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

CYRIACKS ENVIRONMENTAL
CONSULTING SERVICES, INC.,

Petitioner,

vs.

DOT Case No. 15-093
DOAH Case No. 16-0769BID

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

DB ECOLOGICAL SERVICES, INC.,

Intervenor.
_____/

CYRIACKS ENVIRONMENTAL
CONSULTING SERVICES, INC.,

Petitioner,

vs.

DOT Case No. 15-087
DOAH Case No. 16-3530BID

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

FINAL ORDER

These bid protest cases were referred to the Division of Administrative Hearings, where they were consolidated. Pursuant to notice a hearing was conducted before the assigned Administrative Law Judge, Hon. Cathy M. Sellers, in September 2016. The ALJ entered a

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Recommended Order on December 30, 2016. Cyriacks timely filed exceptions. The Department timely filed responses to Cyriacks' exceptions.

Standards for agency rulings on exceptions

Where a party files exceptions to a recommended order within 15 days of its entry, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat.; see also Fla. Admin. Code R. 28-106.217(1) ("Exceptions shall identify the disputed portion of the recommended order by page number or paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.").

"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. "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).

There is a fundamental difference between the deference an agency must accord to findings of evidentiary fact and findings of ultimate fact infused by policy considerations. "Matters that are susceptible of ordinary methods of proof, such as determining the credibility of

witnesses or the weight to accord evidence, are factual matters to be determined by the hearing officer. On the other hand, matters infused with overriding policy considerations are left to agency discretion." Baptist Hosp., Inc. v. Dep't of Health & Rehab. Servs., 500 So. 2d 620, 623 (Fla. 1st DCA 1986); see also McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 579 (Fla. 1st DCA 1977) ("[W]here the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility, a reviewing court will give correspondingly less weight to the hearing officer's findings in determining the substantiality of evidence supporting the agency's substituted findings.").

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. (2016). 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).

Exception 1: Cyriacks takes exception to Paragraphs 71, 73, 74, 75, 100, 102 and 103 of the Recommended Order. Paragraphs 71-75 are the ALJ's "Findings of Ultimate Fact" that the Department reasonably concluded a "2.5 multiplier" (RO ¶¶ 11, 25) in RFP-DOT-15/16-4004PM (hereinafter RFP) (RO at 2-3) for the Department's District IV Mitigation, Wildlife, and Environmental Support Services contract (hereinafter Contract) rendered the RFP ambiguous (RO ¶¶ 70-72, 74-75) and arbitrarily and structurally flawed (RO ¶¶ 73-74). Paragraph 100 concludes Cyriacks "failed to meet its burden" to show the Department's action rejecting all bids was illegal, arbitrary, dishonest, or fraudulent. It further concludes "the evidence shows" the Department's decision was not arbitrary, and that Cyriacks "presented no evidence" that the Department's action was illegal, dishonest, or fraudulent. Paragraph 102 concludes Cyriacks "failed to show" the Department's decisions to cancel the initial award of the Contract to Cyriacks and to require the vendors to submit new proposals were clearly erroneous, contrary to competition, arbitrary, or capricious. It further concludes "the evidence established" the Department's decision was correct, was not contrary to competition, and was not arbitrary or capricious as it was rationally reached after a thorough investigation and analysis. Paragraph 103 concludes Cyriacks "failed to meet the applicable burdens" in both matters referred to DOAH.

Both Cyriacks (Exceptions at 2-3) and the Department (Department's Response at 1-4) squabble over whether competent, substantial evidence supports the ALJ's finding that the RFP was ambiguous. Both arguments miss the mark. "Whether a contract is ambiguous is a question of law." Douglass v. Buford, 9 So. 3d 636, 637 (Fla. 1st DCA 2009). Where, as here, a conclusion of law is incorrectly labeled a finding of fact, the Department may disregard the label.

J.D., 114 So. 3d at 1133 (citing Battaglia Props. v. Fla. Land & Water Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1993)). Whether the RFP is ambiguous is a conclusion of law within the Department's substantive jurisdiction. Care Access PSN, LLC v. Agency for Health Care Admin., 2014 WL 494475, at *2 (holding interpretation of AHCA's ITN are conclusions of law within agency's substantive jurisdiction). The Department agrees with the ALJ's well-reasoned, if mislabeled, conclusion of law that the RFP was ambiguous.

Cyriacks argues that the "perceived ambiguity" (Exceptions at 2) is irrelevant because the ALJ failed to consider whether the ambiguity had an adverse impact on competition or otherwise tainted the competitive bidding process, id. According to Cyriacks, even if DB and Cyriacks interpreted the 2.5 multiplier the same way, Cyriacks would still be the lowest bidder. Id. at 3.

Cyriacks' argument on this point depends on accepting Cyriacks' contention that an ambiguity in a contract procurement allows the Department to reject all bids and re-advertise "only if" the ambiguity gives one bidder an advantage over his competitors or otherwise taints the process. (Exceptions at 3.) In support of this proposition, Cyriacks uses an unattributed block quote to a 1993 recommended order, J.D. Pirotta Company v. Palm Beach County School Board, 1993 WL 943934 (Fla. DOAH 1993). J.D. Pirotta cites three cases for the proposition, which are all cited in Cyriacks' exceptions. (Exceptions at 3.)

The cases the J.D. Pirotta Recommended Order cites do not support the proposition stated. Caber Systems v. Department of General Services affirmed the Department of General Services' decision to reject all bids because of an ambiguity in the invitation to bid. 530 So. 2d 325, 336 (Fla. 1st DCA 1988). Caber Systems establishes the Department has "wide" discretion to reject all bids, but that its decision to do so must be "rational" and not "arbitrary." The ALJ found the Department's decision to reject all bids was not illegal, arbitrary, dishonest, or

fraudulent. (RO ¶¶ 83-90, 95-100, 103.) The other two cases do not concern rejection of all bids based on an ambiguity. Tropabest Foods, Inc. v. Department of General Services does not involve rejection of all bids or an ambiguity in the ITB, but rather affirms the Department of General Services' decision to award a contract to a competitor despite Tropabest's claim that the competitor's bid materially departed from the ITB specifications. 493 So. 2d 50, 52 (Fla. 1st DCA 1986). Robinson Electrical Company v. Dade County also concerns an alleged material variance from the bidding requirements. 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982).

Even if the J.D. Pirotta Recommended Order is correct, Cyriacks' argument still fails. The ALJ did not merely find an ambiguity, but found the ambiguity left the 2.5 multiplier's purpose, use, and significance open to speculation (RO ¶ 70) and that the vendors' different interpretations of the multiplier caused them to submit proposals predicated on differing assumptions, which in turn resulted in the Department "being unable to fairly compare the price proposals for purposes of obtaining the most advantageous proposal for the State." (RO ¶ 71.) The ALJ also concluded the Department thoroughly investigated its use of multipliers, and that this investigation was sufficient to conclude the 2.5 multiplier rendered the RFP ambiguous, arbitrary, and structurally flawed. (RO ¶¶ 74-75.) In light of these findings, the Department agrees with the ALJ's finding that the Department did not act illegally, arbitrarily, dishonestly, or fraudulently in rejecting all bids. (RO ¶ 100.) The ambiguity made it impossible for the Department to "fairly compare" the different price proposals (RO ¶ 71), which inevitably taints the process as a whole and tends to benefit one vendor over another. Global Tel Link Corp. v. Dep't of Corr., 2013 WL 5955693, at *18 (Fla. DOAH Rec. Order Nov. 1, 2013) ("The Department's conclusion that these ambiguities destroyed its ability to fairly compare replies cannot be said to be irrational. There was evidence upon which the Department could conclude

that the vendors conformed their commission pricing to their respective interpretations of the ITN and RBAFO to maximize their opportunity to be awarded the contract, and this evidence was before the Department at the time it made the decision to reject all replies.").

Turning to Cyriacks' exceptions to Paragraphs 100, 102, and 103, as summarized above they all conclude Cyriacks failed to meet its burden of proof. Whether a party meets its burden of proof is a factual question. J.D., 114 So. 3d at 1133 (citing Gross v. Dep't of Health, 819 So. 2d 997, 1005 (Fla. 5th DCA 2002)). Again, the Department is not bound by the ALJ's label of these paragraphs. J.D., 114 So. 3d at 1133. Cyriacks does not contend the findings of fact in these paragraphs are not supported by competent, substantial evidence, but rather that competent, substantial evidence also supports Cyriacks' position. (Exceptions at 2-3.) Thus, Cyriacks is asking the Department to reweigh the evidence to reach a desired conclusion. 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.").

While the Department is bound by the ALJ's factual findings that Cyriacks failed to meet its burden, it is not bound by the ALJ's ultimate conclusions that the Department's decisions to cancel the Contract award, reject all bids, and require new proposals were not clearly erroneous, contrary to competition, arbitrary, or capricious. J.D., 114 So. 3d at 1133. The Department's authority to depart from those conclusions is circumscribed by Section 120.57(1)(*l*). Id. The Department declines to depart from those conclusions because Cyriacks' suggested substituted conclusions are not as or more reasonable than the Recommended Order's conclusions.

For these reasons, Exception 1 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 2: Cyriacks takes exception to Paragraphs 78-80, 100, and 102-103 of the Recommended Order. Paragraphs 100, 102, and 103 are summarized above. Its rulings on those Paragraphs are adopted and incorporated here by reference.

Paragraphs 78-80 are "Findings of Ultimate Fact" under the heading "Procedural Irregularities." Paragraph 78 finds that Jessica Rubio, a Department procurement officer, violated the "cone of silence" (RO ¶ 7) by communicating with both DB and Cyriacks within 72 hours of the Department's posting of its intent to award the Contract. Paragraph 79 finds this cone of silence violation does not require overturning the Department's decision to cancel its intent to award the Contract to Cyriacks. It finds that while "the credible, persuasive evidence shows" Rubio's conversation with DB may have caused Rubio to initiate the investigation into the use of the 2.5 multiplier and instructions in Section 6 (RO ¶ 16), the conversation "was not the reason why [the Department] ultimately determined that the intent to award the Contract should be cancelled. Rather, [the Department]'s discovery of the ambiguity and structural flaws in Section 6, through Rubio's investigation, was the reason that [the Department] determined that the intent to award the Contract to [Cyriacks] should be cancelled." Paragraph 80 finds that notwithstanding the cone of silence violations, the integrity of the procurement process was not undermined, and the Department's decision to cancel the intent to award the Contract to Cyriacks was not clearly erroneous, contrary to competition, arbitrary, or capricious.

Cyriacks does not contend Paragraphs 78-80 are not supported by competent, substantial evidence. Instead, Cyriacks contends the ALJ "should have concluded that FDOT's violation of the cone of silence did in fact undermine the integrity of the procurement process." (Exceptions at 6.) Cyriacks thus asks the Department to reweigh the evidence to reach a desired conclusion. The Department cannot do so. Bill Salter Adver., 974 So. 2d at 551.

Paragraphs 78-80 are supported by competent, substantial evidence. Alternatively, whether the cone of silence violation found by the ALJ (1) undermined the procurement process or (2) rendered the Department's decision to cancel the intent to award the Contract to Cyriacks clearly erroneous, contrary to competition, arbitrary, or capricious, are questions of ultimate fact infused by policy considerations for which the agency has special responsibility. Baptist Hosp., 500 So. 2d at 623; McDonald., 346 So. 2d at 579. The Department declines to depart from the ALJ's ultimate findings in Paragraphs 78-80.

For these reasons, Exception 2 is rejected. § 120.57(1)(*l*), Fla. Stat.

Findings of Fact

The Department adopts the Findings of Fact in the Recommended Order and incorporates them by reference.

Conclusions of Law

The Department adopts the Conclusions of Law in the Recommended Order and incorporates them by reference.

Order

Accordingly, it is ORDERED:

1. In Case No. 16-0769, the rejection of all proposals in response to Request for Proposal RFP-DOT-15/16-4004PM was not illegal, arbitrary, dishonest, or fraudulent.
2. In Case No. 16-3530, the decisions to cancel the award of the Contract for Request for Proposal RFP-DOT-15/16-4004PM to Cyriacks and to require the vendors to submit new price proposals for Request for Proposal RFP-DOT-15/16-4004PM were

not clearly erroneous, contrary to competition, fraudulent, contrary to competition, arbitrary, or capricious.

Order on Motion for Costs

The Department has moved for an award of costs under Section 287.042(2)(c), Florida Statutes, and Florida Administrative Code Rule 28-110.005(4). The Department states that it was required to preserve testimony of the proceedings, § 120.57(1)(g), Fla. Stat., and has provided an invoice in the amount of $6,461.25 for transcription services rendered. Cyriacks has not responded or otherwise objected to the Department's motion.

It is therefore further ORDERED that the Department's Motion for Costs is GRANTED. Cyriacks Environmental Consulting Services, Inc., will pay $6,461.25 to the Department within 30 days of rendition of this Final Order. If payment is not made to the Department within 30 days of rendition, the Department shall deduct $6,461.25 from Cyriacks' bid protest bond.

DONE and ORDERED this 24th day of January, 2017.

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

FILED D.O.T. CLERK
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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.

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