

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES HINSON ELECTRICAL
CONTRACTING COMPANY, INC.,

Petitioner,

vs.

Case No. 13-0685BID

DEPARTMENT OF TRANSPORTATION,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 1, 2013, in Jacksonville, Florida, before W. David Watkins, the duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

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

STATEMENT OF THE ISSUE

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.

PRELIMINARY STATEMENT

On October 24, 2012, DOT posted notice of its intent to award the contract for the Project to ALS. Thereafter, Hinson Electrical Contracting Company, Inc. (Hinson Electrical) timely filed a notice of protest and formal protest (with the required bond) of DOT's intended action. DOT referred this matter to the Division of Administrative Hearings (DOAH). ALS did not petition to intervene in this proceeding and is not a party hereto.

This matter was initially assigned to Administrative Law Judge Jessica Varn, who issued a Notice of Hearing and an Order of Pre-hearing Instructions on February 26, 2013. On February 25, 2013, a scheduling teleconference was convened wherein the 30-day requirement to conduct a hearing was waived by the parties. On March 19, 2013, the Department filed an Unopposed Motion for Continuance, which was granted by Order dated March 22, 2013. The matter was transferred to the undersigned on March 26, 2013, and on April 3, 2013, an Order

re-scheduling the hearing was entered scheduling the final hearing for May 1, 2013, in Jacksonville, Florida.

The final hearing was held as scheduled. The 135-page Transcript was filed with DOAH on May 21, 2013, and Petitioner and Respondent timely filed their proposed findings of fact and conclusions of law on May 31, 2013. Prior to the hearing, the parties filed a Joint Pre-Hearing Stipulation with extensive and detailed admitted facts. The evidence presented at the hearing and the submissions from the parties have been carefully considered in the preparation of this Recommended Order.

At the hearing, Hinson Electrical presented the testimony of its president and principal, J. Daniel Hinson, as well as its project manager, Chris Ginn. DOT presented the testimony of Juanita Moore, the manager of the Contracts Administration Office within DOT. A transcript of the deposition of Colette Jackson (a DOT employee who did not testify at the hearing) was received into evidence at the hearing. Hinson Electrical's Exhibits numbered 1-8, 11-24, and 30 were received into evidence without objection, and Hinson Electrical's Exhibits numbered 9, 10, and 29 were received into evidence over DOT's objection. DOT's Exhibits numbered 1-6, were all received into evidence without objection.

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses and other evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:^{1/}

1. The contract being protested is T2442 for the Intelligent Transportation System improvements and other incidental construction for State Road 9A, in Duval County. The Department advertised the bid solicitation notice for the Project on July 27, 2012.

2. The bid solicitation notice included a list of all of the pay items and estimated quantities for the project. DOT also posted all of the pay items online in two formats. One format was a downloadable file that could be used in software, and the other was similar to an Excel spreadsheet file. These formats could be used to formulate a bid. Changes to pay items are issued in an Addendum, and while two addendums were issued for this project, neither affected the pay items for the project.

3. For several years, DOT has mandated that prospective bidders use an automated, online bidding process, by which prospective bidders request bid documents and submit their bids using the DOT's website.

4. The letting date established as the deadline for submission of bids via electronic submission was September 26, 2012, and was set forth in the bid solicitation notice. In order to be considered, all bids were due by 10:30 a.m. on that day. Letting is the term used to indicate the date that the bids are due.

5. The bid solicitation notice included a requirement that bidders for the Project attend a mandatory pre-bid meeting to be held on August 20, 2012.

6. Hinson Electrical is a licensed electrical contracting company based in Jacksonville, Florida. The company has completed "hundreds" of projects for the State of Florida, including DOT, and is pre-qualified to bid on jobs with DOT.

7. The mandatory pre-bid meeting was held on August 20, 2012, as scheduled. G. Christopher Ginn, Project Manager for Hinson Electrical, attended the pre-bid meeting, signed his name, and identified the company he represented (Hinson Electrical) on the sign-in sheet.

8. Section 337.168(2), Florida Statutes, provides:

(2) A document revealing the identity of persons who have requested or obtained bid packages, plans, or specifications pertaining to any project to be let by the department is confidential and exempt from the provisions of section 119.07(1) for the period which begins two working days prior

to the deadline for obtaining bid packages, plans, or specifications and ends with the letting of the bid.

9. As a business strategy, Hinson Electrical routinely orders bid documents within the two-day blackout period mandated by section 337.168(2), during which time DOT is required to take down its list of contractors who have requested bid documents concerning a particular project. Ordering bid documents within the blackout period prevents competitors from discovering whether Hinson Electrical is bidding for a particular project.

10. The blackout period for the Project began at 5:00 p.m. on Friday, September 21, 2012.

11. The deadline to order the bid documents for the Project was 10:30 a.m. on September 25, 2012. There is no requirement that contractors request bid documents prior to the pre-bid meeting (if one is required for a particular project), or at any time prior to the order deadline, which is 24 hours before the bid deadline. DOT acknowledged at hearing that it is Hinson Electrical's prerogative to order the bid documents within the blackout period during which the identities of bidders are kept confidential.

12. Hinson Electrical ordered the bid documents for the Project at approximately 1:00 p.m. on September 24, 2012. The computerized system immediately provided access for Hinson Electrical to download the plans and specifications for the

project at issue. 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 Prequalification Failure Notice indicated that the bid document was not provided because Hinson Electrical had not attended the required pre-bid meeting for the Project.^{2/} Failure to attend the pre-bid meeting was the only basis stated in the Prequalification Failure Notice for DOT refusing to provide the bid document.

13. As noted, Hinson Electrical's representative did in fact attend the pre-bid meeting for the Project, and he signed the sign-in sheet, attesting to his presence at the meeting. The sign-in sheet had been transmitted to DOT on August 21, 2012, the day after the pre-bid meeting was held. Thus, DOT's basis for sending Hinson Electrical a Prequalification Failure Notice was in error.

14. The Prequalification Failure Notice also stated, "[Y]ou will be contacted by email or phone as soon as possible during business hours regarding requirements for obtaining the bid documents." However, DOT did not send an email or call Hinson Electrical after 1:04 p.m. on September 24, 2012, or at any time on September 25, 2012.

15. Phillip Davis, a DOT employee in the Contracts Administration Office, was "blind copied" on the Hinson Electrical Prequalification Failure Notice email, with a "high importance" tag. Mr. Davis' job responsibilities include following up on these types of notices, though he is not supervised to ensure this occurs. Mr. Davis' responsibilities also include checking sign-in sheets from pre-bid meetings to authorize release of bid documents to contractors. DOT admits that Mr. Davis did not read the Hinson Electrical Prequalification Failure Notice; did not check the sign-in sheet from the pre-bid meeting; and made no attempt to contact Hinson Electrical, as promised in the notice.

16. From September 20 through 25, 2012, Daniel Hinson and Chris Ginn obtained quotes from suppliers and subcontractors to prepare a bid for the Project. Hinson Electrical also secured a bid bond for the Project, and had everything necessary to submit a bid, except for the actual bid document.

17. In the afternoon or early evening of September 25, 2012, Daniel Hinson sat down at his computer with the price lists and quotes he had obtained to prepare a bid for the Project. It was then that Mr. Hinson discovered DOT had not granted him access to the bid document for this Project, and that the failure notice he had received pertained to this Project, and was in error. Hinson Electrical was bidding on a

total of eight contracts at that time, some of which did not have a mandatory pre-bid meeting.

18. As of the close of business on September 25, 2012, DOT had still not made any effort to contact Hinson Electrical, as promised in the failure notice.

19. At 7:55 p.m. on September 25, 2012, Hinson Electrical sent an email to the Contracts Administration general email address, stating that Hinson Electrical's representative had attended the pre-bid meeting and asking why Hinson Electrical was being excluded from the bidding.

20. Shortly after 7:00 a.m. the following morning (September 26, 2012, the bid deadline), Chris Ginn called the project inspector, Thomas Woods of HNTB Corporation, on Hinson Electrical's behalf, and requested that HNTB confirm that Hinson Electrical's representative had attended the pre-bid meeting.

21. At 7:32 a.m. that same morning, Mr. Woods sent an email to Juanita Moore notifying her of the error and confirming that Hinson Electrical's representative had indeed attended the pre-bid meeting.

22. The Contracts Administration Office opened at 8:00 a.m. on the day of the bidding deadline. Within 36 minutes (by 8:36 a.m.), Ms. Moore reviewed Mr. Woods' email; checked the sign-in sheet; and instructed a subordinate, Colette Jackson, to send the bid document to Hinson Electrical. Ms. Jackson

immediately sent the bid document to Hinson Electrical under a cover email.

23. Ms. Moore testified that Phillip Davis could have easily gone through these same steps on September 24, 2012 (two days before the bid deadline), and timely transmitted the bid document to Hinson Electrical, if he had only read the Prequalification Failure Notice on which he was copied. Ms. Moore agreed that 24 hours would have been sufficient time for Mr. Davis to check the sign-in sheet and release the bid document.

24. When DOT finally provided the bid document to Hinson Electrical, it was 1 hour, 54 minutes before the bid submission deadline.

25. At 8:40 a.m. on September 26, 2012, (four minutes after receiving the bid document) Daniel Hinson spoke by telephone with Colette Jackson about needing additional time to complete Hinson Electrical's electronic bid submission. Colette Jackson testified that one of her responsibilities at DOT is to move bid deadlines, and that she can do so quickly upon receiving instructions from Ms. Moore to do so. However, Ms. Jackson did not have authority to provide the requested relief, so she transferred the call to Ms. Moore.

26. Upon being transferred to Ms. Moore, Mr. Hinson asked for additional time to complete the Hinson Electrical bid for

the Project. That request was refused by Ms. Moore. In her view, the fact that the pay items and estimated quantities for the project had previously been provided should have enabled Hinson Electrical to submit a bid within the two hours remaining prior to the deadline. In addition, Ms. Moore felt Hinson Electrical should have taken it upon itself to contact DOT immediately upon receiving the disqualification notification if it believed it had complied with all prerequisites.

27. Contrary to Ms. Moore's opinion, Mr. Hinson testified that it would have taken him about four hours to go through the various steps to submit Hinson Electrical's online bid for the Project. DOT's position that Hinson Electrical could have completed and submitted its bid with less than two hours remaining is rejected as not credible. However, even if that were possible, it would have put Hinson Electrical at a disadvantage because every other bidder was able to download the bid document immediately upon request after the pre-bid meeting.

28. Daniel Hinson has submitted bids for hundreds of DOT projects (including "dozens" using the current online system) and he reasonably believed there was insufficient time remaining before the deadline to prepare a competent bid and ensure its accuracy. Mr. Hinson's testimony regarding the amount of time necessary to prepare a complete and competent bid for the Project is more credible than the testimony of Ms. Moore.

Considering the potential cost to Hinson Electrical of a mistake made in haste, it was entirely reasonable for Hinson Electrical to decline to submit a bid, and instead request a bid extension. Likewise, it was unreasonable for DOT to decline the extension request, given that it was DOT's mistake that necessitated the extension.

29. DOT extends bid deadlines dozens of times each year, for various reasons, including computer issues, mistakes in the bid documents, or bad weather. Ms. Moore testified about bid deadlines that had been moved, three or four times in some cases, for reasons including computer glitches, website issues, and "technical problems." In one such instance, contractors could not obtain their bid documents on the Monday before a Wednesday letting (which is what happened to Hinson Electrical in this case), and DOT postponed the bid deadline. In another instance, a bid deadline was postponed for a third time "because the vendors couldn't download what they needed to bid." And in another example, the bid deadline was postponed with notice provided just 92 minutes before the deadline due to "server issues at the Department." In this final example, once the malfunction was identified, DOT promptly sent the notice of postponement to the bidders and later completed the other necessary steps to move the bid deadline.

30. A postponement notice can be sent to bidders in less than ten minutes after the decision to postpone a bid is made. All other steps required to move a bid deadline are typically accomplished by DOT personnel in about an hour.

31. DOT knows of no harm that would have come to the other bidders had DOT agreed to move the bid deadline to allow Hinson sufficient time to submit its online bid.

32. At 9:22 a.m. on September 26, 2012, Daniel Hinson sent an email to Colette Jackson in response to her email, stating there was insufficient time for Hinson Electrical to prepare its bid for the Project and that a protest would be filed if DOT posted its intent to award the contract to one of the other bidders.

33. The letting of the project occurred as scheduled at 10:30 a.m. on September 26, 2012. At approximately 4:00 p.m. on October 24, 2012, DOT posted notice of its intent to award the contract to ALS. This was the second posting date for the September 26, 2012 letting date. Thereafter, Hinson Electrical timely served its notice of protest, formal protest pleading, and the required bond.

34. The advertisement for the Project reads, in part, "Bidders are hereby notified that all bids on any of the following projects are likely to be rejected if the lowest responsive bid received exceeds the engineer's estimate by more

than ten percent (10%).” DOT does reject all bids for being too high in some cases. 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).

35. The Contract Award Committee (Committee) is the DOT body with discretion to reject all bids for a project. However, Ms. Moore never informed the Committee of Hinson Electrical's situation so that it could determine whether the Project should be rebid. Even after posting notice of intent to award the Project to ALS, DOT retained discretion to reject all bids, but Ms. Moore was unaware of that discretion and never discussed the matter with the Committee.

36. Hinson Electrical credibly 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.

37. DOT had at least three opportunities to correct its mistake and allow Hinson Electrical an opportunity to bid. DOT could have (1) extended the bid deadline, as it has in many other cases; (2) rejected all bids and rebid the Project, before posting notice of intent to award the contract; or (3) rejected all bids even after posting notice of intent.

38. In their Prehearing Stipulation, the parties stipulated to the following:

DOT has no policy statements, handbook provisions, internal memoranda, guidelines, or other documents regarding the following subjects:

a. How a failure to timely transmit bid documents in response to a prospective bidder's request, whether due to a transmission error or otherwise, should be handled or what relief may be provided to the bidder;

b. Acceptable grounds for extending a bid submission deadline;

c. How an erroneous determination that a prospective bidder for a project was not qualified to bid should be handled, either before or after the bid deadline has expired;

d. Relief that can or should be provided to a prospective bidder who was denied the opportunity to bid for a project due, at least in part, to some irregularity in the bidding process;

e. Relief that can or should be provided to a prospective bidder who was denied the opportunity to bid for a project due, at least in part, to some error made by FDOT (including its computer system); and

f. How to handle a situation in which all received bids exceed the budget for the project by more than 10%.

(Prehearing Stipulation, pgs. 11-12)

CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to sections 120.569, 120.57(1) and 120.57(3), Florida Statutes.

40. Hinson Electrical has standing to file this protest by virtue of being a prospective bidder who was wrongfully excluded from the bidding process. See Advocacy Ctr. For Pers. with Disabilities, Inc. v. Dep't of Child. & Fam. Servs., 721 So. 2d 753, 755 (Fla. 1st DCA 1998) (citing and quoting Westinghouse Elec. Corp. v. Jacksonville Transp. Auth., 491 So. 2d 1238, 1241 (Fla. 1st DCA 1986), and Fairbanks, Inc. v. Dep't of Transp., 635 So. 2d 58, 59 (Fla. 1st DCA 1994)). 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. "Standing will inhere in a person who at least has some potential stake in the contract to be awarded." Id. Hinson Electrical satisfies this test.

41. Petitioner, as the party challenging the proposed agency action, has the burden of proof in this proceeding and must show that the agency's proposed action is contrary to the agency's governing statutes, rules or policies, or the bid or proposal specifications. A de novo hearing was conducted to evaluate the action taken by the agency. § 120.57(3)(f), Fla.

Stat.; State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607 (Fla. 1st DCA 1998). The administrative law judge may receive evidence, as with any hearing held pursuant to section 120.57(1), but the purpose of the proceeding is to evaluate the action taken by the agency based on the information available to the agency at the time it took the action. Id.

42. Agencies enjoy wide discretion when it comes to soliciting and accepting proposals, and an agency's decision, when based upon an honest exercise of such discretion, will not be set aside even where it may appear erroneous or if reasonable persons may disagree. Baxter's Asphalt and Concrete, Inc. v. Dep't of Transp., 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985); Capeletti Brothers, Inc. v. State, Dep't of Gen. Servs., 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). Section 120.57(3)(f) establishes the standard of proof as whether the proposed action was clearly erroneous, contrary to competition, arbitrary or capricious.^{3/}

43. A decision is considered to be clearly erroneous when, although there is evidence to support it, after review of the entire record the tribunal is left with the definite and firm conviction that a mistake has been committed. United States v. U.S. Gypsum Co., 333 U.S. 354, 395 (1948). An agency action is capricious if the agency takes the action without thought or reason or irrationally. Agency action is arbitrary if is not

supported by facts or logic. See Agrico Chemical Co. v. State Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding. See Wester v. Belote, 103 Fla. 976, 138 So. 721, 723-24 (1931).

44. By erroneously rejecting Hinson Electric's timely request for the bid document, and then refusing its reasonable request for a bid extension, DOT actions are clearly contrary to competition.

The bid procedure was fashioned to discourage discriminatory governmental awards and to assure the procurement of the best value in exchange for public funds. When the procedure is not followed, those objectives are not achieved.

Courtenay v. Dep't of HRS, 581 So. 2d 621, 623 (Fla. 5th DCA 1991). The purpose of the bidding process is settled in the law:

[T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the county at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the county, by affording an opportunity for an exact comparison of bids.

Wester v. Belote, 103 Fla. 976, 981, 138 So. 721, 723-24 (1931); see also Harris v. Sch. Bd. of Duval Cnty., 921 So. 2d

725 (Fla. 1st DCA 2006); Dep't of Lottery v. GTech Corp., 816 So. 2d 648, 652 (Fla. 1st DCA 2001); Aurora Pump v. Goulds Pumps, Inc., 424 So. 2d 70, 75 (Fla. 1st DCA 1982); Harry Pepper & Assocs., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977); Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc., 354 So. 2d 446 (Fla. 1st DCA 1978).

45. Without question, bid procedures exist to ensure the equal treatment of all potential bidders. When, as here, a bidder who attended the pre-bid meeting and met all other prerequisites was not provided with critical documentation that the other bidders received, "the bidders were not treated equally and fairly" and "the entire purpose of the competitive bidding process [is] subverted." Opus South Corp. v. Bd. of Regents, Case No. 93-2740BID (Fla. DOAH July 29, 1993; Fla. Bd. of Regents Sept. 21, 1993). And when an agency's mistake denies a contractor the opportunity to compete for a contract award, relief should be provided to the contractor. In Asphalt Pavers, Inc. v. Fla. Dep't of Transp., 602 So. 2d 558, 562 (Fla. 1st DCA 1992), the hearing officer held it was clearly arbitrary to reject a bid for failure to include a form that the agency itself lost, and that result was affirmed on appeal.

46. There is no question that Hinson Electrical was treated differently than the other bidders for the Project.

Hinson Electrical was the only bidder that received a Prequalification Failure Notice with the erroneous statement that it had failed to attend the mandatory pre-bid meeting. Hinson Electrical is also the only bidder that was not able to download the bid document promptly upon request. This unequal treatment of bidders is contrary to competition for the Project.

47. DOT responds that Hinson Electrical should have identified DOT's error sooner, but there is no dispute that Hinson Electrical timely satisfied every prerequisite for DOT to deliver the requested bid package. Nor is there any dispute that DOT (in its Prequalification Failure Notice) committed to follow up "as soon as possible" to get the bid document to Hinson Electrical. Bidders are entitled to rely upon the DOT to timely provide bid documents in accordance with the DOT's procedures. See Bell Atlantic Bus. Sys. Servs., Inc. v. Fla. Dep't of Labor & Emp. Sec., 677 So. 2d 989, 991 (Fla. 1st DCA 1996) (holding that bidders were entitled to rely upon the Department's commitment to provide a notice of bid posting by facsimile and were not required to make telephone calls or personal visits to obtain the notice the Department was supposed to provide by facsimile). Hinson Electrical took appropriate action as soon as it became aware of DOT's error.

48. DOT also argues that most contractors request bid documents either before or shortly after the pre-bid meeting.

However, DOT candidly admits this is not required and that it was Hinson Electrical's prerogative to order the bid documents during the blackout period provided by 337.168(2), which statute is intended to foster competition. Any actions or procedures of the DOT that impede the protections afforded by that statute are improper. Capeletti Bros., Inc. v. Dep't of Transp., 499 So. 2d 855, 858 (Fla. 1st DCA 1986) ("The exemptions in section 337.168 were enacted after the Sunshine Law and constitute the later, more specific expression of legislative will and must, therefore, be given effect.").

49. The absence of regulations, policies, or even guidelines to govern the decision whether to postpone a bid deadline or reject all bids under circumstances like this, is problematic. Important decisions should not be made "on the personal whim of a bureaucrat." See SAS Fountains at Pershing Park. Ltd. v. Fla. Hous. Fin. Corp., Case No. 10-8219 (Fla. DOAH Sept. 30, 2010; Fla. Hous. Fin. Corp. June 24, 2011). DOT is entrusted with millions of dollars in taxpayer funding. The public trust demands appropriate policies, procedures, and decision-making to ensure procedural and substantive fairness in the bid procurement process and the use of this funding.

50. DOT has discretion to extend bid deadlines, and in fact does so regularly for various reasons. Given the facts of this case, DOT should have provided some reasonable

accommodation to a bidder who was denied sufficient opportunity to bid for the project due to DOT's error or an irregularity in the bid procurement process that affected the bidder. DOT has done so in many other cases, and should have done so here.

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.

52. Petitioner urges a recommendation from the undersigned that DOT enter a Final Order directing that all bids for the Project be rejected and that the Project be rebid. However, administrative law judges are without the authority to direct how an agency must respond once a finding is made that the procurement process violated applicable law. Dep't of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988); see also, Moore v. State, Dep't of HRS, 596 So. 2d 759 (Fla. 1st DCA 1992); Courtenay v. Dep't of HRS, 581 So. 621 (Fla. 5th DCA 1991).

53. Under the facts of this case, DOT's decision not to extend the bid deadline for the Project was clearly erroneous,

contrary to competition, arbitrary and capricious, in violation of section 120.57(3)(f).

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered by the Department of Transportation that rescinds the Notice of Intent to award Contract T2442 to American Lighting & Signalization, Inc.

DONE AND ENTERED this 21st day of June, 2013, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
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 21st day of June, 2013.

ENDNOTES

^{1/} The parties are in agreement as to the timing and sequence of virtually all of the relevant events. See Prehearing Stipulation, pgs. 10-12.

^{2/} All other bidders for the Project also received a Prequalification Failure Notice stating that the bid documents could not be issued at the time of request because attendance at the pre-bid conference was a prerequisite. However, since all other bidders requested the bid documents prior to the date of the pre-bid conference the Prequalification Failure Notices sent to them was appropriate, whereas the Prequalification Failure Notice sent to Hinson Electrical was not.

^{3/} Section 120.57(3)(f) provides in relevant part:

Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

COPIES FURNISHED:

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

E. Lanny Russell, Esquire
Smith Hulsey and Busey
Suite 1800
225 Water Street
Jacksonville, Florida 32202

Trish Parsons, Clerk of Agency Proceedings
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399

Gerald B. Curington, General Counsel
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399

Ananth Prasad, Secretary
Department of Transportation
Haydon Burns Building, Mail Station 57
605 Suwannee Street
Tallahassee, Florida 32399

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.