



Florida Department of Transportation

RICK SCOTT
GOVERNOR

605 Suwannee Street
Tallahassee, FL 32399-0450

ANANTH PRASAD, P.E.
SECRETARY

June 13, 2013

The Honorable W. David Watkins
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

FILED
13 JUL 17 PM 1:25
DIVISION OF
ADMINISTRATIVE
HEARINGS

**JAMES HINSON ELECTRICAL CONTRACTING COMPANY, INC. v. FDOT
DOT CASE NO. 12-144**

Dear Judge Watkins:

Enclosed for your records is a copy of the Final Order filed July 16, 2013, in the above-styled case.

Sincerely,

Patricia A. Parsons
Clerk of Agency Proceedings
(850) 414-5265

pap

Enclosure

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

FILED
13 JUL 17 PM 1:25
DIVISION OF
ADMINISTRATIVE
HEARINGS

JAMES HINSON ELECTRICAL
CONTRACTING COMPANY, INC.,

Petitioner,

vs.

DOAH Case No. 13-0685BID

DEPARTMENT OF TRANSPORTATION,

Respondent.

_____ /

FINAL ORDER

On October 24, 2012, the Department posted notice of its intent to award contract T2442 for the Intelligent Transportation System improvements project and other incidental construction on State Road 9A, in Duval County, Florida, to American Lighting & Signalization, Inc., (ALS). Hinson Electrical Contracting Company, Inc. (Hinson), timely filed a notice of protest and formal protest of the Department's intended action along with the required bond. The Department referred the matter to the Division of Administrative Hearings (DOAH) for a formal hearing. ALS did not petition to intervene and is not a party to this proceeding.

The parties waived the Section 120.57(3)(e), Florida Statutes, requirement to conduct a hearing within 30 days. The matter was transferred to Administrative Law Judge W. David Watkins (ALJ) on March 26, 2013, and a formal hearing was conducted on May 1, 2013, in Jacksonville, Florida. Appearances on behalf of the parties were as follows:

For Petitioner: E. Lanny Russell, Esquire
Jonathan Huffman, Esquire
Smith, Hulsey & Busey
325 Water Street, Suite 1800
Jacksonville, Florida 32202

For Respondent: C. Denise Johnson, Esquire
Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399

Prior to the hearing, the parties filed a Joint Pre-Hearing Stipulation with extensive and detailed admitted facts. At the hearing, Hinson presented the testimony of its president and principal, J. Daniel Hinson, and its project manager, Chris Ginn. Hinson's Exhibits 1-8, 11-24, and 30 were received into evidence without objection and Hinson's Exhibits 9, 10, and 29 were received over the Department's objection. The Department presented the testimony of Juanita Moore, the manager of the Department's Contracts Administration Office. Additionally, the transcript of the deposition of Department employee Colette Jackson, who did not testify at the hearing, was received into evidence along with Department Exhibits 1-6, which were received without objection.

The parties timely filed their proposed findings of fact and conclusions of law on May 31, 2013. On June 21, 2013, the ALJ entered a Recommended Order recommending that a final order be entered by the Department that rescinds the Notice of Intent to award Contract T2442 to ALS. The Department's exceptions to the Recommended Order were timely filed on July 1, 2013. ALS filed its response to the Department's exceptions on July 11, 2013.

STATEMENT OF THE ISSUE

As stated by the ALJ in his Recommended Order:

Whether the Department of Transportation's (DOT) intended decision to award contract T2442 for the Intelligent Transportation System improvements (Project) and other incidental construction on State Road 9A, in Duval County, to American Lighting & Signalization, Inc. (ALS), is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications.

EXCEPTIONS

In its exceptions, the Department seeks modification and/or clarification of findings of fact in Paragraphs 12, 25, 26, 34, and 36, and conclusions of law in Paragraphs 40 and 51 of the Recommended Order. The Department does not take issue with the ALJ's ultimate recommendation.

Pursuant to Section 120.57(1)(l), Florida Statutes (2012), 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

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

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. Dep’t 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); Rogers, 920 So. 2d at 30; Heifetz, 475 So. 2d at 1281; Section 120.68(7)(b), Florida Statutes (2012).

Regarding an agency’s treatment of conclusions of law, Section 120.57(1)(l), Florida Statutes (2012), 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.

The Department’s first exception is directed to Paragraph 12 of the Recommended Order which found that: “Hinson Electrical ordered the bid documents at approximately 1:00 p.m. on September 24, 2012...However, four minutes later, at approximately 1:04 p.m., Hinson Electrical simultaneously received an email with a ‘Prequalification Failure Notice,’ and a second email stating that the bid document request for the Project was ‘pending.’” The Department requests

modification of these findings of fact to reflect that Hinson ordered the bidding documents at 1:04 p.m. on September 24, 2012, and that Hinson received a simultaneous response consisting of a Prequalification Failure Notice and additional information indicating that the bidding documents were pending. Although there is record testimony supporting the Department's position, the parties' stipulated facts provide:

5. Hinson ordered the bid documents at approximately 1:00 p.m. on September 24, 2012.

7. At 1:04 p.m. on September 24, 2012 Hinson simultaneously received an email with a "prequalification failure notice" and a second email saying his bid document request for the Project was "pending."

The Department's first exception is rejected.

The Department's second exception takes issue with the ALJ's finding of fact in Paragraph 25 of the Recommended Order indicating that Collette Jackson testified that she could move the bid deadline "quickly" when directed to do so. Review of Ms. Jackson's deposition testimony reveals that she testified as follows:

Q Do you have any knowledge of the steps required to move a letting date?

A Yes.

Q What steps are required?

A In order for us to move a letting date we have to get some type of email from Juanita telling us to move the letting date. Once we receive that letting date email notification we will go into the CPP online ordering system and into CPP and move that project from one letting date to another letting date.

Q From the time you receive an email from Juanita Moore instructing you to move a letting date how long does it take for you to notify the bidders of that decision?

A Normally within one to two hours because we have to do all the changes, make sure that the new letting date is up, that the project is in that particular letting, and then we notify contractors once all that information is available.

Q If Juanita Moore sends you an email and says Collette, I want you to move the letting from 10:30 a.m. this morning to 5:00 p.m. today, is that something you could do?

A Yes.

While Ms. Jackson identified the steps involved in moving a bidding deadline and testified that she can move a bidding deadline within one to two hours of being directed to do so, this testimony does not afford a sufficient basis to overturn the ALJ's finding that Ms. Jackson could move a bidding deadline "quickly" once authorized to do so by Ms. Moore. The Department's second exception is rejected.

The Department, in its third exception, addresses the portion of Paragraph 26 where the ALJ found that Ms. Moore had taken the view that Hinson could have submitted its bid in the two hours remaining prior to the bid deadline based on the fact that Hinson had been previously provided the pay items and estimated quantities for the project. The ALJ's finding that Ms. Moore's belief that Hinson could have timely submitted its bid was based only on this fact is not supported by competent substantial evidence. The Department asserts, and the record confirms that Ms. Moore's testimony showed that she considered other factors as well as the reasons set out by the ALJ in Paragraph 26. Specifically, she also looked at the number of pay items, which she thought was within reason; the fact that all Hinson had to do was enter the bid units in a file similar to an Excel file; and that nothing else needed to be done. In light of Ms. Moore's testimony, the Department's exception is accepted and the third sentence of Paragraph 26 is

modified to read: "In her view, the fact that pay items and estimated quantities for the project had been previously provided, the fact that the number of pay items was within reason and all Hinson Electrical had to do was enter the bid units in a file similar to an Excel file, and the fact that nothing else needed to be done, should have enabled Hinson Electrical to submit a bid within the two hours remaining prior to the deadline."

The Department's fourth exception goes to Paragraph 34 of the Recommended Order. The Department takes issue with the fact that the finding appears to blur the distinction between the proposal budget amount, which appears in the advertisement, and the engineer's estimate (official cost estimate), which pursuant to Section 337.168(1), Florida Statutes (2012), is confidential and exempt from disclosure until the contract for the project has been executed or until the project is no longer under active consideration. As the advertisement language quoted by the ALJ in the first sentence of Paragraph 34 and Ms. Moore's testimony demonstrate, the engineer's estimate, and not the proposal budget amount, is the benchmark for determining whether all bids should be rejected. The amount of the engineer's estimate for the Project is not contained in the record because the contract has not been executed and the estimate is still confidential. Consequently, the Department's fourth exception is accepted and the last sentence of Paragraph 34 is modified to read: "Although the bid submitted by ALS for the Project exceeded the proposal budget estimate of \$4,183,958 by 19.9 percent (ALS' winning bid was \$5,016,501.73), it cannot be determined whether the ALS bid exceeded the engineer's estimate for the Project because the amount of the estimate has not been disclosed."

The Department's fifth exception is directed to Paragraph 36 of the Recommended Order which provides:

36. Hinson Electrical established that it would have submitted a bid of \$4,973,361.99 for the Project had DOT provided the online bid document when Hinson Electrical first requested it. Thus, Hinson Electrical would have been the low bidder, and presumably awarded the contract.

Essentially, the Department contends that in the absence of a bid submittal by Hinson, no analysis of the bid and other necessary documentation could be conducted to determine if an intended award could be noticed to Hinson. In other words, there is no evidentiary basis for the ALJ's finding that Hinson would have been the low bidder and presumably awarded the contract. The Department's fifth exception is accepted. While Hinson may have established that it intended to submit a bid in the amount of \$4,973,361.99, the fact that no bid was submitted forecloses the assumptions that the bid would have been the lowest responsive bid and that Hinson would have been awarded the contract. Accordingly, the last sentence of Paragraph 36 of the Recommended Order is stricken because it is not supported by competent substantial evidence.

The Department's sixth exception addresses the portion of the conclusion of law in Paragraph 40 of the Recommended Order which states: "The evidence shows that Hinson electrical would have had the low bid and would likely have been awarded the Project, so Hinson Electrical has the requisite substantial interest in this matter." As it did in the previous exception, the Department asserts that it was "error to deduce that Hinson would have had the low bid and likely would have been awarded the project since the Department did not have an opportunity to review a sealed bid to ensure that all of the requirements had been met." For the reasons expressed in the disposition of the previous exception, the Department's sixth exception is accepted. The second sentence of Paragraph 40 of the Recommended Order is stricken. The

Department finds that the conclusion of law in Paragraph 40, as modified, is as or more reasonable than the original conclusion.

The Department's seventh and last exception goes to Paragraph 51 of the Recommended Order where the ALJ concluded:

51. On the facts found herein, DOT's unequal treatment of Hinson Electrical was contrary to competition. Moreover, on these facts, DOT's refusal to provide any accommodation for Hinson Electrical, once DOT's mistake was brought to light prior to the bid deadline, in the absence of standards and policies, and without discussion with upper-management at DOT, was both arbitrary and capricious.

The Department takes issue with the ALJ's conclusion that the Department's refusal to provide Hinson an accommodation was arbitrary and capricious contending that the Department representative had the authority to make the decision and considered various factors in making that decision.

An arbitrary decision is one not supported by facts or logic, or despotic. Agrico Chemical Co. v. State, Etc., 365 So. 2d 759, 763 (Fla. 1st DCA 1978). A capricious action is one which is taken without thought or reason or irrationally. Id. On the instant record, Ms. Moore's decision was neither arbitrary nor capricious.

The record confirms that Ms. Moore had the authority to make the decision concerning the bid deadline. The record also reflects that Ms. Moore's decision was based upon her consideration of a number of factors which led to her conclusion that Hinson had enough time to submit its bid within the current deadline. While the Department will not disturb the ALJ's conclusion that Ms. Moore's analysis of these factors was clearly erroneous and produced a

result that was contrary to competition, the record will not permit a conclusion that her decision was illogical, despotic, unreasoned, or irrational.

Consequently, Paragraph 51 of the Recommended Order is amended to delete the conclusion of law that Ms. Moore's decision was arbitrary and capricious. Paragraph 53 of the Recommended Order, which summarizes the ALJ's previous conclusions of law, is likewise amended to delete the conclusion that the Department's decision was arbitrary and capricious. The Department finds that the conclusions of law in Paragraphs 51 and 53, as modified, are as or more reasonable than the original conclusions.

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 24, 25 and 26 as modified, 27 through 33, 34 as modified, 35, 36 as modified, 37 and 38 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.
2. The Conclusions of Law in Paragraphs 39, 40 as modified, 41 through 50, 51 as modified, 52, and 53 as modified 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 Notice of Intent to award Contract T2442 to American Lighting & Signalization is rescinded.

DONE AND ORDERED this 16th day of July, 2013.



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

FILED D.O.T. CLERK
2013 JUL 16 AM 8:46

NOTICE OF RIGHT TO FILE AMENDED PETITION

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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