

STATE OF FLORIDA
DEPARTMENT OF HEALTH

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LABORATORY CORPORATION
OF AMERICA,

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Petitioner,

DIVISION OF
ADMINISTRATIVE
HEARINGS

vs.

Case No.: 12-0846BID
DOH ITB No.: DOH11-004
RENDITION NO.:12-1078-FOF-BID

STATE OF FLORIDA
DEPARTMENT OF HEALTH,

Respondent,

FINAL ORDER

This matter is before the Department of Health (hereinafter Department) for the entry of a final order following receipt of a Recommended Order issued by an Administrative Law Judge of the Division of Administrative Hearings. This is a bid protest proceeding initiated by Laboratory Corporation of America, (hereinafter Labcorp) in response to the Department's intent to reject all bids submitted in response to ITB DOH 11-004, relating to a multi-year contract to provide laboratory services to state and local government agencies in the State of Florida. Having found that the Department's rejection of all bids submitted in response to ITB DOH 11-004 was not illegal, arbitrary, dishonest, or fraudulent, the presiding Administrative Law Judge, F. Scott Boyd, recommends that the Department dismiss Labcorp's bid protest. The Department and Labcorp filed exceptions.

PRELIMINARY STATEMENT

On December 20, 2011, the Department advertised an Invitation to Bid to solicit competitive bids for the award of a three-year contract to provide clinical laboratory services to Florida's 67 county health departments. On January 20, 2012, the Department announced its intent to award the contract to Labcorp. The next-lowest bidder, Quest Diagnostics (hereinafter

Quest), served the Department with a notice of its intent to protest the decisions to award the contract to Labcorp on January 20, 2012, and filed a formal bid protest on February 6, 2012.

On February 14, 2012, the Department noticed its intent to reject all bids and to re-solicit bids for the relevant contract at a later date. Petitioner Labcorp then filed a Notice of Protest of Respondent's decision to reject all bids on February 16, 2012, and filed its formal bid protest on February 24, 2012. On March 6, 2012, Petitioner's bid protest was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

Hearing was set for April 2, 2012, and in response to an unopposed Motion for Continuance of one day, was moved to April 3, 2012. At hearing, Joint Exhibits A through X were admitted into evidence, including a detailed stipulation. Four witnesses testified, all employees of the Department. Ms. Susan Renee Gregory, Dr. Max Salfinger, and Ms. Cheryl Robinson were called by both Petitioner and Respondent; Ms. Sandra Bailey was called by Respondent.

The one-volume Transcript of the proceedings was filed with the Division on April 8, 2012.

STANDARD FOR REVIEWING THE RECOMMENDED ORDER AND EXCEPTIONS TO RECOMMENDED ORDER

The Administrative Procedure Act contemplates that the Department will adopt an Administrative Law Judge's Recommended Order as the agency's Final Order in most proceedings. Consequently, the Department has been granted limited authority to reject or modify findings of fact or conclusions of law. In pertinent part, section 120.57(1)(l), Florida Statutes, states:

Rejection or modification of conclusions of law may not form the basis of 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 on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.

Absent a demonstration that the underlying proceeding departed from the essential requirements of law, “[a]n ALJ’s findings cannot be rejected unless there is not competent, substantial evidence from which the findings could reasonably be inferred.”¹ Additionally, in determining whether challenged findings are supported by the record in accordance with the above standard, the Department may not reweigh the evidence or judge the credibility of witnesses. Both of these responsibilities are within the sole province of the Administrative Law Judge as the finder of fact.²

The Administrative Procedure Act also specifies the manner in which the Department is to address conclusions of law in a Recommended Order. In pertinent part, section 120.57(1)(l), Florida Statutes, states:

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*.³ 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.⁴ [Emphasis added.]

In considering the exceptions to an Administrative Law Judge’s findings of fact, the general rule of deference is that an agency may reject or modify a finding of fact only if a challenged finding is not supported by competent, substantial evidence. In contrast to the Administrative Law Judge’s fact finding, an agency need not defer to his/her interpretations of statutes or administrative rules over which the agency has substantive jurisdiction.

Petitioner’s Exceptions Paragraphs numbered one, five, six, seven, eight, nine, ten, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three:

The aforesaid paragraphs are not exceptions to any finding of fact or conclusion of law referenced in the Recommended Order of the Administrative Law Judge. The content is either

¹ Prys v. Department of Health, 823 So. 2d 823 (Fla. 1st DCA 2002).

² Heifetz v. Department of Bus. Reg., 475 So. 2d 1277 (Fla. 1st DCA 1985).

³ Barfield v. Department of Health, 805 So. 2d 1008 (Fla. 1st DCA 2002).

⁴ See also DeWitt v. School Board of Sarasota City, 799 So.2d 322 (Fla. 2nd DCA 2001).

a summary of the findings of the presiding officer as found in the recommended order or a synopsis of the district court's rulings in the *Caber Systems, Inc. v. Department of General Services*,⁵ a case cited by the Petitioner. Accordingly, the Department has no need to respond to those paragraphs separately, however, their content was taken in consideration with the remaining portions of the filed exceptions.

Petitioner's Exceptions Paragraph numbered two, three, four, eleven, twelve, thirteen, fourteen, fifteen sixteen, seventeen, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty:

Petitioner's Exception Paragraph numbered two states that the ALJ was in error to conclude that the Department was not arbitrary when the agency rejected all bids based on the premise that unknown laboratories were prohibited from bidding due to certain ambiguities in the ITB. The ALJ concluded, after hearing the testimony of all the witnesses that the Petitioner failed to prove that the Department's decision to reject all bids was arbitrary. The ALJ recognized that the Department's motivation to reject all bids was a result of the "quality" of the ITB being flawed due to a missing sentence in the Basis of Award and Bid Price Page, the Petitioner's failure to submit a staffing plan, and the agency's failure to provide information to Quest in response to its pre-bid questions. The ALJ found that had the Department rejected all bids based only on its failure to provide information to Quest, and without making a rational connection between the information and the solicitation, the agency's decision would have been arbitrary. The findings of fact in the Recommended Order conclude otherwise, and Finding of Fact Numbered fifty-two specifically states that the Department did not act arbitrarily in its decision to reject all bids. This exception is denied.

Petitioner's Exception numbered Paragraph three states there was no competent substantial evidence presented for the ALJ to conclude that LabCorp's bid lacked a staffing

⁵ *Caber Systems, Inc. v. Department of General Services*, 530 So. 2d 325 (Fla. 1st DCA 1988)

plan. Exhibit "M" consists of notes from a meeting conducted with agency personnel when they were discussing what to do about the irregularities in the bid process. One of the three matters discussed was noted as "staffing plan excluded". Consequently, there was competent substantial evidence presented to the ALJ to support his conclusion, and Petitioner failed to controvert that evidence. This exception is denied.

Petitioner's Exception numbered Paragraph four states that the ALJ failed to address that the decision to reject all bids by the Department was harmful to the object and integrity of the competitive bidding process. Since the ALJ's responsibility is simply to "ascertain whether the agency acted fraudulently, arbitrarily, illegally or dishonestly", the alleged consequences of the Department's actions are not within the ALJ's purview. Nevertheless, the ALJ determined that the Petitioner failed to meet its burden of proof that the agency acted arbitrarily; therefore, this exception is denied.⁶

Petitioner's Exception numbered eleven proffers that the ALJ was in error when it was concluded that the ITB's ambiguities had a chilling effect on unidentified bidders. The ALJ correctly pointed out that an agency has wide discretion in soliciting and accepting bids. In *Department of Transportation v. Groves-Watkins Constructors*, 530 So. 2d 912 (Fla. 1988), the Florida Supreme Court held that an agency's decision would not be overturned, even if it may appear erroneous and even if reasonable persons may disagree. This exception is denied.

Petitioner's Exception numbered twelve reiterates that there was no competent substantial evidence regarding the ambiguities and the effect on the bidding process. The testimony accepted by the ALJ as credible revealed that agency staff did gather at a meeting to discuss the irregularities, which resulted in a decision to reject all bids. In the standard of review to determine if a decision is "arbitrary", a three-pronged test is used by the ALJ. The three elements are whether the agency has considered relevant factors, given actual good faith

⁶ The parties stipulated that agency did not act fraudulently, illegally or dishonestly.

considerations to those factors, and used reason rather than whim to progress from consideration of each factor to final conclusion. The Petitioner failed to controvert the prevailing testimony by the witnesses that established irregularities in the solicitation itself as well as the failure to completely answer pre-bid questions thoroughly. Therefore, there was competent substantial evidence to support the ALJ's conclusion. The exception is denied.

Petitioner's Exception numbered thirteen expands on exception numbered twelve by suggesting the testimony of one of the witnesses was too generic. As noted previously, the department cannot reweigh the evidence or the credibility of the witnesses as that is strictly within the purview of the ALJ. This exception is denied.

Petitioner's Exception numbered fourteen is argument as to whether the decision of the Department was truly based on a fact-based concern over the ambiguities of the solicitation. No reference is made to a finding of fact or conclusion of law and this exception is considered renewed argument on the matter of arbitrariness by the Department. This exception is denied.

Petitioner's Exception numbered fifteen states that the absence of findings of fact by the ALJ regarding efforts on the part of the Department to determine if identifiable bidders were negatively affected by the ambiguities renders the agency's decision arbitrary. As noted in aforementioned paragraphs eleven and twelve, an agency's determination, even if considered differently by others, must prevail unless the ALJ finds the decision arbitrary. The ALJ ruled that the Petitioner failed to meet its burden. This exception is denied.

Petitioner's Exceptions numbered sixteen and seventeen contain arguments rejected by the ALJ as being pertinent to the issue of whether the agency acted in an arbitrary manner when it rejected all bids. The ALJ found to the contrary. These exceptions are denied.

Petitioner's Exceptions numbered twenty-five, twenty-six, twenty-seven, twenty-eight concern Labcorp's lack of a staffing plan and the weight given that matter in relationship to the Department's decision to reject all bids. The prevailing competent substantial evidence

presented to the ALJ suggested that this issue was one of three factors the agency considered when it made its decision to reject all bids. These exceptions are denied based on evidence presented which demonstrated the agency did discuss this as a factor in its decision-making process, and the evidence being uncontroverted.

Petitioner's Exception numbered twenty-nine reiterates that the conclusions of law failed to find that the reject all bids was harmful to the integrity of the competitive bidding process. In the ALJ's conclusion of law that the Petitioner failed to meet its burden and that the Department was not arbitrary, the matter of "harm" was answered in the negative. This exception is denied.

MOTION TO STRIKE

The Petitioner has filed a motion to strike in conjunction with the exceptions to the recommended order. The content of the motion reiterated argument made in the exceptions filed. The Department at this phase of the proceeding cannot properly consider the motion since only matters presented to the ALJ can be reviewed. The motion is denied on procedural grounds.

Assuming arguendo the Department could consider the motion to strike, since the content is a reiteration of the exceptions filed, the motion is denied on substantive grounds.

EXCEPTION TO RECOMMENDED ORDER

The Department has filed exceptions to Conclusions of Law numbered seventy-seven through eighty-three. The argument proffered is that the agency could not legally inquire why a requestor wanted certain public records or the impact the records might have on potential bidders. What is clear from the record and the findings of the ALJ is that the failure to respond to that public records request was of great concern and one of three factors considered in the decision to reject all bids. Nevertheless, the Department correctly points out that since the

agency does not have substantive jurisdiction over the public records laws, overturning any conclusion based on those premises would be improper. The agency's Exception to Recommended Order is denied.

The scope of inquiry for an ALJ in a reject all bids hearing is whether the purpose of the competitive bid process has been subverted.⁷ In *Groves-Watkins*, the Florida Supreme Court held that a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an *honest* exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.⁸ [Emphasis added.] The ALJ in the Recommended Order made findings of fact that the department was not arbitrary in its decision to reject all bids. In order for an agency to reject this finding of fact, there must be *no* competent substantial evidence from which the finding could be reasonably inferred.⁹ [Emphasis added.] The court in *Schumacher* noted that a different view of the same evidence afforded no basis for an agency to reject a finding of fact unless there was no competent substantial evidence.¹⁰ Clearly in the case presented to the ALJ, the presiding officer found competent substantial evidence to determine that the Department was not arbitrary in its decision to reject all bids. Consequently, there is no basis to overturn the findings of fact as reflected in the Recommended Order.

A guiding principle to use when considering the rejection of a conclusion of law is found in the case of *Berger v. DPR*, wherein the third District Court of Appeal held that a finding which involves both a factual and a legal conclusion cannot be rejected where there is competent substantial evidence to support the factual conclusion and where the legal conclusion necessarily follows.¹¹ This concept is particularly meaningful in the case *sub judice* because the decision to reject all bids was deemed not arbitrary, as a finding of fact, the legal conclusion that

⁷ Department of Trans. v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988).

⁸ Id.

⁹ Schumacher v. DPR, 611 So. 2d 75 (Fla. 4th DCA 1992).

¹⁰ Id.

¹¹ Berger v. DPR, 653 So. 2d 479 (Fla. 3rd DCA 1995).

followed was to rule the agency's decision as a correct one and within the Department's wide discretion. As stated earlier, absent a demonstration that the underlying proceeding departed from the essential requirements of law, "[a]n ALJ's findings cannot be rejected unless there is not competent, substantial evidence from which the findings could reasonably be inferred."¹² The ALJ concluded that there was no basis for finding that the Department's intent to reject all bids was illegal, arbitrary, dishonest, or fraudulent, and thus, recommended the bid protest be dismissed.

Having carefully reviewed the thirty-three page recommended order, I conclude that the challenged findings reflect the ALJ clearly explained his weighing of the evidence in this complex case and how he reached his ultimate finding and recommendation that Labcorp's bid protest be dismissed. The Department, having no authority to alter the findings of fact or basis for altering the conclusions of law, denies the exceptions.

FINDINGS OF FACT

A thorough review of the entire record of this matter reveals that the findings of fact contained in the recommended order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law.

The Department hereby adopts and incorporates by reference the Findings of Fact as set forth in the Recommended Order.

CONCLUSIONS OF LAW

A thorough review of the entire record in this matter indicates that the Conclusions of Law contained in the Recommended Order are reasonable and correct interpretations of the law based on the Findings of Fact.

¹² Pysi v. Department of Health, 823 So. 2d 823 (Fla. 1st DCA 2002).

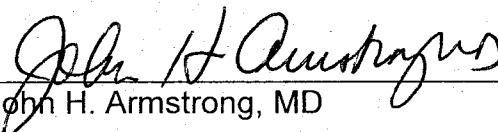
The Department hereby adopts and incorporates by reference the Conclusions of Law as set forth in the Recommended Order.

The Recommended Order entered in this proceeding on May 7, 2012, is adopted and incorporated by reference.

Based on the foregoing, Labcorp's bid protest is dismissed.

DONE and **ORDERED** this 19th day of June 2012 in Tallahassee, Leon County, Florida.

DEPARTMENT OF HEALTH
State Surgeon General


John H. Armstrong, MD

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. A REVIEW PROCEEDING IS GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. A REVIEW PROCEEDING IS INITIATED BY FILING A NOTICE OF APPEAL WITH THE CLERK OF THE DEPARTMENT OF HEALTH AND A COPY ACCOMPANIED BY THE FILING FEE WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES OR THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE FILING DATE OF THIS FINAL ORDER.

Copy furnished to each of the following:

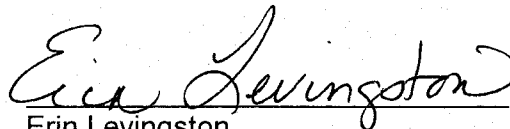
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing FINAL ORDER has been served by mail via the United States Postal Service, inter-office mail, electronic transmission, or by hand delivery to each of the above-named persons this 20th day of June 2012.



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