finding of Fact 25.

2. The Conclusions of Law in paragraphs 47 through 56 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 bid protest of Petitioner, Universal Engineering Sciences, Inc., filed in this matter is denied, and it is further

ORDERED that the continuing services contract for Financial Project ID Nos: 241084-2-32-09 & 241084-2-62-09, is awarded to Ellipse Engineering and Consulting, L.L.C..

DONE AND ORDERED this 15th day of November, 2011.

FILED D.O.T. CLERK
2011 NOV 18 AM 8:42

Ananth Prasad, P.E.
Secretary
Department of Transportation
605 Suwannee Street
Haydon Burns Building
Tallahassee, Florida 32399-0458

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED 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 9.110(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 30 DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

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