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

THE MIDDLESEX CORPORATION,

Petitioner,

vs.

DOAH Case No. 15-3082BID
DOT Case No. 15-038

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

PRINCE CONTRACTING, LLC,

Intervenor.
_____/

FINAL ORDER

In this bid protest, the Department proposed to award the contract issued pursuant to RFP E7K24 to Prince Contracting, LLC. The Middlesex Corporation protested the proposed award and this case was referred to the Division of Administrative Hearings (DOAH). The assigned Administrative Law Judge (ALJ), The Honorable William F. Quattlebaum, entered a Recommended Order on December 7, 2015, recommending that the Department enter a final order awarding the contract to Middlesex.

A copy of the Recommended Order is attached. The Department and Prince timely filed exceptions to the Recommended Order on December 17, 2015. Middlesex timely filed responses to these exceptions on December 28, 2015.

Introduction and General Principles

Where a party timely files exceptions to a recommended order, "[t]he final order shall include an explicit ruling on each exception . . . ." § 120.57(1)(k), Fla. Stat. (2015).

"As with recommended orders in other formal hearings, the agency may reject the administrative law judge's findings of fact in a bid protest only if the findings of fact are not supported by competent and substantial evidence or if the proceedings did not comply with the essential requirements of law." Gtech Corp. v. Dep't of the Lottery, 737 So. 2d 615, 619 (Fla. 1st DCA 1999); § 120.57(1)(*l*), Fla. Stat. (2015). "Competent, substantial evidence is such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred or such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." Bill Salter Adver., Inc. v. Dep't of Transp., 974 So. 2d 548, 550-551 (Fla. 1st DCA 2008) (citations and internal quotations omitted). "Factual inferences are to be drawn by the hearing officer as trier of fact." Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1283 (Fla. 1st DCA 1985). Rejection or modification

of conclusions of law may not form the basis for rejection or modification of findings of fact. § 120.57(1)(*l*), Fla. Stat. (2015).

The Department may reject or modify conclusions of law over which it has substantive jurisdiction. Gtech, 737 So. 2d at 619; § 120.57(1)(*l*), Fla. Stat. (2015). In a bid protest, "the ALJ is charged with reviewing the agency's proposed action against appellate-like 'standard[s] of proof.'" J.D. v. Fla. Dep't of Children and Families, 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013) (citing § 120.57(3)(f), Fla. Stat.) (internal quotations and brackets in original). The DOAH hearing is de novo, "but its purpose is to evaluate the action taken by the agency." Id. The ALJ does not "sit as a substitute" for the Department and make a determination whether to award the bid de novo. Id. at 1133 (citations omitted). The Department "is not bound by the ALJ's legal conclusion as to whether the intended action was an abuse of discretion, but the agency's review of that issue is circumscribed by the standards in section 120.57(1)(*l*)." Id. Thus, even if the ALJ determines as a factual matter that the protesting bidder met its burden, and concludes as a legal matter that the agency should not award the contract as proposed, the agency head retains discretion to award the contract "so long as the final order 'states with particularity its reasons for rejecting or modifying such conclusion of law . . . and make[s] a finding that its substituted conclusion of law . . . is as or more reasonable that that

which was rejected or modified." Id. (quoting § 120.57(1)(*l*), Fla. Stat.) (ellipses in original).

Rulings on Prince's Exceptions

Exception No. 1: Prince takes exceptions to paragraphs 8, 9, and 10 of the Recommended Order.

Prince's exception to paragraph 8 is limited to the last sentence, which finds that RFP E7K24 (RFP – see RO ¶ 1) required the Department to issue an addendum to the RFP if an approved Alternative Technical Concept, or ATC, had the effect of altering the RFP specifications. Prince argues that this finding is not supported by competent substantial evidence because the RFP "sets forth a distinct list of just 10 RFP requirements for which the Department was required to issue an addendum" and that Department approval of an ATC related to any item other than those specifically listed "will NOT result in issuance of an Addendum to the RFP." (Prince Exceptions at 3) (quoting Jt. Ex 1 at 28) (emphasis in original).

While paragraph 8 is labeled a finding of fact, the Department is not bound by the ALJ's labels. Sch. Bd. of Leon County v. Hargis, 400 So. 2d 103, 107 (Fla. 1st DCA 1981); Battaglia Properties v. Fla. Land & Water Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1993). Rather, "it is the true nature and substance of the determination or ruling by the ALJ that controls the Agency's

ability to reject the ruling." J.J. Taylor Cos. v. Dep't of Bus. & Prof'l Regulation, Div. of Alcoholic Bevs. & Tobacco, 724 So. 2d 192, 193 (Fla. 1st DCA 1999).

The Department finds that what the RFP does or does not require is a conclusion of law. The Department also finds that a legal conclusion on what the RFP does or does not require is within the Department's substantive jurisdiction. The Department has substantive jurisdiction over the statutes and rules involving the Department's area of expertise, Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001), and also has substantive jurisdiction over an RFP issued under those statutes and rules. Care Access PSN, LLC v. State of Fla., Agency for Health Care Admin., 2014 Fla. Div. Adm. Hear. LEXIS 60, *7 (AHCA Final Order Jan. 31, 2014) (finding interpretation of AHCA-issued ITN conclusion of law within AHCA's substantive jurisdiction).

To the extent the last sentence of paragraph 8 of the Recommended Order concludes that the Department was "required" to issue an addendum to the RFP if **any** approved ATC had the effect of altering the RFP specifications, the Department rejects that conclusion of law. The Department substitutes its conclusion of law that issuance of addenda to the RFP is required only if an approved ATC proposal relates to the requirements specifically listed on page 28 of the RFP. Because the RFP specifically provides that "Department approval of an ATC proposal that is related to [all items not specifically listed on Page 28] will

NOT result in the issuance of an Addendum to the RFP" (Jt. Ex 1 at 28) (emphasis in original), the Department finds that this conclusion of law is as or more reasonable than the rejected conclusion of law in paragraph 8 of the Recommended Order. § 120.57(1)(*l*), Fla. Stat. (2015).

Alternatively, the last sentence of Paragraph 8 is an ultimate fact, infused by policy considerations for which the agency has special responsibility. McDonald v. Dep't of Banking & Finance, 346 So. 2d 569, 579 (Fla. 1st DCA 1977). In such cases, the expertise of the reviewing agency prevails. Fla. Cargo Carriers Ass'n v. Dep't of Bus. & Prof'l Regulation, 738 So. 2d 391, 392 (Fla. 3d DCA 1999). The Department therefore rejects the last sentence of paragraph 8 as inconsistent with the Department's policy considerations for which it has special responsibility.[1]

Prince also takes exception to paragraph 10.[2] Paragraph 10 states that the RFP "established requirements that were not to be changed other than by amendment or addenda issued by DOT[,]" and goes on to quote selected requirements from a list found on pages 3-6 of the RFP. Prince argues that the ALJ ignored the preceding sentence, which specifically contemplates approval of ATCs that deviate from the RFP requirements.

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[1] This ruling also applies to the Department's exception to paragraph 8.

[2] If Prince takes exception to paragraph 9, which consists entirely of block quotes from the RFP, the exception appears to be limited to the ALJ's omission of the text from page 28 discussed above and inconsistencies in capitalization and emphasis (Prince Exceptions at 3 n.1). The Department rejects the exception to Paragraph 9.

While labeled a finding of fact, the Department finds that paragraph 10 of the Recommended Order is a conclusion of law on what the RFP requires. As developed above, the Department has substantive jurisdiction over this conclusion of law.

The Department rejects paragraph 10's conclusion of law that all requirements on pages 3-6 of the RFP cannot be changed "other than by amendment or addenda issued by DOT." The RFP does not use the word "amendment." Rather, the RFP states that the requirements on pages 3-6 cannot be changed by Design-Build Firms "except as specifically **modified by the RFP** and associated addenda[.]" (Jt. Ex 1 at 3) (emphasis in original). The phrase "modified by the RFP" refers to the ATC Proposal process, which as Prince notes is referenced in the sentence immediately preceding the one forming the basis of the ALJ's conclusion.

To promote flexibility and encourage innovation, design-build firms[3] may propose changes for literally any requirement in the RFP through the ATC Proposal process (Jt. Ex 1 at 3, 27). Because an ATC Proposal could reveal a proposing firm's work product to its competitors, the RFP pledges to keep ATC submissions confidential to the fullest extent allowed by law. Id. at 28. For a specifically delimited subset of RFP requirements, approved ATC proposals will

[3] See § 337.11(7), Fla. Stat. (2015).

result in issuance of addenda. Id. at 28. A published RFP addendum renders complete confidentiality impossible, but even in these cases, the Department endeavors to maintain confidentiality of the proposing firm's specific ATC proposal. Id. To further the goal of confidentiality, the RFP also allows firms to withdraw previously submitted ATC proposals that will result in issuance of addenda prior to approval. Id. Any ATC proposal related to a requirement that is not listed as resulting in the issuance of an addendum will not result in the issuance of an addendum, but will rather be kept confidential between the proposing firm and the Department to the fullest extent possible. Id.

Paragraph 10 of the Recommended Order suggests that any change to RFP requirements proposed by a design-build firm will be divulged to the firm's competitors, whether through "amendment" or "addendum" issued by the Department. The Department rejects this interpretation. Because the Department's interpretation of the RFP strikes an appropriate balance between fair competition and encouraging innovation by keeping ATC proposals as confidential as possible, the Department finds that this conclusion of law is as or more reasonable than the rejected conclusion of law in paragraph 10 of the Recommended Order. § 120.57(1)(*l*), Fla. Stat. (2015).

Alternatively, paragraph 10 is an ultimate fact, infused by policy considerations for which the agency has special responsibility. McDonald, 346 So.

2d at 579. In such cases, the expertise of the reviewing agency prevails. Fla. Cargo Carriers, 738 So. 2d at 392. The Department therefore rejects paragraph 10 as inconsistent with the Department's policy considerations for which it has special responsibility.

Exception No. 2: Prince takes exception to Paragraphs 14 and 49. Paragraph 14 finds that Middlesex submitted a Technical Proposal for a SPUI (Single Point Urban Interchange – see RO ¶ 6) concept referenced in the RFP. Paragraph 49 finds that Middlesex was not required to propose an ATC for traffic signalization in an SPUI concept proposal.

Prince argues that Paragraph 14 is not supported by competent substantial evidence because Middlesex's SPUI design is not the same as the SPUI concept in the RFP, and that no competent substantial evidence supports the proposition that Middlesex's only change to the SPUI concept related to traffic signalization.

The Department does not interpret Paragraph 14 as finding that Middlesex proposed to construct an SPUI that was identical to the concept reflected in the RFP. Nor does the Department interpret Paragraph 49 as finding that Middlesex's only change related to traffic signalization. Prince's Exception No. 2 is rejected. § 120.57(1)(*l*), Fla. Stat. (2015).

Exception No. 3: Prince takes exception to paragraphs 28, 29, and 30. Paragraph 28 finds that the Prince PARCLO (Partial Cloverleaf interchange – see

RO ¶ 12) does not comply with the RFP requirements for northbound exit lanes from I-75 onto State Road 50, which per the RFP shall consist of triple lefts. Paragraph 29 finds that Prince initially proposed a variation of the triple left requirements consisting of dual left and dual right turn lanes with a shared left-right fifth lane, and later revised its plan to omit the shared lane proposal in response to the Department's concerns. Paragraph 30 concludes that there is no evidence that the Department approved Prince's deviation from the RFP triple-left requirement.

Prince argues that the triple-left requirement does not apply to its PARCLO design. Whether a given requirement in the RFP applies is a conclusion of law over which the Department has substantive jurisdiction. Deep Lagoon, 784 So. 2d at 1142; Care Access, 2014 Fla. Div. Adm. Hear. LEXIS 60, *7. The Department finds that the RFP's triple left requirement applies to Prince. Under the RFP, Prince was allowed to seek approval to deviate from that requirement through the ATC process. The Department agrees with the ALJ that there is competent substantial evidence that such approval was not given.

Prince argues that there is competent substantial evidence that Prince discussed with the Department removal of the proposed shared left-right lane, "the Department responded affirmatively through action such as head nodding," and did not inform Prince that the shared left/right lane was disapproved. Prince also

argues there is evidence that if the Department had expressed concern over the removal of the shared left-right lane, Prince would not have made that change to its design. Middlesex correctly notes that Prince is asking the Department to reweigh evidence and reject a finding of fact. The Department cannot do so. Bill Salter Adver., 974 So. 2d at 551 ("In reviewing the record, neither the agency nor this court is permitted to re-weigh the evidence presented, judge the credibility of the witnesses, or otherwise interpret the evidence to fit a desired ultimate conclusion."). Prince's Exception No. 3 is rejected. § 120.57(1)(*l*), Fla. Stat. (2015).

Exception No. 4: Prince takes exception to paragraphs 32, 33, and 34. Prince disputes the findings in paragraphs 32 and 33 that it did not comply with the RFP requirements regarding placement of stop bars on exit lanes from I-75 to SR 50.

Prince argues that the ALJ mischaracterizes the RFP as requiring a stop bar in front of a bridge retaining wall. As Prince notes, the RFP requires "the lead vehicles (at a minimum) at the stop bar, shall be in front of the bridge retaining wall and have no sight obstructions at SR 50." (Jt. Ex. 1 at 5) (parentheses in original). If Prince is arguing that the RFP imposes a requirement on "the lead vehicles . . . at the stop bar" and not the stop bar itself, the Department rejects

Prince's argument. The Department agrees with the ALJ's conclusion that the RFP requires a stop bar in front of the bridge retaining wall.

The ALJ found that Prince's proposal places the stop bar behind the bridge retaining wall. Prince does not dispute this finding. Instead, Prince argues that it was not required to show a stop bar in its preliminary design submittal. The ALJ did not make a specific finding on whether a stop bar was required to be shown in Prince's submittal, although the ALJ's findings that Prince did not comply with this requirement (RO ¶¶ 33, 60) implies that the ALJ made this finding. Even so, the Department can only rule on the ALJ's findings, not make new ones. Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) ("Florida courts are in agreement that when competent substantial evidence in the record supports the ALJ's findings of fact, the agency may not reject them, modify them, substitute its findings, **or make new findings**.") (citation and internal quotations omitted, emphasis supplied).

Prince also argues there is evidence that its design meets the RFP's sight distance requirements, but this is an invitation to impermissibly reweigh the evidence to reach a desired outcome. Bill Salter Adver., 974 So. 2d at 551.

Prince takes exception to paragraph 34's finding that Prince's stop bar design is preliminary and subject to change, but its argument amounts to forcefully reiterating that it proved its design is preliminary and subject to change. Prince also

takes exception to paragraph 34's finding that deviation from the stop bar requirement would provide a competitive advantage. Competent substantial evidence supports the ALJ's finding that compliance would require lengthening the I-75 bridges, thereby increasing project costs. The Department is sympathetic to Prince's point that even if that were true, there is no competitive advantage because Prince is locked into its lump sum bid price. Prince is required to fully comply with the project criteria, so any overruns resulting from a variance from Prince's preliminary submission are Prince's responsibility. Yet the Department is constrained to reject Prince's exception to paragraph 34 because paragraph 34 is supported by competent substantial evidence. Prince's Exception No. 4 is rejected. § 120.57(1)(*l*), Fla. Stat. (2015).

Exception No. 5: Prince takes exception to paragraph 36's finding, and the related findings in paragraphs 37-42, that Prince's proposal does not comply with the RFP requirement regarding thru lanes on SR 50. Prince argues that these findings are not supported by competent substantial evidence.

Paragraphs 37 and 38 find that the RFP requires four 12-foot thru lanes on SR 50, and paragraph 39 finds that Prince's proposal includes only three westbound thru lanes on SR 50. Prince admits that its proposal includes only three westbound thru lanes (Prince Exceptions at 13). The exceptions to Paragraphs 36-39 are accordingly rejected.

Prince also argues that paragraph 39 failed to make certain findings regarding Middlesex's proposal, but the Department can only rule on the ALJ's findings, not make new ones. Walker, 946 So. 2d at 605.

Paragraph 40 finds there was no evidence that the Department approved a deviation from the four lane requirement. This is incorrect in a narrow sense. There is evidence that the Department approved a deviation. But the Department's review of whether competent substantial evidence supports a given finding "is not done by mechanically combing the transcript for words and phrases of testimony . . . , but rather by considering the whole record, including the [ALJ's] findings." McDonald, 346 So. 2d at 578-579. Middlesex notes, and the Department agrees, that there is evidence – some of it from the same witness – that the Department did not approve a deviation. The ALJ's finding that there is "no" evidence of a Department-approved deviation is an overstatement, but the Department rejects the exception to paragraph 40 because it asks the Department to impermissibly reweigh the evidence to reach a desired outcome. Bill Salter Adver., 974 So. 2d at 551.

Paragraph 41 finds that the RFP required the Department "to issue an addendum of ATC-approved deviations from the RFP that result in modification or abandonment of RFP requirements." As developed above, the Department rejects this conclusion of law because the RFP expressly does not require issuance of

addenda for all ATC approvals, but rather requires issuance of addenda for ATCs relating to a specifically listed subset of RFP requirements. For the reasons developed above, this conclusion of law is as or more reasonable than the ALJ's.[4]

The Department finds that the requirement of four thru lanes is not among the requirements requiring issuance of an addendum (compare Jt. Ex. 1 at 4 with Jt. Ex. 1 at 28). Department approval of an ATC related to any other requirements is, however, still required, id., and as stated above the Department does not reject the ALJ's finding that the Department did not approve a deviation from the thru lane requirement. The Department accepts the finding in Paragraph 41 that the Department did not issue an addendum that modified the thru lane requirement.

Paragraph 42 finds that deviation from the thru lane requirement would provide a substantial financial advantage over compliant firms. In response, Prince makes the same argument that it made in response to Paragraph 34. The Department's ruling is likewise the same.

Except as otherwise stated above, Prince's Exception No. 5 is rejected. § 120.57(1)(*l*), Fla. Stat. (2015).

Exception No. 6: Prince takes exception to paragraph 45, which finds that "the evidence failed to establish" whether the SPUI or PARCLO proposal was superior. Prince argues that a PARCLO is superior. Whether a given proposal is

[4] This ruling also applies to the Department's exception to paragraph 41.

superior is a finding of ultimate fact, infused by policy considerations for which the agency has special responsibility. McDonald, 346 So. 2d at 579. In such cases, the expertise of the reviewing agency prevails. Fla. Cargo Carriers, 738 So. 2d at 392. The Department exercises its discretion to decline to set aside the ALJ's finding of ultimate fact that a PARCLO is not necessarily superior to a SPUI. Exception No. 6 is therefore rejected. Alternatively, exception No. 6 is rejected because the Department cannot reweigh evidence. Bill Salter Adver., 974 So. 2d at 551; Goin v. Comm'n on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995) ("By stating he was not persuaded, the hearing officer engaged in the act of ascribing weight to the evidence."); Strickland v. Fla. A&M Univ., 799 So. 2d 276, 278 (Fla. 1st DCA 2001).

Exception No. 7: Prince takes exception to paragraphs 50 and 51. Paragraph 50 summarizes Prince's argument that Middlesex's proposal failed to meet stormwater management system requirements, and paragraph 51 finds that the evidence is insufficient to establish that Middlesex's proposal does not meet the RFP's stormwater requirements.

Whether a proposal meets the RFP requirements is a finding of ultimate fact, infused by policy considerations for which the agency has special responsibility. McDonald, 346 So. 2d at 579. In such cases, the expertise of the reviewing agency prevails. Fla. Cargo Carriers, 738 So. 2d at 392. The Department exercises its

discretion to decline to set aside the ALJ's finding of ultimate fact that Middlesex's proposal meets the RFP's stormwater requirements. Exception No. 7 is therefore rejected. Alternatively, exception No. 7 is rejected because the Department cannot reweigh evidence. Bill Salter Adver., 974 So. 2d at 551; Goin, 658 So. 2d at 1138.

Exception No. 8: Prince takes exception to paragraphs 52-55. Paragraph 52 finds Prince argued that the Middlesex proposal failed to comply with RFP requirements related to border width and mowing strips. Paragraph 53 explains the border width requirement and finds that both Prince's and Middlesex's proposals did not comply. Paragraph 54 explains the mowing strip requirement and finds that both Prince's and Middlesex's proposals did not comply.[5] Paragraph 55 finds that "the evidence failed to establish that the border width or mowing strip deficiencies warranted rejection of either proposal as non-responsive."

Prince argues that the ALJ correctly found that Middlesex's proposal was non-compliant, and Middlesex does not dispute this. Prince does not appear to dispute that its proposal was also non-compliant, but rather suggests that the Department approved its non-compliance through the ATC process. Thus, Prince asks the Department to make new findings. The Department cannot do so. Walker, 946 So. 2d at 605.

[5] Paragraph 54 also finds that the RFP concept plan exhibits the same deficiency.

Despite its label, the ALJ's finding that non-compliance with the border width or mowing strip requirements did not warrant rejection of either proposal as non-responsive is a conclusion of law over which the Department has substantive jurisdiction. The Department has discretion to overlook minor, technical discrepancies. (Jt. Ex. 1 at 21); Overstreet Paving Co. v. State of Fla., Dep't of Transp., 608 So. 2d 851, 852 (Fla. 2d DCA 1992). The Department agrees with the ALJ that Middlesex's and Prince's failure to comply with the border width and mowing strip requirements are such minor, technical discrepancies, and agrees that these failures of compliance do not warrant rejection of either proposal. Id. Prince's exception No. 8 is rejected. § 120.57(1)(*l*), Fla. Stat. (2015).

Exception No. 9: Prince takes exception to paragraph 20 of the Recommended Order. Paragraph 20 consists almost entirely of a block quote from the RFP, and to that extent the exception is rejected.

Paragraph 20 also finds that the RFP allows the Department to waive minor irregularities, but "precluded" the Department from waiving irregularities that affect the price of a proposal to the disadvantage of other bidders. While labeled a finding of fact, this finding is a conclusion of law on what the Department may or may not do under the RFP. The Department finds that it has substantive jurisdiction over this conclusion of law. The Department agrees that the RFP allows the Department to waive "minor irregularities." The Department finds the

RFP defines "minor irregularities" as "those that will not have an adverse effect on the Department's interest **and** will not affect the price of the Proposals by giving a Proposer an advantage or benefit not enjoyed by other Proposers." (Jt. Ex. 1 at 21) (emphasis supplied). The Department rejects Paragraph 20 to the extent it omits adverse effects on the Department's interest as a factor in determining whether a proposal demonstrates a minor irregularity. The Department finds this conclusion is as or more reasonable than the ALJ's. The Department agrees that if an irregularity affects the price of a proposal by giving a proposal an advantage or benefit not enjoyed by other proposers, the irregularity is by definition not minor. Except as otherwise stated, the Department rejects Prince's exception No. 9. § 120.57(1)(*l*), Fla. Stat. (2015).

Exception No. 10: Prince takes exception to paragraphs 27 and 60-62. Paragraph 27 finds the Prince PARCLO proposal is non-responsive to various requirements of the RFP. Paragraph 60 concludes the Prince proposal does not comply with the RFP requirements for exit ramp turn lanes, location of stop bars, and full concrete pavement of four thru lanes in each direction on SR 50 through the I-75 junction. Paragraph 61 defines "clearly erroneous," finds that award of a contract that fails to meet RFP requirements is clearly erroneous, and concludes that the proposed award of the contract to Prince is clearly erroneous. Paragraph 62

finds the evidence did not establish that the Department exempted Prince from complying with the requirements of the RFP.

Prince argues the exit ramp, stop bar, and thru lane requirements either do not apply to Prince, or that Prince complied with these requirements "when the RFP is construed as a whole in light of the Department's approval of Prince's PARCLO ATC and the discussion and clarification of the Q & A process." (Prince Exceptions at 23.) As discussed previously, the requirements do apply to Prince, and the ALJ's findings that deviation from these requirements was not approved is supported by competent substantial evidence.

Prince also argues the RFP does not prohibit the Department from awarding the contract to Prince because Prince must comply with all "applicable" requirements at the lump sum bid price. The Department declines to rule on whether the RFP "prohibits" an award to Prince because the ALJ did not decide that question. Walker, 946 So. 2d at 605.

Prince argues that the ALJ's definition of "clearly erroneous" in paragraph 61 is error. The Department finds that it lacks substantive jurisdiction over this conclusion of law and therefore cannot reject or modify it. § 120.57(1)(*l*), Fla. Stat. (2015); Deep Lagoon, 784 So. 2d at 1144.

Prince also argues that the ALJ erred in concluding that the proposed award of the contract is contrary to the RFP specifications and is clearly erroneous. These

are conclusions of law over which the Department has substantive jurisdiction. See State Contr. & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 608 (Fla. 1st DCA 1998) (affirming Department final order rejecting recommended order finding bid noncompliant); Care Access, 2014 Fla. Div. Adm. Hear. LEXIS 60, *7. Alternatively, they are findings of ultimate fact infused by policy considerations for which the Department has special responsibility. McDonald, 346 So. 2d at 579; Fla. Cargo Carriers, 738 So. 2d at 392. The Department declines to reject the ALJ's conclusions in paragraphs 27 and 60-62 and finds that the proposed award of the contract to Prince is contrary to the RFP's specifications. Prince's Exception No. 10 is rejected. § 120.57(1)(*l*), Fla. Stat. (2015).

Prince Exception No. 11: Prince takes exception to paragraphs 31, 35, and 63. Paragraph 31 finds that Prince stated it would comply with the RFP's triple left requirement at the proposed price "if DOT and/or the FHWA insist." Paragraph 35 finds that Prince stated it would comply with the RFP's stop bar placement requirement "if required to do so." Paragraph 63 concludes that the ALJ disregarded Prince's offer to cure these deficiencies because Section 120.57(3)(f), Florida Statutes, "prohibits consideration of submissions made after the proposal opening which amend or supplement the proposal."

Prince argues that paragraphs 31 and 35 mischaracterize the record. The Department finds that paragraphs 31 and 35 are supported by competent substantial evidence and rejects Prince's exceptions to them. § 120.57(1)(*l*), Fla. Stat. (2015).

As for paragraph 63, the Department lacks substantive jurisdiction over the APA and therefore cannot modify or reject the ALJ's interpretation of Section 120.57(3)(f), Florida Statutes. § 120.57(1)(*l*), Fla. Stat. (2015); Deep Lagoon, 784 So. 2d at 1144. Prince does not argue otherwise. Prince's exception to paragraph 63 is therefore rejected, id., with the reservation that this conclusion is not immune from review. Barfield v. Dep't of Health, Bd. of Dentistry, 805 So. 2d 1008, 1013 (Fla. 1st DCA 2001). Prince's Exception No. 11 is rejected.[6]

Prince Exception No. 12: Prince takes exception to paragraphs 64, 65, and 66. Paragraph 64 finds that the proposed award of the contract to Prince is contrary to competition, and defines that phrase. Paragraph 65 finds that a deviation from solicitation specifications is material if it gives the bidder a substantial advantage and thereby restricts competition. Paragraph 66 finds the Prince proposal deviations were not minor irregularities "because they precluded an appropriate comparison of proposals." Paragraph 66 also concludes that the Prince proposal deviations provided an "economic advantage over other firms because the adjusted score calculations incorporated each firm's Price Proposal."

[6] The Department has raised other objections to paragraph 63, considered below.

Prince argues that the ALJ's conception of contrary to competition, which relies on "an opportunity for an exact comparison of bids," (RO ¶ 64) (citing Harry Pepper and Assoc., Inc., v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2d DCA 1977)) is inapplicable to design-build contracts solicited under Section 337.11(7), Florida Statutes, particularly those that permit ATCs. Prince argues that it did not have an advantage over Middlesex or any other firm, who could have submitted an ATC for a PARCLO, but did not.

The Department rejects Middlesex's argument that paragraphs 64-66 "involve the application of legal principles that are not within the substantive jurisdiction of the Department and, resultantly, cannot be rejected in the Final Order." (Middlesex Resp. at 24.) Accepting this argument would mean the Department is bound by the ALJ's decision on whether a proposed award is contrary to competition. This is not and never has been the law. See J.D., 114 So. 3d at 1132-1133.

The ALJ suggests that bids based on deviations from the RFP – including, apparently, deviations the Department expressly approves through the ATC process – "preclude[ ] an appropriate comparison of proposals" (RO ¶ 66) and are thereby contrary to competition (RO ¶¶ 64-65). The RFP expressly contemplates comparing proposals that deviate from the RFP requirements in different ways (Jt. Ex. 1 at 3, 27-28). The extent and nature of the deviation, if any, is left to the

proposer, subject to Department approval. Id. The stated goals of the ATC process – innovation, flexibility, time and cost savings (Jt. Ex. 1 at 27) – cannot be achieved if bidders who propose, and secure approval of, deviations are automatically disqualified (RO ¶¶ 65-66). The Department finds this conclusion is as or more reasonable than the ALJ's.

While the Department rejects the ALJ's conclusions of law to the extent they hold bids based on approved deviations from RFP requirements must be disqualified, because as found above the Department does not reject the ALJ's findings that Prince's deviations from the RFP requirements of triple lefts, stop bar placement, and thru lanes, the Department in its discretion declines to reject or modify the ALJ's finding that award of the contract to Prince on these facts would be contrary to competition. With the exceptions stated above, Prince's exception No. 12 is rejected.

Prince Exception No. 13: Prince takes exception to paragraph 67. Paragraph 67 finds that a conditional proposal may be found non-responsive under the RFP, finds the FHWA has not approved Prince's PARCLO proposal, and that the RFP does not permit the Department to award a contract to a conditional proposal that does not comply with the RFP.

Prince argues that the RFP expressly contemplates that FHWA approval may be required for ATC proposals, and that FHWA approval therefore does not

render a proposal conditional or non-responsive. Middlesex agrees that FHWA approval does not render a proposal non-responsive, and notes that the ALJ did not hold otherwise. The Department agrees that FHWA approval does not render a proposal conditional or non-responsive. Prince's exception No. 13 is rejected with the understanding that the ALJ did not hold that FHWA approval renders a proposal conditional.

Rulings on the Department's Exceptions

Exception One: The Department takes exception to paragraphs 8 and 41. The Department incorporates by reference its rulings on Prince's exceptions to these paragraphs.

Exception Two: The Department takes exception to paragraphs 18, 19, and 67. Paragraph 18 finds the RFP prohibits the Department from scoring a non-responsive proposal. Paragraph 19 finds the Prince PARCLO design has not been approved by the FHWA and that construction of a PARCLO is conditional on FHWA approval. Paragraph 67 is summarized above.

The Department's exceptions admit that non-responsive proposals shall not be considered. The Department therefore rejects the Department's exception to paragraph 18.

As for paragraph 19, the Department argues that while the RFP states that proposals "may" be considered non-responsive if they are "conditional proposals,"

the Prince proposal is not "conditional" in the sense contemplated by the RFP. According to the Department, "conditional" here "relates to a firm putting conditions on its proposal[,] not the ultimate acceptance or denial of the proposal by the FHWA, or in some cases by the Department. To the extent paragraph 19 finds "conditional proposal" on page 20 of the RFP means "conditioned on FHWA approval" (the Recommended Order is ambiguous on this point), the Department rejects that conclusion of law, and substitutes its finding that a "conditional proposal" within the meaning of the RFP is when a proposing firm puts conditions on its proposal. The Department finds this conclusion is as or more reasonable than the ALJ's.

The Department incorporates its ruling on paragraph 67 above by reference.

With the exception stated above, the Department rejects the Department's second exception.

Exception Three: The Department takes exception to Paragraphs 63 and 64 of the Recommended Order. Paragraph 63 is a conclusion of law that Section 120.57(3)(f), Florida Statutes, prohibits consideration of submissions made after the proposal opening which amend or supplement the proposal, and that the ALJ disregards Prince's offer to remedy the deficiencies in its proposal by complying with the RFP. Paragraph 64 is summarized above.

Section 120.57(3)(f), Florida Statutes, provides "appellate-like 'standard[s] of proof'" for evaluating proposed agency action. J.D., 114 So. 3d at 1132. The applicable "standard of proof" varies depending on the proposed action. For protests "to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered." § 120.57(3)(f), Fla. Stat. (2015). The Department argues that the ALJ's conclusion that applying this standard to design-build submissions under Section 337.11(7), Florida Statutes, is "misplaced" because all firms "are aware that the initial submissions are preliminary and that ultimately the Department will require that the requirements of the RFP be adhered to at the amount of the firm's lump sum bid. Restricting the Department to accepting the preliminary plans at this stage of the process would lead to undesired consequences and not afford the Department the opportunity to maintain control and review of the ultimate design." (Department Exceptions at 6.)

The Department agrees with this exception as a policy matter, but because the Department lacks substantive jurisdiction over the APA, the Department cannot reject or modify the ALJ's conclusion of law in paragraph 63.

Barfield holds that while an ALJ's evidentiary conclusions of law may be beyond an agency's substantive jurisdiction, such conclusions are not immune from review. 805 So. 2d at 1013. The Court held that an agency may enter a final

order under protest and thereafter appeal from its own order as a party adversely affected. Id. (citing § 120.68(1), Fla. Stat.). Accordingly, the Department does not reject, under protest and subject to the right of the Department to appeal from this order as a party adversely affected, the conclusion of law in Paragraph 63 that the prohibition on considering amended or supplemental submissions set forth in Section 120.57(3)(f), Florida Statutes, applies to a solicitation conducted under Section 337.11(7), Florida Statutes.

The Department incorporates its ruling on paragraph 64 above by reference.

Ruling on request to reject all bids

The Department has "wide," although "not unbridled," discretion to reject all bids. Caber Systems, Inc. v. Dep't of General Services, 530 So. 2d 325, 334 (Fla. 1st DCA 1988). In their exceptions to the Recommended Order, both the Department and Prince (as an alternative remedy) request rejection of all bids. The Department declines to exercise its discretion to reject all bids.

Findings of Fact

Except as stated above, the Department adopts the Findings of Fact in the Recommended Order and incorporates them by reference.

Conclusions of Law

Except as stated above, the Department adopts the Conclusions of Law in the Recommended Order and incorporates them by reference.

Order

Based on the foregoing Findings of Fact and Conclusions of Law, the Department awards the contract issued pursuant to RFP E7K24 to the Middlesex Corporation.

DONE and ORDERED this 5th day of January, 2016.

Jim Boxold
Secretary
Florida Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, MS 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN 30 DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

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