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

PRINCE CONTRACTING, LLC,

Petitioner,

and

HUBBARD CONSTRUCTION COMPANY,

Intervenor,

vs.

DOT Case No. 16-039
DOAH Case No. 16-4982BID

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

FINAL ORDER

This bid protest case was referred to the Division of Administrative Hearings. Pursuant to notice a hearing was conducted before the assigned Administrative Law Judge, Hon. Lawrence P. Stevenson, in October and November 2016. The ALJ entered a Recommended Order on December 22, 2016 (attached). Prince Contracting, LLC timely filed exceptions. The Department timely filed responses to Prince's 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: Prince nominally takes exception to Paragraph 8's findings of fact that Astaldi Construction Corporation (RO at 2) submitted the lowest bid and that all bidders had sufficient financial capacity. The substance of Exception 1, however, is not an exception to what Paragraph 8 finds, but rather what (according to Prince) it may imply: that Astaldi's bid was the lowest responsive bid or that Astaldi was responsible as to this project. (Exceptions at 1-2.) Prince suggests two interlineations: "Astaldi submitted the lowest *apparent* bid" and "All bidders . . . had sufficient *prequalification* capacity . . . ." Id. at 2 (suggested interlineations emphasized).

Exception 1 does not include appropriate and specific citations to the record as required. § 120.57(1)(k), Fla. Stat.; Fla. Admin. Code R. 28-106.217(1). The Department therefore need not rule on Exception 1. Id. If a ruling is required, Prince does not argue Paragraph 8's findings are not supported by competent, substantial evidence. Instead, it argues that implications Prince sees in Paragraph 8 are not supported by such evidence, and urges the Department to accordingly make new findings. The Department cannot do so. 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). Exception 1 is rejected. § 120.57(1)(*l*), Fla. Stat. (2016).

Exception 2: Prince takes exception to Paragraphs 9-16, 19-21, 23, 49, and 89 of the Recommended Order. Paragraphs 9-11 are findings of fact detailing the Department's construction procurement procedure. Paragraph 12 is a finding of fact that the Department prepares an official estimate for every road and construction contract procurement, and that the Department keeps this official estimate confidential under Section 337.168(1), Florida Statutes. Paragraph 13 is a finding of fact that the six bids the Department received for Contract T7380 (hereinafter Contract) and the Department's official estimate were analyzed to create an average for each pay item. Astaldi's unit pricing was compared to the averages. Paragraph 14 is a finding of fact that Department computers created an "Unbalanced Item Report" that flagged Astaldi's "mathematically imbalanced" items – those items either above or below a confidential tolerance from the average, and that no quantity errors were found. Paragraph 15 is a finding of fact that the Department culled the work items down to those for which Astaldi's unit price was 75% more than or below the average. The Department sent a Notice to Contractor to Astaldi which

identified the mathematically unbalanced items, stated the Department could not guarantee their approval, and requested Astaldi's confirmation that the unit bid price was correct for the listed items.

Paragraph 16 is a finding of fact that Section 5.4 of the Department's Bid Review Procedure states contracts are not considered for award until the Notice to Contractor form is signed and returned. Paragraph 16 also finds that Greg Davis, the Department's State Estimating Engineer, testified that this procedure is no longer accurate. Paragraph 19 is a finding of fact that Section 6.6 of the Contract Procurement Procedure establishes the circumstances under which an apparent low bid must be considered by the Department's Technical Review Committee, or TRC. Paragraph 20 is a finding of fact that because it was mathematically unbalanced, the Astaldi bid was submitted to the TRC for review, and that the TRC voted to recommend awarding the Contract to Astaldi. Paragraph 21 is a finding of fact that the TRC's recommendation was presented to the Contracts Award Committee, or CAC. Paragraph 23 is a finding of fact that the Contract consisted of seven components, that the Department does not compare bids by component but rather by total bid amount, and that the Department reviews bids for discrepancies. Paragraph 49 is a finding of fact that the Department's Standard Specifications (RO ¶ 2) allow bidders to indicate "free" or "$0.00" for items that will be supplied at no cost. It also finds the Department's practice is to include zero bid items on the Notice to Contractor, but the specifications do not require an investigation into whether the bidder's cost for zero bid items is actually zero. Paragraph 89 is a conclusion of law that the Recommended Order does not purport to establish a rule that a bid can never be rejected for being too low, but that the threshold for such rejection should be high given the many variables in play and the "jealous manner in which bidders guard their business information and strategies."

Prince does not contend that Paragraphs 9-16, 19-21, 23, and 49[1] are not supported by competent, substantial evidence. Rather, Prince contends that these findings of fact violated Prince's due process rights. (Exceptions at 2.) Prince states that it sought the Department's official estimate and other estimates in discovery but the Department refused to produce them. Prince contends further that the ALJ's order on Prince's motion to compel gave the Department the option of either disclosing the official estimate or being precluded from relying on the official estimate to justify its intended award.[2] Prince contends the ALJ relied on the official estimate and other estimates to make the findings in Paragraphs 9-16, 19-21, 23, and 49, and that these findings therefore violate Prince's due process rights (Exceptions at 3) and did not comply with the essential requirements of law, id. at 4.

The Department agrees that it may reject findings of fact if it finds the proceedings did not comply with the essential requirements of law. Gtech, 737 So. 2d at 619; § 120.57(1)(*l*), Fla. Stat. (2016). The Department finds these proceedings complied with the essential requirements of law. The Department's response to Prince's exception notes the Department did not present evidence of the official estimate and acquiesced to Prince's request to not present evidence of the algorithms, tolerance values, or other confidential information. Prince does not argue otherwise.

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[1] Prince contends Paragraph 89 is a mislabeled finding of fact. (Exceptions at 3.) The Department agrees it is not bound by the label affixed to Paragraph 89, id. at 3 n. 3, but disagrees that Paragraph 89 is mislabeled.

[2] Exception 2 is a muddle on this point. Prince contends it sought the Department's official estimate, the Department refused, and Prince filed a motion to compel. (Exceptions at 2-3.) But Prince also contends the ALJ gave the Department the option of disclosing or being precluded from relying on "manuals, policies, procedures, official estimate, algorithms, parameters, and tolerances," which Prince refers to collectively as the "Procedures, Estimates, and Algorithms." Id. The ALJ's October 10, 2016, Order on Discovery is narrower: it deals with Prince's requests for the "Department's official estimate" and "[a]ll estimates of any kind for the project." The Department will therefore rule on Exception 2 vis-à-vis the actual Order on Discovery.

The Department's response also notes, accurately, that Prince adduced evidence of how the Department uses the official estimate and the confidential algorithms and tolerance values. Any error by the ALJ in using this evidence was invited by Prince. Terry v. State, 668 So. 2d 954, 962 n. 10 (Fla. 1996) (holding invited error doctrine applies to appellant complaining of "evidence that he himself has introduced.").

Because the proceedings complied with the essential requirements of law, and because Prince does not contend the findings are not supported by competent, substantial evidence, Prince's exception to Paragraphs 9-16, 19-21, 23, and 49 is rejected. Gtech, 737 So. 2d at 619; § 120.57(1)(*l*), Fla. Stat. (2016).

As for Paragraph 89, Prince does not argue for a substituted conclusion of law or that a substituted conclusion of law would be as or more reasonable than Paragraph 89. If Prince's substituted conclusion of law is that Prince was deprived of due process, the Department finds Prince's substituted conclusion is not as or more reasonable than Paragraph 89. Prince's exception to Paragraph 89 is rejected. Gtech, 737 So. 2d at 619; § 120.57(1)(*l*), Fla. Stat. (2016).

Exception 3: Prince takes exception to Paragraph 20's finding that because it was mathematically unbalanced, the Astaldi bid was submitted to the TAC for review.

Prince acknowledges the Astaldi bid was submitted to the TAC for review, but contends the finding that the bid was mathematically unbalanced is not supported by competent, substantial evidence. Prince argues that while the Department produces a report called the "Unbalanced Bid Report" (the ALJ found the Department produces an Unbalanced *Item* Report, RO ¶ 14), the report identifies "price variances," not "true unbalancing." (Exceptions at 5.) Prince's argument rests on another Recommended Order in another case, which defines an "unbalanced" bid as one where an item is underpriced and a different item is overpriced to

compensate. (Exceptions at 5) (citing Cone Bros. Contracting, Inc. v. Dep't of Transp., Case No. 82-2246BID, ¶ 6) (Fla. DOAH Feb. 25, 1983)).

Prince's point is unclear. The Department's Bid Review Procedure defines "mathematically unbalanced" as 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." (RO ¶ 11.) If Prince is suggesting that the Bid Review Procedure's definition of "mathematically unbalanced" is wrong and the definition of "unbalanced" – not "mathematically unbalanced" – in the 1983 Cone Brothers Recommended Order is right, the Department cannot reject or modify a finding of fact on that basis. § 120.57(1)(*l*), Fla. Stat. (2016) ("Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.").

On the merits, the definition of "mathematically unbalanced" the Department uses in its bid reviews is either a conclusion of law over which the Department has 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), or a matter infused with policy considerations committed to agency discretion, Baptist Hosp., 500 So. 2d at 623. Either way, the Department declines to reject or modify the definition of "mathematically unbalanced" in the Bid Review Procedure and adopted by the ALJ for purposes of the Recommended Order. (RO ¶¶ 11, 14.) The Department finds that Prince's proposed definition is not as or more reasonable than the definition in the Bid Review Procedure and adopted by the ALJ for purposes of the Recommended Order. Exception 3 is rejected. § 120.57(1)(*l*), Fla. Stat. (2016).

Exception 4: Prince takes exception to Paragraphs 43, 46-48, and 79. Paragraph 43 finds the Contract includes 666 line items. Six bidders means a total of 3,996 line items for this Contract alone. In a given year involving 200-300 let projects there would be more than one million line items bid. Paragraph 43 finds that accepting Prince's position would mean the Department would have to examine each of these line items and somehow determine whether the item includes all of the bidder's costs. Paragraph 46 finds Prince "did not explain" how the Department is supposed to know which items are "companion items" (RO ¶ 44) as it examines bids line-by-line as Prince proposes. Paragraph 47 finds Prince "failed to provide an explanation" on how the Department is to determine a bidder's costs for any one line item or for its overall bid. It also finds bidders consider their cost information and bidding process proprietary, that Prince disclosed its own information under seal, and that the Department does not compare bids by component, but rather total bid amount. Paragraph 48 finds the Standard Specifications reserve the Department's right to audit the contractor's records upon execution of the contract, but do not authorize an audit prior to contracting.

Prince does not contend Paragraphs 43 and 46-48 are not supported by competent, substantial evidence,[3] and does not contend that the proceedings did not comply with the essential requirements of law. As these are the only two bases on which the Department may reject or modify findings of evidentiary fact, the Department rejects Prince's exceptions to Paragraphs 43 and 46-48. § 120.57(1)(*l*), Fla. Stat.

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[3] Section 120.57 and myriad case law affirming the principle ensures that failure to argue an ALJ's findings of fact are not supported by competent, substantial evidence is always conspicuous. This is particularly true here: the ALJ found Prince "did not explain" and "failed to provide an explanation" about the practical upshot of its position. Prince does not dispute that competent, substantial evidence supports these findings.

Paragraph 79 is a conclusion of law that it is unreasonable to expect the Department to investigate a bidder's pricing for each unit item. Prince did not cite any statute or rule for the proposition that the Department has authority to investigate a bidder's relationship with its subcontractors, vendors, or suppliers, or inquire into its business strategies, inventory, and expenses.

Prince argues that it "has never contended that FDOT is required to investigate every bidder's pricing for every unit item and compel any bidder to 'explain its pricing strategy, inventory, relationship with subcontractors, and business structure.'" (Exceptions at 6.) Assuming this is true, it is unclear why Prince takes exception to Paragraph 79.

The answer seems to be that while Prince may not seek to require the Department to investigate literally every unit item in every bid, Prince does seek to impose a requirement whereby the Department must regard mathematically unbalanced items as non-responsive. (Exceptions at 6.) Prince also seeks to impose a requirement by which the Department cannot take bids including mathematically unbalanced items at face value, but must instead "examine additional information that will allow FDOT to determine whether the bidder has the capacity in all respects to fully perform the contract requirements." Id.

The position Prince stakes out in its exceptions may be somewhat more modest than Paragraph 79 suggests, but the problems Paragraph 79 identifies remain. Prince has still not explained how the Department is supposed to get the "additional information" Prince wants the Department to "examine," which apparently includes the bidder's relationships with its subcontractors, suppliers, and vendors, its business and pricing strategies, and its expenses (RO ¶ 79), and which bidders consider confidential and proprietary (RO ¶ 47). The ALJ pointed out

Prince cited no statute or rule that would give the Department this authority at the hearing. Prince has not cured that deficiency in its exceptions.

The Department finds Prince's suggested substituted conclusion of law is not as or more reasonable than Paragraph 79. The exception to Paragraph 79 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 5: Prince takes exception to Paragraphs 47, 48, and 89, all summarized above. Exception 5 takes issue with the "incorrect implication" that the Department has no means to inquire into a bidder's proprietary cost information and that the Department lacks authority to conduct a pre-contract audit.

Paragraphs 47 and 48 are supported by competent substantial evidence. Prince does not contend otherwise. The exception to Paragraphs 47 and 48 is rejected. § 120.57(1)(*l*), Fla. Stat.

Paragraph 89 concludes that that the Recommended Order is not intended to establish a rule that a bid can never be rejected for being too low. On its face, it has little to do with the argument advanced in Exception 5. The Department suspects Prince meant Paragraph 79: as summarized above, that paragraph concludes Prince did not point to any statute or rule giving the Department authority to investigate a bidder's business relationships or proprietary business strategies, expenses, and inventory. If Exception 5 is meant to take exception to Paragraph 89, the Department finds the suggested substituted conclusion of law is not as or more reasonable than Paragraph 89.

If Exception 5 means to take exception to Paragraph 79, Prince argues, without citation, that bidders "routinely" submit proprietary information voluntarily when responding to solicitations. (Exceptions at 8.) This argument does not include appropriate and specific citations to the record, so the Department is not required to rule on it. § 120.57(1)(k), Fla. Stat. If

a ruling is necessary, in the Department's experience bidders sometimes do voluntarily disclose confidential information when responding to a contract solicitation, probably in the hope that the confidential information will improve their chances. The ALJ never found otherwise. The ALJ found that Prince could not identify a statute or rule giving the Department authority to compel bidders to disclose their proprietary information (RO ¶ 79), a point which Prince does not dispute. The Department can only rule on the ALJ's findings, not make new ones. Walker, 946 So. 2d at 605.

Prince also argues the Department requests this information, and contends the Notice to Contractor form requires an "explanation" of the line items flagged by the Department's algorithm. (Exception at 8) (citing Joint Ex. 18). The Notice to Contractor form does not require an explanation, but merely an acknowledgment that the unit price bid is correct. (Joint Ex. 18.)

Prince next shifts from arguing the Department can request or that bidders voluntarily disclose confidential information to arguing "[p]lainly the Department has the power to inquire into bidders' proprietary cost information, inherent in FDOT's purchasing power." (Exceptions at 9.) The Department is skeptical that an administrative agency has inherent authority to compel disclosure of confidential information. Florida Elections Comm'n v. Davis, 44 So. 3d 1211, 1215 (Fla. 1st DCA 2010) ("[A]dministrative agencies are creatures of statute and have only such powers as statutes confer."). Prince offers no statutory source for this authority. (RO ¶ 79.) The Department finds the suggested substituted conclusion of law is not as or more reasonable than Paragraph 79. Exception 5 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 6: Prince takes exception to endnote 7 to Paragraph 52 and Paragraph 90. Endnote 7 finds Prince presented no evidence that Astaldi lacks the reserves to complete the

work at the bid price. Paragraph 90 is a conclusion of law that no evidence was presented that Astaldi "lacks the will or wherewithal to complete this project at the price it bid."

Prince does not take exception to what endnote 7 and Paragraph 90 find, but what Prince believes they imply: namely, that Prince was required to present evidence that Astaldi cannot complete the work for the bid price.

Prince does not argue that endnote 7 is not supported by competent, substantial evidence. The endnote is supported by competent, substantial evidence. The exception to the implications Prince sees in endnote 7 is therefore rejected. § 120.57(1)(*l*), Fla. Stat.

While Paragraph 90 is labeled a conclusion of law, the Department is not bound by that label. Prince takes exception to the last sentence of Paragraph 90, which the Department considers a finding of fact. Valenti v. Coral Reef Shopping Ctr., Inc., 316 So. 2d 589, 592 (Fla. 3d DCA 1975) ("[T]he trial court made a finding of fact that Coral Reef and Percival presented no evidence to show that the subject properties are presently worth less than the prices specified in the contracts . . . ."). Prince does not argue the sentence is not supported by competent, substantial evidence. The sentence is supported by competent, substantial evidence. The exception to the implications Prince sees in the last sentence of Paragraph 90 is therefore rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 7: Prince takes exception to Paragraph 73's conclusion of law that the evidence established that Astaldi intended to perform all items of work in the contract, and later confirmed that it still intends to do so if awarded the contract. Prince argues this conclusion does not establish Astaldi's bid was responsive.

While Paragraph 73 is labeled a conclusion of law, the ALJ's finding of what the evidence established is a finding of fact. J.D., 114 So. 3d at 1133. Prince does not contend the

finding is not supported by competent, substantial evidence. The finding is supported by competent, substantial evidence.

Prince argues that whether Astaldi submitted a responsive bid must be assessed on the bid materials submitted and not its "intent" as developed after the fact. (Exceptions at 10.) Prince is mistaken. In this de novo proceeding, the ALJ was not required to consider only those facts available to the Department when it made its decision. J.D, 114 So. 3d at 1132.

Prince also argues that Astaldi was impermissibly given an opportunity to change its bid after the bids were opened. (Exceptions at 10-11.) Prince is again mistaken. Astaldi was not permitted to modify or amend its proposal. Jt. Exhibit 18. Nothing in Paragraph 73 suggests otherwise. Paragraph 73 does not conclude Astaldi amended or modified its proposal; it concludes the evidence established Astaldi intended to hold up its end of the bargain. Exception 7 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 8: Prince takes exception to Paragraphs 75-78 of the Recommended Order. Paragraph 75 is a conclusion of law that Standard Specification 9-2.1 cautions the contractor that it must accept the compensation set forth in the Contract as full payment for all materials and work contemplated by the Contract, as well as any unforeseen contingencies. Paragraph 76 is a conclusion of law that 9-2.1 does not require the vendor to include all costs on pain of being found unresponsive, but rather that the bidder should include all costs for each item because the Department will not pay more than the bid price. Paragraph 77 is a conclusion of law that allowance of zero and penny bids indicates bidders may offer items below cost, and is further indication that Prince's interpretation is mistaken. Paragraph 78 is a conclusion of law that the bid submitted by Astaldi was an offer to perform the work and furnish the labor and materials involved in the Contract at the prices quoted by Astaldi. It also concludes the Department reads

9.2-1 to mean a bidder should not expect to be paid more for an item than the bid price submitted, and that the Department's reading is reasonable.

Prince argues that Specification 9-2.1 requires bidders to include the cost of "all" labor, materials, equipment, etc., and that Astaldi's failure to do so rendered its bid nonresponsive. (Exceptions at 11-14.) The Department disagrees. Prince concedes the Department has the discretion to accept a bid that shows costs below reasonable cost analysis values. (Exceptions at 13.) While the Department agrees this discretion cannot be exercised arbitrarily, id., the Department accepts the ALJ's conclusion of law that the decision was not arbitrary. (RO ¶¶ 89, 91.) Prince's suggested substituted conclusions of law are not as or more reasonable than the conclusions of law in Paragraphs 75-78. Exception 8 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 9: Prince takes exception to Paragraphs 46 and 77. Both are summarized above. Prince argues that although Standard Specification 2-5.1 allows bidders to offer to supply items for free, bidders cannot offer items below cost.

Paragraph 46 is supported by competent, substantial evidence. Prince does not contend otherwise. Prince argues that under the ALJ's interpretation, a contractor could bid zero for every line item and the Department would be compelled to accept the bid. (Exceptions at 16.) This is a distortion of the ALJ's well-reasoned position. (RO ¶¶ 89-91.) Prince's suggested substituted conclusion of law is not as or more reasonable than Paragraph 77. Exception 9 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 10: Prince takes exception to Paragraph 80, which concludes Prince asserts Astaldi materially underbid the project, thereby undermining competition. Paragraph 80 also concludes "[t]he test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the

bidder an advantage or benefit not enjoyed by the other bidders." (quoting Harry Pepper & Assocs., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977)).

Prince argues Paragraph 80 is incomplete, and that Florida courts use a second test for whether a noncompliance with a solicitation is acceptable: "whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements . . . ." Robinson Elec. Co. v. Dade Cty., 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982). For this second test, Robinson cites 10 McQuillan, *Municipal Corporations* § 29.65 (3d ed. rev. 1981) and, ironically, Harry Pepper. Id. Prince contends that the ALJ's failure to consider this second criterion requires remand to DOAH for additional findings.

The Department finds Prince's suggested substituted conclusion of law is not as or more reasonable than Paragraph 80. Harry Pepper remains good law and Prince does not contend otherwise. Alternatively, the Department finds that even if the ALJ was required to consider whether Astaldi's "deviation"[4] would give the Department reason to doubt Astaldi's ability to perform, see Miami Dade Cty. Sch. Bd. v. J. Ruiz Sch. Bus Serv., Inc., 874 So. 2d 59, 60 (Fla. 3d DCA 2004), the ALJ found that the evidence established Astaldi intended to perform all items of work included in the Contract. (RO ¶ 73.) Exception 10 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 11: Prince takes exception to Paragraph 81, a conclusion of law that the scope of work was predetermined by the Department and that no deviations from the specifications were possible. Paragraph 81 also concludes that the awardee will be required to deliver all listed items in the Contract for the price it bid and that all bidders were compared under a common

[4] As Paragraph 81 establishes, Astaldi's only "deviation" was submitting a lower bid than its competitors.

standard, i.e., the specified scope of work. Paragraph 81 concludes "Astaldi's only 'deviation" was bidding a lower price than the other bidders" and that Astaldi gained no benefit not enjoyed by other bidders.

Prince argues the ALJ incorrectly concluded deviations from the predetermined specifications were not possible. (Exceptions at 17.) Prince contends Astaldi's pricing for utilities did not include the costs of all labor, materials, and equipment, and that this deprived the Department of assurance that Astaldi would perform. Prince argues that under the ALJ's reasoning, no bid could ever be nonresponsive. The ALJ dealt with this strawman elsewhere. (RO ¶ 89.)

Prince next argues that just because Astaldi will be required to deliver all Contract items for the price it bid does not establish Astaldi's bid was responsive, referring to Exception 12. The Department rules on Exception 12 below.

Prince argues that there is no competent, substantial evidence to support the finding that all bidders were compared under the common standard of the specified scope of work. The challenged finding is correct in that the ALJ found, and Prince does not challenge, the procurement at issue is a low-bid contract. (RO ¶ 2.) The Department designed the project and established the necessary units to complete the project. (RO ¶ 85.) "The specifications are set and the only variable a bidder can affect is price." Id.

Finally, Prince argues Astaldi "deviated" by failing to include pricing for all costs. Prince contends this conferred an economic advantage on Astaldi, and that Astaldi gained a benefit by "potentially" being able to change its bid. Prince does not contend, and the record does not support, that Astaldi changed its bid. The record establishes Astaldi did provide a price for all

listed items. Prince's substituted conclusion of law is not as or more reasonable than Paragraph 81. Exception 11 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 12: Prince takes exception to Paragraphs 82-86 of the Recommended Order. Paragraph 82 is a conclusion of law that Prince relies on Middlesex Corporation v. Department of Transportation, Case No. 15-0382BID (Final Order January 5, 2016). It concludes Middlesex involved requests for proposals (RFP) on a design-build project. Paragraph 83 concludes the Middlesex bidders were authorized to propose an alternative technical concept (ATC) for review and approval. It concludes Prince was initially awarded the Middlesex contract, but was found nonresponsive at the hearing when the ALJ found its ATC deviated from the RFP in ways the Department had not approved. Paragraph 84 concludes the Middlesex ALJ found the unauthorized deviations materially affected Prince's bid because it omitted materials and costs that gave it a substantial advantage over other firms that complied with the RFP. The Middlesex ALJ found the Department was barred from considering Prince's amendment after-the-fact. The Department accepted the Middlesex ALJ's determination that Prince's proposal was non-compliant. Paragraph 85 concludes Middlesex is distinct because price was only one factor; bidders could propose alternative methods. In this low-bid procurement, the Department designed the project and established the quantity units necessary to complete it. "All specifications are set and the only variable a bidder can affect is price." Paragraph 86 concludes that in Middlesex, Prince materially deviated from the RFP specifications. It rejects Prince's argument that Astaldi deviated from the terms of Specification 9-2.1: Astaldi entered a price for every item required and made no quantity errors. It concludes that "[u]nder the facts of this case, low price alone does not render Astaldi's bid nonresponsive."

Prince contends Middlesex is binding and mandates that Astaldi's bid be deemed nonresponsive. (Exceptions at 18.) The Department disagrees. The ALJ in Middlesex found Prince materially deviated from the RFP's specifications. Id. at 19. The ALJ in this case found Astaldi did not materially deviate from the ITB. (RO ¶¶ 81, 86.) The Department agrees with the ALJ that Middlesex is distinguishable from this case on the facts. (RO ¶¶ 82-86.) Prince's suggested substituted conclusions of law are not as or more reasonable than Paragraphs 82-86. Exception 12 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 13: Prince takes exception to Paragraph 88's conclusion that D.A.B. Constructors v. Department of Transportation, 656 So. 2d 940 (Fla. 1st DCA 1995) is controlling authority on the question of raising a bidder's responsibility in a bid protest. Prince attempts to distinguish D.A.B. on the grounds that it holds a bid protest hearing is not the proper vehicle to investigate or adjudicate a contractor's certificate of qualification, not responsibility. (Exceptions at 20-21.)

Paragraph 87 of the Recommended Order, which Prince does not contest, features a lengthy block quote from D.A.B. That block quote says in relevant part "if a contractor is prequalified and its certificate has not been suspended or revoked at the time of the bid, the contractor **must be deemed responsible** as matter of law. . . . An administrative hearing triggered by a bid protest . . . is not the proper vehicle by which a contractor's **responsibility** and qualification to bid is to be investigated or adjudicated." (RO ¶ 87) (emphasis added). The Department agrees with the ALJ that D.A.B. is controlling authority on the question of raising a bidder's responsibility in a bid protest proceeding, and agrees with the ALJ that Prince's suggested distinction falls short. Prince's substituted conclusion of law is not as or more reasonable than Paragraph 88. Exception 13 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 14: Prince takes exception to Paragraph 89's conclusion that the threshold for rejecting a bid for simply being too low should be "high." Prince also takes exception to Paragraph 90's conclusion that going behind the face of bids in a low-bid procurement should occur in only the most extraordinary situations.

Prince argues these conclusions suggest a different standard for evaluating whether a bid is responsive than Robinson. (Exceptions at 22.) This amounts to a rehash of Prince's Exception 10; the Department's ruling is the same. Prince also incorporates by reference its Exceptions 11 and 12. Id. The Department's ruling is the same. Prince's substituted conclusions of law are not as or more reasonable than Paragraphs 89 and 90. Exception 14 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 15: Prince takes exception to Paragraph 91's conclusion that Prince failed to meet its burden of proof. Whether a party meets their burden of proof is a question of fact. J.D., 114 So. 3d at 1133 (citations omitted). The ALJ's finding that Prince failed to meet its burden is supported by competent, substantial evidence.

While the Department is not bound by the ALJ's legal conclusions that the Department did not act contrary to its governing statutes, rules or policies, or the ALJ's legal conclusions that the Department's intended action is not arbitrary, capricious, clearly erroneous, or contrary to competition, J.D., 114 So. 3d at 1133, the Department declines to exercise its discretion to reverse or modify the legal conclusions in Paragraph 91. Prince's suggested substituted conclusions of law are not as or more reasonable than Paragraph 91. The Department therefore rejects Exception 15. § 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

Prince Contracting, LLC's second amended formal written protest is dismissed. Contract T7380 is awarded to Astaldi Construction Corporation.

Order on the Department's Motion for Costs

The Department has moved for an award of costs under Section 337.11(5)(b), Florida Statutes. The Department states that it was required to preserve testimony of the proceedings, § 120.57(1)(g), and has provided an invoice in the amount of $2,354.75 for transcription services rendered. Prince 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. Prince Contracting, LLC, will pay $2,354.75 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 $2,354.75 from Prince's bid protest bond.

DONE and ORDERED this 20th 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
2017 JAN 20 PM 3:49

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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