

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA DEPARTMENT OF HIGHWAY)	
SAFETY AND MOTOR VEHICLES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 13-0439F
)	
MORPHOTRUST USA,)	
)	
Respondent.)	
)	
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SOLUTIONS THRU SOFTWARE, INC.)	
)	
Petitioner,)	
)	
vs.)	Case No. 13-0440F
)	
MORPHOTRUST USA,)	
)	
Respondent.)	
)	
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FINAL ORDER

This is a proceeding pursuant to sections 57.105, 120.595(1)(b), and 120.569(2)(e), Florida Statutes (2012),^{1/} pending before Linzie F. Bogan, Administrative Law Judge, Division of Administrative Hearings, wherein the parties hereto each claim entitlement to attorney's fees and costs. The final hearing on the motions was held on March 8, 2013, in Tallahassee, Florida.

APPEARANCES

For Petitioner Florida Department of Highway
Safety and Motor Vehicles:

Douglas Sunshine, Esquire
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room A-432
2900 Apalachee Parkway
Tallahassee, Florida 32399

For Petitioner Solutions Thru Software, Inc:

Maria Elena Abate, Esquire
Colodny, Fass, Talenfeld,
Karlinsky, Abate and Webb, P.A.
23rd Floor
100 Southeast 3rd Avenue
Fort Lauderdale, Florida 33394

For Respondent MorphoTrust USA:

J. Stephen Menton, Esquire
Rutledge, Ecenia and Purnell, P.A.
119 South Monroe Street, Suite 202
Post Office Box 551
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

1) Whether, pursuant to sections 57.105 and 120.595(1)(b), the Florida Department of Highway Safety and Motor Vehicles (Department) is entitled to an assessment of attorney's fees and costs against Morphotrust USA (Morphotrust) resulting from Morphotrust's unsuccessful bid protest.

2) Whether, pursuant to sections 57.105 and 120.569(2)(e), Solutions Thru Software, Inc. (STS), is entitled to an assessment of attorney's fees and costs against Morphotrust resulting from Morphotrust's unsuccessful bid protest.

3) Whether, pursuant to 120.569(2)(e), Morphotrust is entitled to an assessment of attorney's fees against the Department and STS resulting from their pursuit of attorney's fees and costs against Morphotrust.

PRELIMINARY STATEMENT

The parties in the instant proceeding were litigants in the case of Morphotrust USA v. Department of Highway Safety and Motor Vehicles and Solutions thru Software, Inc., Case No. 12-2917BID (Bid Protest). STS intervened in the Bid Protest proceeding. The instant matter is before the undersigned on motions by the Department and STS^{2/} for an award of attorney's fees and costs pursuant to sections 57.105,^{3/} 120.595(1)(b) and 120.569(2)(e).

The final hearing in the Bid Protest proceeding was held by the undersigned on October 10, 11, 16 and 17, 2012, before the Division of Administrative Hearings (DOAH). On October 24, 2012, STS filed a motion seeking attorney's fees and costs against Morphotrust. On October 29, 2012, the Department filed its motion for attorney's fees and costs against Morphotrust. STS claims entitlement to attorney's fees and costs pursuant to sections 57.105 and 120.569(2)(e). The Department claims entitlement to attorney's fees and costs pursuant to sections 57.105 and 120.595(1)(b). Morphotrust seeks, pursuant to section 120.569(2)(e), attorney's fees against the Department and STS for

having to defend against the claims for attorney's fees and costs filed against the company by the Department and STS.

On December 7, 2012, a Recommended Order was issued by the undersigned in the Bid Protest proceeding. On January 7, 2013, the Department issued its Final Order in the Bid Protest proceeding and adopted, in toto, therein the Findings of Fact and Conclusions of Law contained in the Recommended Order. On January 25, 2013, the Department and STS renewed with DOAH their respective motions for attorney's fees and costs. Morphotrust, in response to the motions, contends that DOAH lacks jurisdiction in the instant matter because the Bid Protest proceeding "is now closed as a result of the entry of a Final Order" and the issue of attorney's fees and costs was not addressed in the Final Order issued in the Bid Protest proceeding.

FINDINGS OF FACT

The Department and STS rely upon the Findings of Fact as determined in the Bid Protest proceeding as the basis for their respective motions for attorney's fees and costs in the instant proceeding. Accordingly, the Findings of Fact and Conclusions of Law from the Bid Protest proceeding are incorporated herein by reference.

CONCLUSIONS OF LAW

I. Jurisdiction

1. In the underlying Bid Protest proceeding, DOAH possessed recommended order authority with respect to the merits of the bid challenge. In instances where DOAH has recommended order authority, an agency, pursuant to section 120.57(1)(1), may reject or modify Findings of Fact if, after review of the entire record, the agency determines 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." Because the respective motions for attorney's fees and costs are predicated on factual underpinnings that, at the time of issuance of the recommended order could have been rejected or modified by the Department in its final order, the undersigned believed it more prudent to reserve jurisdiction and consider issues related to attorney's fees and costs apart from the primary proceeding.^{4/} Proceeding in this manner was further necessitated by the fact that prior to January 7, 2013, it was not yet possible to identify the "prevailing party" as required and contemplated by sections 57.105(1), 120.595(1)(b) and 120.569(2)(e).

2. It is well established that "[o]nce an appeal is taken, the appellate court's jurisdiction is exclusive, and the trial court no longer has jurisdiction to adjudicate any matter except

attorney's fees and costs." Schultz v. Time Warner Entm't Co., 906 So. 2d 297, 299 (Fla. 5th DCA 2005)(citing Emerald Coast Commc'ns, Inc. v. Carter, 780 So. 2d 968, 969 (Fla. 1st DCA 2001)); and Roberts v. Askew, 260 So. 2d 492 (Fla. 1972)("costs may be adjudicated after final judgment, after the expiration of the appeal period, during the pendency of an appeal, and even after the appeal has been concluded."). The Supreme Court has also held that "proof of attorneys' fees[,] whether such fees are provided by statute . . . or by contract[,] may be presented [to the trial court] for the first time after final judgment pursuant to a motion for attorney's fees" Cheek v. McGowan Elec. Supply Co., 511 So. 2d 977, 979 (Fla. 1987). "The rationale behind these decisions is that an award of attorneys' fees or costs is ancillary to, and does not interfere with, the subject matter of the appeal and, thus, is incidental to the main adjudication." McGurn v. Scott, 596 So. 2d 1042, 1043-44 (Fla. 1992), overruled in part, Westgate Miami Beach, LTD. v. Newport Operating Corp., 55 So. 3d 567 (Fla. 2010)(in Westgate, the court retreated from that portion of McGurn dealing with prejudgment interest).

3. Turning to the instant proceeding, the Recommended Order issued in the Bid Proceeding, and subsequently adopted by the Department in its Final Order, unequivocally acknowledges that motions for attorney's fees and costs had been filed and that

matters related thereto would be addressed following the entry of the Department's final order. This pronouncement by the undersigned was a clear indication that labor had not ended with respect to the issue of attorney's fees and costs. The undersigned's general reservation of jurisdiction in the Recommended Order, and the Department's adoption thereof, are sufficient to provide DOAH with continuing jurisdiction to consider issues related to the unresolved claims for attorney's fees and costs.^{5/} Accordingly, DOAH possesses jurisdiction over the parties and the subject matter of this proceeding.

§§ 57.105, 120.569, 120.57(1), and 120.595(1)(b) and (d).

II. Attorney's Fees and Costs

A. Section 57.105

4. Section 57.105 provides in part as follows:

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense;
or

(b) Would not be supported by the application of then-existing law to those material facts.

* * *

(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection. . . .

5. "The purpose of section 57.105 is to discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities." Vasquez v. Provincial South, Inc., 795 So. 2d 216, 218 (Fla. 4th DCA 2001)(citing Whitten v. Progressive Cas. Ins. Co., 410 So. 2d 501 (Fla. 1982)). Section 57.105 "must be applied carefully to ensure that

it serves the purpose for which it was intended, which was to deter frivolous pleadings." Wendy's of N.E. Fla., Inc. v. Vandergriff, 865 So. 2d 520, 523 (Fla. 1st DCA 2003)(citing Bridgestone/Firestone, Inc. v. Herron, 828 So. 2d 414 (Fla. 1st DCA 2002)).

6. "In determining whether a party is entitled to statutory attorney's fees under section 57.105, frivolousness is determined when the claim or defense was initially filed; if the claim or defense is not initially frivolous, the court must then determine whether the claim or defense became frivolous after the suit was filed." Wendy's of N.E. Fla., Inc., at 523. In conducting this evaluation, it must be determined if the party or its counsel knew or should have known that the claim or defense asserted was not supported by the material facts necessary to establish the claim or defense or by the application of then-existing law to the material facts. Read v. Taylor, 832 So. 2d 219 (Fla. 4th DCA 2002). "An award of fees is not always appropriate under section 57.105, even when the party seeking fees was successful in obtaining the dismissal of the action or summary judgment in an action." Id. at 222; see also Mason v. Highlands Cnty. Bd. of Cnty. Comm'rs, 817 So. 2d 922, 923 (Fla. 2d DCA 2002)("Failing to state a cause of action is not in and of itself a sufficient basis to support a finding that a claim was so lacking in merit as to justify an award of fees pursuant to section 57.105.");

Pappalardo v. Richfield Hospitality Servs., Inc., 790 So. 2d 1226, 1228 (Fla. 4th DCA 2001)("Whether fees should have been awarded in this case depends upon whether the underlying cause of action, which was dismissed by the trial court, was so clearly and obviously lacking as to be untenable.").

7. In the instant case, the evidence does not support an award of attorney's fees pursuant to section 57.105. The evidence introduced during the final hearing in the Bid Protest proceeding established that the Department had never before issued an ITN like the one involved herein. The uniqueness of the deliverable sought by the Department through the issuance of the ITN is bolstered, in part, by the four addenda to the ITN; each of which contained amendments, modifications, and explanations of the ITN specifications. While the undersigned found against Morphotrust in the Bid Protest proceeding, it cannot be said that Morphotrust's claim was so lacking in merit at any point during the underlying litigation that an award of attorney's fees is justified pursuant to section 57.105.

B. Section 120.595

8. Section 120.595 provides in part as follows:

(1) Challenges to agency action pursuant to section 120.57(1).

* * *

(b) The final order in a proceeding pursuant to s. 120.57(1) shall award

reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

* * *

(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.
2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.
3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously

existing proceeding to support the position of an agency. . . .

9. The Department, in its amended motion for attorney's fees and costs, contends, as to section 120.595(1)(b), that Morphotrust participated in the Bid Protest proceeding for an improper purpose by making factual allegations that were "baseless and frivolous." Specifically, the Department alleges that Morphotrust's "factual allegations, [(i.e., that the ITN did not allow a per test charge for skills testing, [and] that the performance bond requirement was not met by STS, that STS was not allowed to modify the price proposal form[]), are patently false . . . [and that] [o]ther allegations, such as those directed to the 'ambiguity' or 'unfairness' of the price proposal form were waived and thus, have no basis in law." There are no cases expressly defining "frivolous purpose" within the meaning of section 120.595(1)(b). It has long been recognized "that to some extent, the definition of 'frivolous' is incapable of precise determination." Visoly v. Sec. Pac. Credit Corp., 768 So. 2d 482, 491 (Fla. 3d DCA 2000). As noted by the court in Visoly,

Court opinions on attorney's fees speak easily of cases being either frivolous or nonfrivolous, as if all cases fit easily into one or the other category. Reality is more complicated. In the legal world, claims span the entire continuum from overwhelmingly strong to outrageously weak. Somewhere between these two points, courts draw a line to separate the nonfrivolous

from the frivolous, the former category providing safe shelter, the latter subjecting attorney and client to sanctions.

(citing Eastway Constr. Corp. v. City of New York, 637 F.Supp. 558, 574 (E.D.N.Y. 1986)). The case of Mercedes Lighting and Electrical Supply, Inc. v. State of Florida, Department of General Services, 560 So. 2d 272 (Fla. 1st DCA 1990), is also instructive as to this issue. In Mercedes Lighting, the court, in considering a claim for attorney's fees pursuant to what is now section 120.569(2)(e), held that "a frivolous purpose . . . should be one which is of little significance or importance in the context of the goal of administrative proceedings." Id. at 278.

10. While it is true that in the Bid Protest proceeding the undersigned concluded that Morphotrust's claims "were without merit," the characterization of the claims in this manner does not ipso facto equate to a finding of frivolous purpose within the meaning of section 120.595(1)(b). As previously noted, the Department and the bidders were dealing with a very unique ITN that resulted in the Department issuing multiple addenda. On the continuum of cases, Morphotrust's challenge to the ITN was not so outrageously weak that it satisfied the requirements for imposing attorney's fees and costs pursuant to section 120.595(1)(b).

C. Section 120.569(2)(e)

11. Section 120.569 provides in part as follows:

(1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or s. 120.574. Unless waived by all parties, s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2) applies in all other cases. If a disputed issue of material fact arises during a proceeding under s. 120.57(2), then, unless waived by all parties, the proceeding under s. 120.57(2) shall be terminated and a proceeding under s. 120.57(1) shall be conducted. Parties shall be notified of any order, including a final order. Unless waived, a copy of the order shall be delivered or mailed to each party or the party's attorney of record at the address of record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply.

(2)(a) Except for any proceeding conducted as prescribed in s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency requests an administrative law judge from the division, it shall so notify the division by electronic means through the division's website within 15 days after receipt of the petition or request. A request for a hearing shall be granted or denied within 15 days after receipt. On the request of any agency, the division shall assign an administrative law judge with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to

a proceeding under s. 120.57(1), except as a party litigant, as long as the division has jurisdiction over the proceeding under s. 120.57(1). Any party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.

* * *

(e) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. . . .

12. In support of its motion for attorney's fees and costs filed pursuant to section 120.569(2)(e), STS alleges that "the facts stated in Morpho[trust]'s Amended Formal Written Protest and Petition for Administrative Hearing are either false or legally irrelevant to the validity of the intent to award the Automated Driver's License Testing System ('ADLTS') Contract to STS." As more fully explained elsewhere herein, the undersigned

finds insufficient grounds to support a determination that Morphotrust, in pursuing its protest of the Department's intended action, acted with a frivolous purpose within the meaning of section 120.569(2)(e).^{6/}

D. Morphotrust's Motion for Attorney's Fees

13. Morphotrust, pursuant to section 120.569(2)(e), seeks an award of attorney's fees against the Department and STS. Morphotrust claims that the Department's amended motion for attorney's fees and costs "is unprecedented, unsupported by law[,] should be summarily dismissed[, and] the request is frivolous and has unnecessarily increased the costs of this litigation." As for STS, Morphotrust claims that "STS' request for attorney's fees to be awarded to an intervenor in an administrative bid protest is unprecedented, unsupported by law[,] should be summarily dismissed[, and] is frivolous and has unnecessarily increased the costs of this litigation."

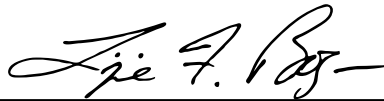
14. There is nothing unprecedented about both an agency and an intervenor seeking and being awarded attorney's fees in the context of a bid protest proceeding. See, e.g., Johnson Controls, Inc. v. Dep't of Mgmt. Servs., Case No. 93-4272BID (Fla. DOAH Jan. 11, 1994)(agency awarded attorney's fees and costs totaling \$22,514.63, and intervenor awarded attorney's fees and costs totaling \$25,811.75).^{7/} Morphotrust has not demonstrated that either the Department's or STS' claims for

attorney's fees and costs were pursued for a frivolous purpose as contemplated by section 120.569(2)(e). Accordingly, Morphotrust's request for attorney's fees and costs is denied.^{8/}

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, the respective motions for attorney's fees and costs filed by the Florida Department of Highway Safety and Motor Vehicles, Solutions Thru Software, Inc., and Morphotrust USA under sections 57.105, 120.569(2)(e), and 120.595(1)(b) are DENIED.

DONE AND ORDERED this 25th day of March, 2013, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of March, 2013.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2012, unless otherwise indicated.

^{2/} In its initial motion for attorney's fees and costs, STS only sought recovery pursuant to section 57.105. In its amended motion for attorney's fees and costs, STS added a claim for fees

and costs under section 120.569(2)(e) as an additional basis for recovery. Absent a showing of prejudice to the opposing party, amendments are to be liberally allowed. Optiplan, Inc. v. Sch. Bd. of Broward Cnty., 710 So. 2d 569 (Fla. 4th DCA 1998). See also Fla. Admin. Code R. 28-106.202. As more fully explained elsewhere herein, no prejudice to Morphotrust has resulted as a consequence of allowing the amendment.

^{3/} Section 57.105 allows for the recovery of a reasonable attorney's fee, but does not allow for the recovery of costs. Ferere v. Shure, 65 So. 3d 1141, 1145 (Fla. 4th DCA 2011).

^{4/} In Jain v. Florida Agricultural and Mechanical University, 914 So. 2d 998 (Fla. 1st DCA 2005), the court made it very clear that DOAH has final order authority in section 57.105 proceedings and that it is reversible error for an agency to consider in any way a fee request brought pursuant to this statute. See also Dep't of HRS v. S.G., 613 So. 2d 1380 (Fla. 1st DCA 1993)(In a proceeding where claims for attorney's fees and costs are raised under differing theories, and as to one theory, DOAH has final order authority and as to the other, DOAH has recommended order authority, it is appropriate for DOAH to issue a final order addressing all theories of recovery. "[R]eview in . . . [the] district court of appeal provides sufficient protection for the [parties] under such circumstances."). Id. at 1384.

^{5/} "[T]he procedure of retaining jurisdiction in a recommended order to consider sanctions requested in a pending motion is sufficient to preserve jurisdiction over the Motion for Attorney's Fees under sections 57.105, 120.569(2)(e), and 120.595(1)(a-e) . . . especially where the final order also reserves jurisdiction" Spanish Oaks of Cent. Fla., LLC, v. Lake Region Audubon Soc'y, Inc., Case No. 05-4644 (Fla. DOAH July 7, 2006). See also Lawler v. Dep't of Mgmt. Servs., Case No. 07-2192 (Fla. DOAH Jan. 30, 2008)(Under section 57.105, in order for an award of attorney's fees to be at issue, "the Petitioner must first become a 'prevailing party' under that section. . . [and] that cannot occur in this case until a final order has been entered by the Respondent agency, and/or by an appellate court. Thus, the motion for attorney's fees and costs pursuant to section 57.105 must be the subject of a separate petition filed once the Petitioner becomes a prevailing party, if he does, upon conclusion of [the primary] proceeding."). Accord, n.4, supra.

^{6/} This determination also applies to counsel for Morphotrust.

^{7/} In Johnson Controls, attorney's fees and costs were awarded pursuant to section 120.57(1)(b)5., Florida Statutes (1993), which is a precursor to what is now section 120.569(2)(e). As germane to the instant proceeding, the statutory provisions are essentially identical. Section 120.569(2)(e), unlike section 120.595(1)(e)3., which expressly provides that the term "prevailing party" does not "include any party that has intervened in a previously existing proceeding to support the position of an agency," contains no express limitation on the ability of an intervenor to recover attorney's fees and costs sought pursuant thereto.

^{8/} It is well established that an award of attorney's fees "must be supported by detailed factual findings . . . predicated on a high degree of specificity" Moakley v. Smallwood, 826 So. 2d 221, 227 (Fla. 2002). However, it is not necessary for a trial court to state its basis when denying a request for attorney's fees and summary denial of a motion regarding the same is appropriate. See, e.g., Bus. Success Grp., Inc. v. Argus Trade Realty Inv., Inc., 898 So. 2d 970 (Fla. 3d DCA 2005).

COPIES FURNISHED:

Julie L. Jones, Executive Director
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room B-443
2900 Apalachee Parkway
Tallahassee, Florida 32399-0500

Steve Hurm, General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room A-432
2900 Apalachee Parkway, Mail Stop 02
Tallahassee, Florida 32399-0504

Deana Metcalf, Director
Division of Administrative Services
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room B-431
2900 Apalachee Parkway, Mail Stop 20
Tallahassee, Florida 32399-0500

Jennifer Clark, Agency Clerk
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room A-430
2900 Apalachee Parkway, Mail Stop 61
Tallahassee, Florida 32399

Douglas Sunshine, Esquire
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room A-432
2900 Apalachee Parkway, Mail Stop 02
Tallahassee, Florida 32399-0504

Maria Elena Abate, Esquire
Colodny, Fass, Talenfeld,
Karlinsky, Abate and Webb, P.A.
23rd Floor
100 Southeast 3rd Avenue
Fort Lauderdale, Florida 33394

J. Stephen Menton, Esquire
Rutledge, Ecenia and Purnell, P.A.
119 South Monroe Street, Suite 202
Post Office Box 551
Tallahassee, Florida 32301

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.