

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

E.R. REEVES CORP., d/b/a ALL  
SEASONS AIR CONDITIONING,

Petitioner,

vs.

DOAH Case No. 17-3184BID  
DOT Case No. 17-017

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

BLUE RAY'Z HEATING AND AIR  
CONDITIONING, LLC,

Intervenor.

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FINAL ORDER

The Department issued ITB-DOT-16/17-8017-AC to maintain, repair, install, and replace HVAC systems and components at various facilities along Florida's Turnpike. (RO ¶ 2.) The ITB requires all labor, materials, and incidentals to maintain and repair 232 HVAC units at 65 different facilities. (RO ¶ 3.) Blue's bid was the lowest and All Seasons' was second lowest. (RO ¶ 15.) The Department posted a notice of intent to award the contract to Blue. (RO ¶ 16.)

All Seasons timely protested the proposed award and this case was referred to the Division of Administrative Hearings (DOAH). The assigned Administrative Law Judge (ALJ), The Honorable Darren A. Schwartz, entered a Recommended Order on August 28, 2017, recommending that the Department enter a final order rescinding the proposed award to Blue.

A copy of the Recommended Order is attached. The Department timely filed exceptions to the Recommended Order on September 7, 2017. Blue filed exceptions with DOAH on the same day, but not with the Department as required. Fla. Admin. Code R. 28-106.217(1). To facilitate meaningful review, the Department will treat Blue's exceptions as if they were correctly filed. All Seasons apparently did not file responses as the rule authorizes (but does not require). Fla. Admin. Code. R. 28-106.271(3).

#### Introduction and General Principles

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

"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). "Factual inferences are to be drawn by the hearing officer as trier of fact." Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1283 (Fla. 1st DCA 1985). Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. § 120.57(1)(l), Fla. Stat.

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. 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 than that which was rejected or modified.’” Id. (quoting § 120.57(1)(l), Fla. Stat.) (ellipses in original).

#### Rulings on the Department’s Exceptions

Exception 1: The Department takes exception to Paragraphs 26 and 27. Paragraph 26 is a finding of fact that the Department “did not review Blue’s Certification of Experience form to determine whether Blue demonstrated the necessary qualifications and experience required by the ITB.” Paragraph 27 finds that the Department’s witnesses could not testify to Blue’s demonstration of prior experience “similar in size, technical scope, and volume of work to that specified in the scope of work.” The Recommended Order’s findings vis-à-vis the “size,

technical scope, and volume of work” in the contract’s scope of work are detailed in Paragraphs 2-8, and its findings vis-à-vis Blue’s experience are in Paragraphs 17-25. These findings, which include that Blue “failed to demonstrate” experience similar in size, technical scope, and volume to that specified in the scope of work (RO ¶ 17), are unchallenged by the Department.

The Department points to testimony by a Department consultant, Trissa Thomas, that she looked at Blue’s Certification of Experience form, and that she looked at “the dates, the client project and the project description.” (Tr. 115.) The Recommended Order acknowledges this testimony, but also finds Thomas did not consider the volume of Blue’s work. (RO ¶ 30.) Paragraph 31 is a lengthy excerpt from the hearing transcript supporting this finding. The Department does not challenge either paragraph.

Paragraphs 26 and 27 are supported by competent, substantial evidence. Exception 1 is rejected. § 120.57(1)(I), Fla. Stat.

Exception 2: The Department takes exception to Paragraph 32’s finding that Santiago Alvarez, the facilities administrator of Florida’s Turnpike Enterprise, “just looked to confirm the documents were included in the bid package [submitted by Blue].” According to the Department, this finding gives a false impression because Alvarez did more than “just” confirm the documents were in the bid package.

The Department’s review of whether competent, substantial evidence supports a given finding “is not done by mechanically combing the transcript for words and phrases of testimony ... , but rather by considering the whole record, including the [ALJ’s] findings.” McDonald, 346 So. 2d at 578-579. The record reflects that Alvarez did go beyond merely confirming documents were in the bid package. For example, he testified that he reviewed the submittal for conflicts of interest, the evaluations and comments of his staff, and “ma[de] sure that they have the years of

experience and their references have been checked.” (Tr. 155-157.) But the Department does not challenge Paragraph 32’s other finding that Alvarez did not review Blue’s Certification of Experience Documentation in any detail. The ALJ’s finding that Alvarez “just” confirmed the documents were in the bid package may be an overstatement, but it is not material to the outcome.

Exception 2 is rejected. § 120.57(1)(I), Fla. Stat.

Exception 3: The Department takes exception to Paragraphs 35-38 and 49.

Paragraph 35 finds the Department established specific requirements in the ITB to determine responsiveness, but failed to determine if Blue had experience similar in size, technical scope, and volume to that specified in the scope of work.

Paragraph 36 finds the Department awarded the contract to Blue because it was the lowest bidder, without considering whether Blue had experience similar in size, technical scope, and volume to that specified in the scope of work.

Paragraph 37 is virtually identical to Paragraph 36. The main difference is that Paragraph 36 finds the Department awarded the contract “without considering” whether Blue’s experience matched the scope of work, while Paragraph 37 finds the Department awarded the contract “even though Blue failed to demonstrate” its experience matched the scope of work. The former faults the Department and the latter faults Blue.

Paragraph 38 concludes Blue is not a responsive and responsible vendor. Both Paragraphs 38 and 49 conclude the Department’s proposed action is contrary to the bid specifications, clearly erroneous, contrary to competition, arbitrary, and capricious.

Paragraphs 35-37 are findings of fact and are properly labeled as such. They are supported by competent, substantial evidence. The Department’s exception points to contrary

evidence, but the Department cannot reweigh evidence to reach a desired conclusion. 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.”).

Paragraphs 38 and 49 are essentially the same. The differences are that Paragraph 38 finds Blue is not a responsive or responsible bidder (Paragraph 49 does not reach this issue) and that it is labeled a finding of fact. Unbound by the ALJ’s labels, the Department treats Paragraph 38 as if it were properly labeled as a conclusion of law. J.D., 114 So. 3d at 1134. Thus, the Department retains discretion to reject the ALJ’s legal conclusions that Blue is not responsive or responsible and that the Department’s proposed action is contrary to the bid specifications, clearly erroneous, contrary to competition, arbitrary, and capricious. See id. at 1135. To do so, the Department must explain its rationale in accordance with Section 120.57(1)(I), *viz.*, state with particularity its reasons for rejecting or modifying the ALJ’s conclusions of law, and find that its substituted conclusions of law are as or more reasonable than the ALJ’s conclusions of law. Id.

The Department declines to reject or modify the conclusions of law in Paragraphs 38 and 49. Exception 3 is rejected. § 120.57(1)(I), Fla. Stat.

Exception 4: The Department takes exception to Paragraphs 38, 49, 50, and 54. Paragraphs 38 and 49 are summarized above. Paragraph 50 is a conclusion of law that Blue’s bid was nonresponsive and materially deviated from the ITB because Blue failed to demonstrate that it had the requisite prior experience. Paragraph 54 is a conclusion of law that this failure was material.

The Department incorporates its rulings on the Department’s exceptions to Paragraphs 38 and 49 by reference. As for the other two paragraphs identified in Exception 4, the Department

argues that any failure by Blue to demonstrate that it had the requisite experience was not material, because it did not give Blue an advantage or benefit not enjoyed by other bidders. The Department reasons that Blue will be required to perform the scope of work for the price bid, and that any failure to document its experience in its bid package did not confer a competitive leg up.

The Department is sympathetic to this view, but notes the Department does not take exception to the ALJ's conclusions explaining why it is misplaced on these facts. (RO ¶¶ 55-57.)

The Department declines to reject or modify the conclusions of law in Paragraphs 50 and 54. Exception 4 is rejected. § 120.57(1)(l), Fla. Stat.

Exception 5: The Department takes exception to Paragraphs 38, 49, and 58. Paragraphs 38 and 49 are summarized above. Paragraph 58 is a conclusion of law that the Department's "failure to consider" whether Blue's prior experience is consistent with the ITB's specifications is arbitrary and capricious.

The Department incorporates its rulings on the Department's exceptions to Paragraphs 38 and 49 by reference. As for Paragraph 58, the Department argues that its proposed action is not arbitrary because a reasonable person could take the view that Blue is a responsive bidder.

The Department agrees that it has the discretion to reject the ALJ's conclusions that its actions were arbitrary and capricious, J.D., 114 So. 3d at 1134-5, but declines to exercise that discretion on these facts. Exception 5 is rejected.

§ 120.57(1)(l), Fla. Stat.

### Rulings on Blue's Exceptions

At various points, Blue contends that the recommended order is “unnerving,” (Blue’s Exceptions at 1), that the ALJ’s recommendation was “foregone,” *id.* at 2, and that the ALJ “demonstrated” he was “predisposed” to rule against the Department and Blue, *id.* at 4 (emphasis omitted).

The Department is not required to rule on exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. § 120.57(1)(k), Fla. Stat. The majority of Blue’s exceptions do not meet this standard.

To facilitate meaningful review, the Department construes these contentions as an argument that the proceedings did not comply with the essential requirements of law. § 120.57(1)(l), Fla. Stat. The Department disagrees and rejects these contentions. *Id.*

As for the exceptions that do minimally meet the Section 120(1)(k) standard, Blue takes exception to Paragraph 38 (Blue’s Exceptions at 2), summarized above. As explained above, the Department agrees with Blue that Paragraph 38 is a mislabeled conclusion of law. Also as explained above, the Department agrees with Blue that it has discretion to reject or modify this conclusion of law that Blue is a responsive and responsible bidder, but declines to exercise that discretion on these facts. Blue’s exception to Paragraph 38 is rejected. § 120.57(1)(l), Fla. Stat.

Blue appears to take exception to Paragraphs 19, 20, and 25. (Blue’s Exceptions at 4.) Each is supported by competent, substantial evidence. If Blue takes exception to these paragraphs, the exception 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

Based on the foregoing Findings of Fact and Conclusions of Law, the Department rescinds the proposed award to Blue Ray'z Heating and Air Conditioning, LLC.

DONE and ORDERED this 29<sup>th</sup> day of September, 2017.



Michael Dew  
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.**

Copies furnished to:

Hon. Darren A. Schwartz  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060

Douglas Dell Dolan  
Florida Department of Transportation  
605 Suwannee Street, MS 58  
Tallahassee, Florida 32399-0458  
[doug.dolan@dot.state.fl.us](mailto:doug.dolan@dot.state.fl.us)

Mark H. Jamieson  
MHJ Law PLLC  
425 West Colonial Drive, Suite 400  
Orlando, Florida 32804  
[mark@mhjlaw.com](mailto:mark@mhjlaw.com)

James W. Markel  
J.W. Markel, P.A.  
Post Office Drawer 2006  
Winter Park, Florida 32790-2006  
[jwmarkel@gmail.com](mailto:jwmarkel@gmail.com)

Benjamin Shane Boutty  
The Boutty Law Firm, P.A.  
1150 Louisiana Avenue, Suite 5  
Winter Park, Florida 32789  
[shane@bouttylaw.com](mailto:shane@bouttylaw.com)