

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PRINCE CONTRACTING, LLC,

Petitioner,

and

HUBBARD CONSTRUCTION COMPANY,

Intervenor,

vs.

Case No. 16-4982BID

DEPARTMENT OF TRANSPORTATION,

Respondent.

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FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on October 31 and November 4, 2016, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether certain procedures of the Department of Transportation ("Department") constitute rules that have not been properly adopted through formal rulemaking procedures.

PRELIMINARY STATEMENT

On April 15, 2016, the Department issued an Invitation to Bid on Contract T7380, a road-widening project on U.S. Highway 301 in Hillsborough County. Bids were opened on June 15, 2016. On June 29, 2016, the Department posted its notice of intent to award the contract to Astaldi Construction Corporation ("Astaldi").

On July 5, 2016, Prince Contracting, LLC, ("Prince"), the second lowest bidder, filed its notice of intent to protest and a protest bond. On July 15, 2016, Prince filed its formal written protest, followed by an amended petition on August 1, 2016. On August 29, 2016, the Department referred the original petition to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge to conduct a formal administrative proceeding. The final hearing was initially scheduled for September 19 through 21, 2016, but was continued to October 21 through 23, 2016, upon Prince's stipulated motion.

The Department provided notice of the proceeding to the five other construction companies that had submitted bids on the project, including Astaldi. On September 14, 2016, Hubbard Construction Company ("Hubbard"), the third lowest bidder, filed a petition to intervene, which was granted by Order dated September 15, 2016. On September 22, 2015, the Department filed Prince's amended petition at DOAH.

On October 13, 2016, Prince filed a motion for leave to file a second amended petition to include a challenge to Department procedures and protocols as unadopted rules. By Order dated October 14, 2016, Prince's second amended petition was accepted.

A final hearing on the bid protest and unadopted rule challenge was held in Tallahassee, Florida, on October 31, 2016, and November 4, 2016.

At the hearing, Prince presented the testimony of its executive director, Jack Calandros; bid estimating expert, John Armeni; the Department's contracts administration manager, Alan Autry; and the Department's state estimates engineer, Greg Davis. The parties offered designated portions of the deposition testimony of Astaldi's chief estimator, Ed Thornton, in lieu of live testimony, and the designations were accepted into evidence as Prince's Exhibit 5. Prince's Exhibits 7, 11, and 12, containing quotes from Westra Construction Corporation

and Ferguson Waterworks, were admitted into evidence without objection. Prince's Exhibit 16, a cost summary spreadsheet, was admitted into evidence under seal, over the Department's objection.

Hubbard did not present any exhibits or witnesses, but did fully participate in the cross-examination of the other parties' witnesses.

The Department was allowed to extend the cross-examination of Mr. Davis into direct testimony for its case-in-chief. The Department also called Mr. Autry to testify as its corporate representative. The Department's Exhibit 3 was accepted into evidence over Prince's objection.

The three-volume Transcript of the hearing was filed at DOAH on November 10, 2016. Two versions of Volume I were filed, one under seal containing confidential bid information, and a public version without the confidential information. The parties timely filed their Proposed Recommended Orders on November 21, 2016. The Department's Proposed Recommended Order addressed the issues in the unadopted rule challenge. Prince timely filed a separate Proposed Final Order on September 21, 2016, in which Hubbard joined.

A separate Recommended Order addressing the bid protest issues will be issued.

References to the Florida Statutes are to the 2016 edition, unless otherwise noted.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of the proceeding, the following Findings of Fact are made:

1. The Department is a state agency authorized by section 337.11, Florida Statutes, to contract for the construction and maintenance of roads within the State Highway System, the State Park Road System, and roads placed under its supervision by law. The Department is specifically authorized to award contracts under section 337.11(4) to "the lowest responsible bidder."

2. On April 15, 2016, the Department advertised a bid solicitation for Contract T7380, seeking contractors for the widening of a 3.8 mile portion of U.S. Highway 301 in Hillsborough County from two lanes to six lanes between State Road 674 and County Road 672 and over Big Bull Frog Creek. The advertisement provided a specification package for the project and the "Standard Specifications for Road and Bridge Construction" ("Standard Specifications") used on Department roadway projects.

3. Prince is a Florida highway and site development contractor that works almost exclusively for public owners throughout the state, including the Department, the Central

Florida Expressway Authority, and Hillsborough County. Prince is an experienced roadway contractor employing over 700 Floridians throughout the state and has gross revenues of over a quarter billion dollars. Prince has bid on numerous Department jobs in the past, is currently working on bids that it will submit to the Department in the upcoming weeks and months, and intends to continue bidding on Department projects in the future.

4. Astaldi, Prince, Hubbard, and other potential bidders attended the mandatory pre-bid meeting. Prequalified contractors were given proposal documents that allowed them to enter bids through BidExpress, the electronic bidding system used by the Department.

5. Bids were opened on the letting date of June 15, 2016. Bids for Contract T7380 were received from Astaldi, Prince, Hubbard, and three other bidders. The bids were reviewed by the Department's contracts administration office to ensure they were timely, included a unit price for each line item, and contained the completed certifications required by the specifications. Bidders were checked against the Department's list of prequalified bidders to confirm they possessed a certification of qualification in the particular work classes identified by the bid solicitation. Each bidder's total current work under contract with the Department was examined to ensure that award

of Contract T7380 would not place the bidder over its Department-designated financial capacity limit.

6. Astaldi submitted the lowest bid, a total amount of \$48,960,013. Prince submitted the next lowest bid, a total amount of \$57,792,043. Hubbard's total bid was the third lowest at \$58,572,352.66. The remaining three bids were significantly higher than Hubbard's. The contracts administration office confirmed that all bidders were prequalified in the appropriate work classes and had sufficient financial capacity, in accordance with section 337.14, and Florida Administrative Code chapter 14-22.

7. The Department's construction procurement procedure, from authorization to advertisement through contract execution, is outlined in the Department's "Road and Bridge Contract Procurement" document ("Contract Procurement Procedure"). The scope statement of the Contract Procurement Procedure provides: "This procedure applies to all Contracts Administration Offices responsible for advertising, letting, awarding, and executing low bid, design-bid-build, construction, and maintenance contracts." Limited exceptions to the procedure may be made if approved by the assistant secretary for Engineering and Operations. If federal funds are included, the Federal Highway Administration division administrator, or designee, must also approve any exceptions from the procedure. The stated

objectives of the Contract Procurement Procedure are: "to standardize and clarify procedures for administering low-bid, design-bid-build, construction, and maintenance contracts" and "to provide program flexibility and more rapid response time in meeting public needs."

8. The Department's process for review of bids is set forth in the "Preparation of the Authorization/Official Construction Cost Estimate and Contract Bid Review Package" ("Bid Review Procedure"). The scope statement of the Bid Review Procedure states:

This procedure describes the responsibilities and activities of the District and Central Estimates Offices in preparing the authorization and official construction cost estimates and bid review packages from proposal development through the bid review process. Individuals affected by this procedure include Central and District personnel involved with estimates, specifications, design, construction, contracts administration, work program, production management, federal aid, and the District Directors of Transportation Development.

9. The Bid Review Procedure contains a definitions section that defines several terms employed by the Department to determine whether a bid, or a unit item within a bid, is "unbalanced." Those terms and their definitions are as follows:

Materially Unbalanced: A bid that generates reasonable doubt that award to that bidder would result in the lowest ultimate cost or,

a switch in low bidder due to a quantity error.

Mathematically Unbalanced: A unit price or lump sum bid that does not reflect a reasonable cost for the respective pay item, as determined by the department's mathematically unbalanced bid algorithm.

Official Estimate: Department's official construction cost estimate used for evaluating bids received on a proposal.

Significantly Unbalanced: A mathematically unbalanced bid that is 75% lower than the statistical average.

Statistical Average: For a given pay item, the sum of all bids for that item plus the Department's Official Estimate which are then divided by the total number of bids plus one. This average does not include statistical outliers as determined by the department's unit price algorithm.

10. For every road and construction project procurement, the Department prepares an "official estimate," which is not necessarily the same number as the "budget estimate" found in the public bid solicitation. The Department keeps the official estimate confidential pursuant to section 337.168(1), which provides:

A document or electronic file revealing the official cost estimate of the department of a project is confidential and exempt from the provisions of s. 119.07(1) until the contract for the project has been executed or until the project is no longer under active consideration.

11. In accordance with the Bid Review Procedure, the six bids for Contract T7380 were uploaded into a Department computer system along with the Department's official estimate. A confidential algorithm identified outlier bids that were significantly outside the average (such as penny bids) and removed them to create a "statistical average" for each pay item. Astaldi's unit pricing was then compared to the statistical average for each item.

12. The computer program then created an "Unbalanced Item Report" flagging Astaldi's "mathematically unbalanced" items, i.e., those that were above or below a confidential tolerance value from the statistical average. The unbalanced item report was then reviewed by the district design engineer for possible quantity errors. No quantity errors were found.^{1/}

13. The Department then used the Unbalanced Item Report and its computer software to cull the work items down to those for which Astaldi's unit price was 75 percent more than, or below, the statistical average. The Department sent Astaldi a form titled "Notice to Contractor," which provided as follows:

The Florida Department of Transportation (FDOT) has reviewed your proposal and discovered that there are bid unit prices that are mathematically unbalanced. The purpose of this notice is to inform you of the unbalanced nature of your proposal. You may not modify or amend your proposal.

The explanation of the bid unit prices in your proposal set forth below was provided by ASTALDI CONSTRUCTION CORPORATION on () INSERT DATE.

FDOT does not guarantee advanced approval of:

(a) Alternate Traffic Control Plans (TCP), if permitted by the contract documents;

(b) Alternative means and methods of construction;

(c) Cost savings initiatives (CSI), if permitted by the contract documents.

You must comply with all contractual requirements for submittals of alternative TCP, means and methods of construction, and CSI, and FDOT reserves the right to review such submittals on their merits. As provided in section 5-4 of the Standard Specifications for Road and Bridge Construction you cannot take advantage of any apparent error or omission in the plans or specifications, but will immediately notify the Engineer of such discovery.

Please acknowledge receipt of this notice and confirmation of the unit bid price for the item(s) listed below by signing and returning this document.

14. Section 5.4 of the Bid Review Procedure describes the Notice to Contractor and states: "Contracts are not considered for award until this form has been signed and successfully returned to the Department per the instruction on the form." State estimating engineer Greg Davis testified that the stated procedure was no longer accurate and "need[s] to be corrected" for the following reason:

Since the procedure was approved back in 2011, we've had some subsequent conversations about whether to just automatically not consider the award for those that are not signed. And since then we have decided to go ahead and just consider the contract, but we are presenting a notice, of course, unsigned and then let the technical review and contract awards committee determine.

15. Astaldi signed and returned the Notice to Contractor and noted below each of the ten listed items: "Astaldi Construction confirms the unit price."

16. Section 6.6 of the Contract Procurement Procedure sets forth the circumstances under which an apparent low bid must be considered by the Department's Technical Review Committee ("TRC") and then by the Contract Awards Committee ("CAC"). Those circumstances include: single bid contracts; re-let contracts; "significantly mathematical unbalanced" bids; bids that are more than 25 percent below the Department's estimate; 10 percent above the Department's estimate (or 15 percent above if the estimate is under \$500,000); materially unbalanced bids; irregular bids (not prepared in accordance with the Standard Specifications); other bid irregularities^{2/}; or "[a]ny other reason deemed necessary by the chairperson."^{3/} Bids that are not required to go before the TRC and CAC are referred to as "automatic qualifiers."

17. Because it was mathematically unbalanced, the Astaldi bid was submitted to the TRC for review at its June 28, 2016, meeting. The TRC is chaired by the Department's contracts administration manager, Alan Autry, and is guided by a document, entitled "Technical Review Committees" ("TRC Procedure"). The TRC Procedure sets forth the responsibilities of the TRC in reviewing bid analyses and making recommendations to the CAC to award or reject bids. The TRC voted to recommend awarding Contract T7380 to Astaldi.

18. The TRC's recommendation and supporting paperwork was referred to the CAC for its meeting on June 29, 2016. The duties of the CAC are described in a document, entitled "Contracts Award Committees" ("CAC Procedure"). Pursuant to the CAC Procedure, the CAC meets approximately 14 days after a letting to assess the recommendations made by the TRC and determines by majority vote an official decision to award or reject bids. The CAC voted to award Contract T7380 to the low bid submitted by Astaldi. A Notice of Intent to award the contract to Astaldi was posted on June 29, 2016.

19. Prince argues that the Contract Procurement Procedure, the Bid Review Procedure, the TRC Procedure, the CAC Procedure, and the computer algorithms in the Department's bid software that identify outlier bids and the tolerance percentages used to identify unbalanced items, are all unadopted rules. The four

challenged procedures are available to the public on the Department's website. The computer algorithms are kept confidential pursuant to section 337.168.

Contract Procurement Procedure

20. The Contract Procurement Procedure's stated purpose is to "provide procedures for contract procurement of Department . . . low bid, design-bid-build, construction, and maintenance contracts for work performed on roads and bridges in Florida." The Contract Procurement Procedure cites sections 20.23(3)(a) and 334.048(3), Florida Statutes, as its authority. Section 20.23(3)(a) provides, in relevant part:

(3)(a) The central office shall establish departmental policies, rules, procedures, and standards and shall monitor the implementation of such policies, rules, procedures, and standards in order to ensure uniform compliance and quality performance by the districts and central office units that implement transportation programs.

21. Section 334.048(3) provides:

The department shall implement the following accountability and monitoring systems to evaluate whether the department's goals are being accomplished efficiently and cost-effectively, and ensure compliance with all laws, rules, policies, and procedures related to the department's operations:

* * *

(3) The central office shall adopt policies, rules, procedures, and standards which are necessary for the department to function properly, including establishing

accountability for all aspects of the department's operations.

22. The Contract Procurement Procedure establishes procedures for, among other things: advertising; determining which specifications packages apply; adding addenda to and amending solicitations; bid letting; reviewing bids (which must be done in accordance with the Bid Review Procedure); verifying the low bidder's status as to suspension or debarment, its presence on the Scrutinized Companies List, its DBE/Affirmative Action Plan, and its capacity; recommending award; deciding to award; rejecting all bids; awarding the contract; and executing the contract.

23. The Department stipulates that it uses and applies the Contract Procurement Procedure in all road construction procurements. Mr. Autry testified that he lacks the discretion to disregard the Contract Procurement Procedure for a given procurement. The Contract Procurement Procedure is signed by and considered a directive of the Secretary of the Department.

24. Prince asserts that the Contract Procurement Procedure imposes specific requirements on contractors. It cites as an example section 3.6, which gives district engineers or the contracts administration office the option of holding pre-bid meetings. If the bid advertisement states that such a pre-bid meeting is mandatory, then bidding documents are provided only

to those contractors who attend the meeting. Under section 3.6, a contractor's late arrival at a mandatory pre-bid meeting also precludes the contractor from submitting a bid.

25. The Department contends that the Contract Procurement Procedure is an internal operating manual setting forth the standard processes to be followed by Department personnel from authorization to advertisement through execution of the contract. The Contract Procurement Procedure is used to minimize the variances between contract lettings as required by section 337.015(2), which states, "In order to increase competition and maximize the utilization of personnel, the department shall minimize the variances between contract lettings."

26. The Department agrees that the Contract Procurement Procedure includes items that are required of a bidder, such as attendance at pre-bid meetings, submission of a proposal guaranty, and verification of capacity and prequalification. However, the Department argues that these items are not directives to the bidder but are there to inform contract administration staff on the process to be followed.

27. The Department notes that Contract Procurement Procedure requirements for each individual contract are placed in the bid advertisement, which potential bidders have the ability to accept or decline. The Department argues that this

ability to walk away means that the Contract Procurement Procedure lacks the force and effect of law and does not otherwise mandate compliance.

Bid Review Procedure

28. The Bid Review Procedure's stated purpose is to "provide standard procedures for preparing the authorization and official construction cost estimates and bid review packages for Central Office Let (Class 1) construction contracts advertised for competitive bidding and considered for contract award." The Bid Review Procedure cites sections 20.23(4) (a) and 334.048(3) as authority for the procedures set forth in the manual. Section 334.048(3) is set forth in full at Finding of Fact 21, supra. Section 20.23(4) (a) provides:

(4) (a) The operations of the department shall be organized into seven districts, each headed by a district secretary, and a turnpike enterprise and a rail enterprise, each enterprise headed by an executive director. The district secretaries and the executive directors shall be registered professional engineers in accordance with the provisions of chapter 471 or the laws of another state, or, in lieu of professional engineer registration, a district secretary or executive director may hold an advanced degree in an appropriate related discipline, such as a Master of Business Administration. The headquarters of the districts shall be located in Polk, Columbia, Washington, Broward, Volusia, Miami-Dade, and Hillsborough Counties. The headquarters of the turnpike enterprise shall be located in Orange County. The headquarters of the rail enterprise shall be located in Leon County.

In order to provide for efficient operations and to expedite the decisionmaking process, the department shall provide for maximum decentralization to the districts.

29. As described at Findings of Fact 8-15, supra, the Bid Review Procedure makes use of the official cost estimate, which is confidential and exempt from disclosure until a contract has been executed or until the project is no longer under active consideration. § 337.168(1), Fla. Stat.^{4/}

30. The Department stipulates that it uses and applies the Bid Review Procedure in all low-bid road construction procurements. Mr. Davis, the state estimates engineer, testified that he lacks the discretion to disregard the Bid Review Procedure for a given procurement. The Bid Review Procedure is signed by and considered a directive of the Secretary of the Department.

31. The Department states that the Bid Review Procedure, like the Contract Procurement Procedure, is directed to Department staff to ensure consistency in compiling estimates and reviewing bid packages. Prince is at most tangentially affected by the Bid Review Procedure when Department staff uses the procedure to evaluate bids. However, the Bid Review Procedure sets out no compliance requirement for an outside entity, such as Prince, nor does it impose any penalty for noncompliance.

Computer Algorithms

32. As described in more detail at Findings of Fact 11-13, supra, the Department employs a software program to analyze bids. The software includes a set of algorithms used to identify outlier bids and tolerance parameters used to create the unbalanced item report. The algorithms identify pay items that are at variance with the official estimate and extremely low bids. The tolerance parameters determine the degree of variance from the official cost estimate that will trigger an unbalanced items report, a desk item review, or a Notice to Contractor. The software produces various reports identifying the deviations.

33. The Department agrees that it uses the algorithms to review and analyze bids and proposals in every road construction procurement. Mr. Davis testified that his office lacks the discretionary authority to decide not to apply the algorithms in a given procurement. The Bid Review Procedure requires use of the algorithms to generate the unbalanced bid report. The algorithms unquestionably play a central role in the decision to award a contract.

34. The Department counters that its computer processes for bid evaluation are confidential in accordance with section 337.168(3), which provides:

The bid analysis and monitoring system of the department is confidential and exempt from the provisions of s. 119.07(1). This exemption applies to all system documentation, input, computer processes and programs, electronic data files, and output, but does not apply to the actual source documents, unless otherwise exempted under other provisions of law.

35. The Department argues that adoption of its bid analysis software into a rule would violate the statutory confidentiality requirement. The Department states that its computer program and supporting elements do not impose a duty on any individual or company. They do not regulate or require compliance by anyone outside the Department.

TRC Procedure

36. As stated at Finding of Fact 17, supra, the TRC Procedure sets forth the responsibilities of the TRC in reviewing bid analyses and making recommendations to the CAC to award or reject bids. The TRC Procedure cites sections 20.23(4)(a) and 334.048(3) as authority for its stated procedures. Section 20.23(4)(a) is set forth in full at Finding of Fact 28, supra. Section 334.048(3) is set forth in full at Finding of Fact 21, supra.

37. The TRC Procedure applies to all bids that meet the criteria for consideration by the TRC. See Finding of Fact 16, supra. The TRC Procedure is a four-page document that provides direction for TRC meetings. It names (by job position) the

Department employees who sit and vote on the TRC, states the criteria requiring a TRC review, and provides that the TRC will consider all information submitted and arrive at a decision by majority vote. The TRC Procedure requires that minutes be kept of TRC meetings, with redactions in respect of section 337.168(1). Each member of the TRC is required to certify that he or she does not have a conflict of interest with any contractor being evaluated.

38. The Department points out that the TRC Procedure applies only after all bids have been submitted and does not impose any further obligations on persons outside the Department. The TRC Procedure directs Department employees to meet and make recommendations on bids that meet select criteria.

39. The Department concededly uses and follows the TRC Procedure in all road construction procurements. The Department also concedes that the TRC lacks discretion to decide for a given procurement not to apply the TRC Procedure, which is signed by, and constitutes a directive from, the Secretary of the Department.

CAC Procedure

40. The CAC Procedure is a three-page document, the stated purpose of which is to describe the responsibilities of district and central CACs in determining whether to award construction and maintenance contracts. The CAC Procedure cites sections

20.23(4) (a) and 334.048(3) as authority for its stated procedures. Section 20.23(4) (a) is set forth in full at Finding of Fact 28, supra. Section 334.048(3) is set forth in full at Finding of Fact 21, supra.

41. The CAC Procedure names (by job position) the Department employees who sit and vote on the CAC. It provides that the CAC's official decision will be made by majority vote and recorded by the chairperson. The CAC Procedure requires that minutes be kept of CAC meetings, with redactions in respect of section 337.168(1). Each member of the CAC is charged with keeping the official estimate confidential until it is no longer deemed confidential under section 337.168(1). Each member of the CAC is required to certify that he or she does not have a conflict of interest with any contractor being evaluated.

42. The Department states that the CAC Procedure does not require compliance by anyone outside of the Department. It simply directs members of the CAC to meet and consider recommendations presented by the TRC. The CAC Procedure does not provide criteria that must be considered in awarding or rejecting a bid, but only directs the committee to meet, decide matters by a majority vote, and keep the minutes recording its decision. The Department concludes that the CAC procedure is an internal guidance document, imposing no duty or obligation on persons outside of the Department.

CONCLUSIONS OF LAW

43. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.57(1)(e) and 120.56(4), Florida Statutes.

44. Section 120.52(16) sets forth the following definition, in relevant part:

"Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

45. Section 120.52(20) provides:

"Unadopted rule" means an agency statement that meets the definition of the term "rule," but that has not been adopted pursuant to the requirements of s. 120.54.

46. Section 120.54(1)(a) provides, in relevant part:

Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by section 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

47. Section 120.56(4) (a) provides:

Any person^[5/] substantially affected by an agency statement may seek an administrative determination that the statement violates section 120.54(1) (a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes an unadopted rule.

48. The Department is an "agency" as defined in section 120.52(1).

49. To demonstrate that he is "substantially affected" by an agency statement, a person must establish "(1) a real and sufficiently immediate injury in fact; and (2) that the alleged interest is arguably within the zone of interest to be protected or regulated." Lanoue v. Dep't of Law Enf., 751 So. 2d 94, 96 (Fla. 1st DCA 1999) (quoting Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995)).

50. To establish a "real and immediate injury in fact," a petitioner must "allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct." Village Park Mobile Home Ass'n v. Dep't of Bus. Reg., 506 So. 2d 426, 433 (Fla. 1st DCA 1987).

51. The Department applied the challenged procedures and algorithms to award Contract T7380 to Astaldi rather than to Prince, meaning that Prince has arguably suffered a sufficiently real and immediate injury in fact to prove it is substantially

affected by the Department's procedures. Prince is a responsible, prequalified contractor engaged in the roadway construction business that regularly submits bids in response to the Department's road construction project solicitations and intends to submit bids on pending solicitations. Therefore, Prince's interest is arguably within the zone of interest to be protected or regulated by the procedures and algorithms.

52. It is noted at the outset of this analysis that Prince has challenged the procedures and algorithms conceptually, in their entirety. The undersigned has therefore taken Prince's challenge as he found it, feeling no obligation to engage independently in a line-by-line reading of each procedure in an attempt to pick out severable portions that may run afoul of the prohibition on unadopted rules. The procedures and algorithms will each stand or fall in its entirety, as Prince has chosen to attack them.

53. Prince contends that the "inescapable conclusion" is that the challenged procedures are unadopted rules. They are used and applied by the Department in every road construction procurement throughout the state. Prince asserts that, by their own terms, the procedures implement, interpret, or prescribe law or policy or describe the Department's procedure or practice requirements. The procedures themselves identify their authorizing statutes.

54. The Department, on the other hand, generally characterizes its procedures as internal operating manuals that directly implement the statutory directive in section 337.015(2) that the Department minimize the variances between contract lettings. The procedures demand nothing of a bidder that is not already required by the bid specifications, which Prince did not challenge.

55. Prince argues that the procedures formulate agency action and affect private interests, as they are applied by the Department to determine whether a bidder, such as Prince, is awarded or denied a contract. Prince points to Department of Business & Professional Regulation v. Harden, 10 So. 3d 647 (Fla. 1st DCA 2009), which affirmed a DOAH Final Order determining that the Construction Industry Licensing Board's ("CILB") use of an application committee to review and make recommendations to the full board constituted an unadopted rule. No statute or rule expressly authorized the application review committee and the CILB failed to establish that rulemaking was neither feasible nor practical. Id. at 648. Explaining that the process affected the agency's ultimate decision to approve or deny a license application and therefore affected applicants' private interests, the court rejected the agency's contention that the process was exempt from rulemaking requirements under

section 120.54's internal management memorandum exception. Id. at 649.

56. Prince goes on to argue that "a contract award for a low-bid project--to which Prince is entitled if it meets the criteria--is not unlike a general contractor's license, to which an applicant is entitled if the applicant meets certain criteria." This analogy is rejected. A competitive bidding situation is very different from a licensing scenario. Prince is correct that a license applicant is entitled to a license if it meets the licensing criteria. Twenty applicants for general contractor's licenses may all obtain licenses if they all meet the licensing criteria. They are not all competing against each other for a single available license.

57. A bidder on a low-bid project is in a very different position. The bidder may be qualified, responsible, and responsive, in compliance with every criterion set forth in the bid specifications, yet still not win the contract. A bidder is not "entitled" to win a contract in the same way that an applicant may be "entitled" to a license. The Legislature has expressly stated that the opportunity to bid on Department contracts "is a privilege, not a right." § 337.164(2), Fla. Stat. To the extent that a bidder has a cognizable "private interest" in the bidding process, that interest is in competing

for the contract in a fair, even-handed process, not in winning the contract.

58. The Legislature has recognized the state's overriding interest in a fair and honest competitive bidding process for state road construction. Chapter 83-4, Laws of Florida, enacted a suite of statutes, sections 337.164-337.168, designed to further the goal of integrity in Department of Transportation contracting. Section 337.164 provides as follows:

Legislative intent with respect to integrity of public contracting process.--Recognizing that the preservation of the integrity of the public contracting process of the department is vital to the development of a balanced and efficient transportation system and is a matter of interest to all the people of the state, the Legislature determines and declares that:

- (1) The procedures^[6/] of the department for bidding and qualification of bidders on department contracts exist to secure the public benefits of free and open competition and to secure the quality of public works.
- (2) The opportunity to bid on department contracts or to supply goods or services to the department is a privilege, not a right.
- (3) The privilege of transacting business with the department should be denied to persons or firms involved in contract crime in order to preserve the integrity of the public contracting process.
- (4) Persons or firms involved in contract crime should be denied both the privilege of transacting business with the department and the opportunity of obtaining economic

benefit through the transaction of business by their affiliates with the department.

To this end, it is the intent of the Legislature to provide sufficiently broad authority to the department to ensure the integrity of its public contracting process.

59. Section 337.168, originally part of the 1983 suite of contract integrity statutes, provides:

Confidentiality of official estimates, identities of potential bidders, and bid analysis and monitoring system.—

(1) A document or electronic file revealing the official cost estimate of the department of a project is confidential and exempt from the provisions of s. 119.07(1) until the contract for the project has been executed or until the project is no longer under active consideration.

(2) A document that reveals the identity of a person who has requested or obtained a bid package, plan, or specifications pertaining to any project to be let by the department is confidential and exempt from the provisions of s. 119.07(1) for the period that begins 2 working days before the deadline for obtaining bid packages, plans, or specifications and ends with the letting of the bid. A document that reveals the identity of a person who has requested or obtained a bid package, plan, or specifications pertaining to any project to be let by the department before the 2 working days before the deadline for obtaining bid packages, plans, or specifications remains a public record subject to s. 119.07(1).

(3) The bid analysis and monitoring system of the department is confidential and exempt from the provisions of s. 119.07(1). This exemption applies to all system

documentation, input, computer processes and programs, electronic data files, and output, but does not apply to the actual source documents, unless otherwise exempted under other provisions of law.

60. Section 337.168 makes confidential and exempts from disclosure the Department's official cost estimate and its bid analysis and monitoring system, including computer processes and programs. The Department's official cost estimate and bid analysis and monitoring system are therefore not subject to rulemaking that would violate the statutory confidentiality requirement. The undersigned is unable to square the circle and imagine a meaningful rule as to the official cost estimate and bid analysis and monitoring system that would not breach section 337.168.

61. This conclusion means that, at the very least, the Department's cost estimate and the challenged computer algorithms are not subject to rulemaking due to their confidential nature. Prince's challenge as to these items will be dismissed, leaving for decision those aspects of the Contract Procurement Procedure, the Bid Review Procedure, the TRC Procedure, and the CAC Procedure that are not confidential pursuant to section 337.168.

62. In determining whether the Contract Procurement Procedure is an illicit rule, the overriding concern is its effect, not the Department's characterization of it. Dep't of

Rev. v. Vanjara, 675 So. 2d 252, 255 (Fla. 5th DCA 1996). An agency statement is a rule if it “purports in and of itself to create certain rights and adversely affect others” or serves “by [its] own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law.”

Dep’t of Transp. v. Blackhawk Quarry, 528 So. 2d 447, 449 (Fla. 5th DCA 1988) (quoting Balsam v. Dep’t of HRS, 452 So. 2d 976, 977-978 (Fla. 1st DCA 1984)). A procedural manual is not the equivalent of a rule where it merely informs of a process or procedure without imposing a penalty for noncompliance.

Coventry First, LLC v. Off. of Ins. Reg., 38 So. 3d 200, 204 (Fla. 1st DCA 2010) (citing Dep’t of Rev. v. Novoa, 745 So. 2d 378, 382 (Fla. 1st DCA 1999)).

63. By its terms and by Department stipulation, the Contract Procurement Procedure applies “to all Contracts Administration Offices” that advertise, let, award and execute low-bid, design-bid-build, construction and maintenance contracts. It does not directly require any action by bidders and does not, in and of itself, create or adversely affect any rights of Prince. The one portion specifically cited by Prince, the mandatory pre-bid conference provision, is an internal Department instruction stating how the contracts administration office should proceed if in its discretion it elects to hold such a conference. Any terms from the Contract Procurement

Procedure that impose a requirement on a bidder are also included in the bid solicitation documents, which the bidder is free to walk away from or to protest under section 120.57(3). The Contract Procurement Procedure is an internal management memorandum, not a rule.

64. By its terms and by Department stipulation, the Bid Review Procedure applies to all low-bid road construction projects. Many of its provisions reference and incorporate the official bid estimate and the algorithm Department uses to determine whether a bid is unbalanced, both of which are confidential and not proper subjects for rulemaking. The Bid Review Procedure is directed to Department staff and is to be applied in the interest of maintaining consistency in estimating and evaluating bids. The Bid Review Procedure imposes no compliance requirement on Prince. By its terms, it requires nothing of anyone outside the Department. The Bid Review Procedure is an internal management memorandum, not a rule.

65. Both the TRC Procedure and the CAC Procedure apply only after the bids have been submitted. They do not even arguably require any compliance requirement on the bidder. They set forth no contract award criteria. They create no rights nor do they adversely affect any existing right of a bidder. These procedures direct certain Department employees to meet and vote

on the award of a contract. The TRC Procedure and the CAC Procedure are internal management memoranda, not rules.

66. It may be objected that the instant case is distinguishable from cases in which the courts decided that a policy or procedure was not a "rule" in part because its application was discretionary. See, e.g., Ag. for Health Care Admin. v. Custom Mobility, Inc., 995 So. 2d 984, 986 (Fla. 1st DCA 2008) (cluster sampling formula for purpose of calculating Medicaid overpayments was "subject to discretionary application"). In the instant case, the Department conceded that its employees were without discretion to use or not use the procedures in question.

67. This distinction is not controlling under the facts of this case. The Department of Transportation is not here acting primarily in a regulatory or disciplinary capacity, as is the circumstance in most cases involving alleged unadopted rules. The Department is operating a vast procurement process in which it contracts directly with hundreds of private entities. The Legislature has directed that the process be efficient, effective, and consistent. Section 337.015 recognizes that inefficient and ineffective administration of public contracts "inconveniences the traveling public, increases costs to taxpayers, and interferes with commerce."^{7/}

68. Section 337.015(2) requires the Department to minimize variances between contract lettings in order to increase competition and efficiently employ Department personnel. Section 337.164(2) declares that the opportunity to bid on Department contracts is a privilege, not a right. Section 337.168 recognizes that certain information should be withheld from the public generally in the interest of ensuring a fair and even-handed bid process. In light of legislative directives to uniformly administer the bidding process and to keep a great deal of estimating and evaluative information confidential, the Department's internal management memoranda understandably provide a minimum of discretion as to their application.

69. For the reasons stated above, it is concluded that the procedures and computer systems relied upon by the Department for consistency in bid evaluation do not meet the definition of a rule.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

ORDERED that the portion of Prince Contracting, LLC's, second amended formal written protest challenging the procedures and computer processes of the Department of Transportation is dismissed.

DONE AND ORDERED this 22nd day of December, 2016, in
Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of December, 2016.

ENDNOTES

^{1/} If quantity errors had been found on any of the mathematically unbalanced items, the bid would have been recalculated using Astaldi's unit prices and the correct quantities to determine whether the bid rankings would change. A mathematically unbalanced bid that affects the ranking of the low bid is "materially unbalanced," and subject to rejection.

^{2/} Standard Specification 2-6, titled "Rejection of Irregular Proposals," provides as follows in relevant part:

A proposal is irregular and the Department may reject it if it shows omissions, alterations of form, additions not specified or required, conditional or unauthorized alternate bids, or irregularities of any kind; or if the unit prices are obviously unbalanced, or if the cost is in excess of or below the reasonable cost analysis values.

^{3/} Section 6.6 does not specify whether it is referring to the "chairperson" of the TRC or the CAC.

^{4/} As noted in the companion Recommended Order in this case, there was a discovery issue as to the disclosure of the cost estimate and items employed to arrive at that estimate. At issue was not the estimate's uncontested confidentiality under the statute, but whether that confidentiality rendered it immune to discovery, subject to a confidentiality agreement. The undersigned, concluding that section 337.168(1) was not an absolute bar to discovery, ordered the Department to either disclose the estimate or forego reliance on it at the final hearing. The Department elected not to disclose the cost estimate, thereby foregoing reliance on it at hearing.

^{5/} The term "person" includes "individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." §§ 1.01(3) & 120.52(14), Fla. Stat. Prince comfortably satisfies the definition of a "person."

^{6/} The Department contrasts this reference to "procedures" for bidding on contracts with the express directive to adopt "by rule" procedures to administer design-build contracts in section 337.11(7)(b). The Department also points out that section 20.23(3)(a) directs it to adopt such "policies, rules, procedures, and standards" as necessary for the proper functioning and accountability of the Department. The Department suggests these statutes indicate that the Legislature "recognizes that not all statements are rules merely because they are consistently applied," and that "procedures," as well as "rules," are necessary to maintain accountability. These points are of passing interest but are not persuasive proof of a legislative intent to exempt the Department from rulemaking where section 120.54(1)(a) would otherwise apply.

^{7/} It is noted parenthetically that contractors are not mentioned in the Legislature's list of stakeholders.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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