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.
_____/

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. Amin. 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)(*l*), 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)(*l*), 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)(*l*), *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)(*l*), 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 29th day of September, 2017.

Michael Dew
Secretary
Florida Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

NOTICE OF RIGHT TO APPEAL

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

Copies furnished to:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION,

Case No. 17-3184BID

Respondent,

and

BLUE RAY'Z HEATING AND AIR CONDITIONING, LLC,

Intervenor.
_____/

DEPARTMENT OF TRANSPORTATION'S EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to section 120.57(1)(k), Florida Statutes, Respondent Department of Transportation (Department), files its exceptions to the Recommended Order entered in this matter on August 28, 2017. Through these exceptions, the Department requests a final order declaring that Blue Ray'z Heating and Air Conditioning, LLC's (Blue) bid was responsive to the Invitation to Bid (ITB), declaring that Blue was a responsible bidder for the project, and affirming the Department's award of the contract for the project to Blue.

Exception 1

Recommended Order Paragraphs 26, 27

The Department takes exception to the statement in paragraph 26 that "DOT did not review Blue's Certification of Experience Documentation form to determine whether Blue demonstrated the necessary qualifications and experience required by the ITB." This finding is not supported by

any competent, substantial evidence, conflicts with the record, and should read "The Department reviewed Blue's Certification of Experience Documentation for and determined that Blue demonstrated the necessary qualifications and experience required by the ITB."

The Department takes exception to the statement in paragraph 27 that "...none of the witnesses presented by DOT could testify as to Blue's demonstration of prior experience, specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work.". This finding is not supported by competent, substantial evidence, and conflicts with the record.

Trisa Thomas, a Department consultant, testified that she verified "the dates, the client project, and the project description." Tr. 115, 122. Ms. Thomas verified that Blue worked for three years on the listed projects. Tr. 116. Ms. Thomas reviewed the descriptions of the listed projects and the type of work Blue performed to verify that the work Blue listed was related to the scope of work in the ITB. Tr. 116-117. The findings of fact listed in paragraphs 26 and 27 of the Recommended Order are not supported by competent, substantial evidence and should reversed.

Exception 2

Recommended Order Paragraph 32

The Department takes exception to paragraph 32 of the Recommended Order, which finds that "[Mr. Alvarez] just looked to confirm the documents were included in the bid package." This finding gives the impression that Mr. Alvarez only made sure all the required forms were included. This finding omits the majority of Mr. Alvarez' testimony regarding his review of Blue's bid package. Mr. Alvarez' review of the Blue's bid package also included review of the bid tabulation, certifying that he had no conflict of interest, reviewing evaluations of the bid made by multiple staff, reviewing the engineer's estimate and comparing it to the bid, conducting a post-bid

conference call, and verifying that Blue has the required years of experience and that its references were checked. Tr. 155-157.

Exception 3

Recommended Order Paragraphs 35, 36, 37, 38, 49

The Department takes exception to the finding in paragraph 35 that "DOT established specific requirements for the ITB to determine responsiveness and then failed to determine if Blue had prior work experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work".

The Department takes exception to the finding in paragraph 36 that "DOT awarded the bid to Blue because it was the lowest bidder, without considering whether Blue demonstrated prior experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work".

The Department takes exception to the finding in paragraph 37 that "DOT awarded the bid to Blue because it was the lowest bidder, even though Blue failed to demonstrate in the Certification of Experience Documentation form that it had prior experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work".

The Department takes exception to paragraphs 38 and 49 which find and conclude that Blue is not a responsive and responsible bidder.

The Department considered whether Blue demonstrated prior experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of

work. Both Trisa Thomas and Santiago Alvarez reviewed, in differing degrees, Blue's previous experience as reported, including verification of provided references. Tr. 115-119, 157. After Ms. Thomas and Mr. Alvarez both reviewed Blue's bid in its entirety, Mr. Alvarez concluded that Blue had demonstrated that it had prior experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work. Tr. 159.

None of the bid solicitation materials specifically indicated precisely how the Certification of Experience form should be completed and therefore did not specifically enumerate what the threshold level of detail would be to be found responsive. Blue completed the form and the Department found this level of detail to be satisfactory to determine that Blue was responsive and determined had prior work experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work.

A responsible bidder is a bidder who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance. Section 287.012(25), Florida Statutes. Blue has a Class B Air Conditioning contractor's license and the required expertise to complete the contract. Tr. 236. Mr. Alvarez, who is responsible for selecting the intended awardee, evaluated Blue's bid and concluded that Blue can fulfill the contract requirements reliably. Blue is, by definition, a responsible bidder.

Exception 4

Recommended Order Paragraphs 38, 49, 50, 54

The Department takes exception to paragraph 38 and 49, which find and conclude that the Department's proposed action is contrary to the bid specifications.

The Department takes exception to paragraph 50, in that it concludes that "Blue's bid was nonresponsive and deviated materially from the bid specifications of the ITB".

The Department takes exception to paragraph 54, which concludes that "Blue's failure to demonstrate in the Certificate of Experience Documentation form prior experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work, is material."

Pursuant to Section 287.012(26), Florida Statutes, "a responsive bid is one that conforms in all material respects to the solicitation." The Department may waive a variance from the specifications if it is nonmaterial. Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So.2d 1190, 1193 (Fla. 2d DCA 1978). Materiality is determined by whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders. Id.

Any failure by Blue to demonstrate experience in the Certificate of Experience form was not material as it was not of such a nature as its waiver would adversely affect bidding by placing Blue in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition as Blue will have to complete the same scope of work as any of the other bidders on this contract would have to perform. Blue will be required to service all units included in the scope of the contract on the set schedule and must respond to emergencies as per the bid specifications. Blue has not gained any competitive advantage whatsoever in any failure to include information in its Certification of Experience form.

For the foregoing reasons, the conclusions reached in paragraphs 50 and 54 of the Recommended Order should be disregarded, as Blue's bid did not materially deviate from the bid specifications and was responsive.

Exception 5

Recommended Order Paragraphs 38, 49, 58

The Department takes exception to paragraphs 38, 49, and 58, as they find and conclude that the Department's "failure to consider whether Blue's prior experience is specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work, is arbitrary and capricious."

If the Department's action is "justifiable under any analysis that a reasonable person would use to reach a decision of similar importance … the decision is neither arbitrary or capricious." *Dravo Basic Materials Co. v. Dept. of Transportation*, 602 So.2d 632, 634 (Fla. 2d DCA 1992).

As explained in Agrico Chemical Co. v. Dep't of Envtl. Regulations, 365 So. 2d 759, 763 (Fla. 1st DCA 1978) "a capricious action is one taken without thought or reason or irrationally [whereas] an arbitrary decision is one not supported by facts or logic, or despotic." The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner is "whether the agency (1) considered all relevant factors; (2) has given actual good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." *Adam Smith Enter. v. Dep't of Envtl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

Mr. Alvarez considered the totality of Blue's bid package, staff's review of Blue's bid package, and his 14 years of experience in his position, which are all relevant factors. Tr. 165-166. There is no evidence to indicate that Mr. Alvarez did not give good faith consideration to those factors. Based on the aggregation of this information, Mr. Alvarez reasonably awarded the contract to Blue, as he believes Blue can reliably perform the work under the contract and was the lowest bidder. Tr. 166. Based on the foregoing, the Department's decision to award the contract to Blue was neither arbitrary nor capricious.

RESPECTFULLY SUBMITTED this 7 day of September, 2017, in Tallahassee, Leon County, Florida.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was furnished on August 7, 2017, by electronic mail to the following:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

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vs.

DEPARTMENT OF TRANSPORTATION, CASE NO. 17-3184BID

Respondent,

and

BLUE RAY'Z HEATING AND
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Intervenor.

_____/

WRITTEN EXCEPTIONS OF INTERVENOR, BLUE RAY'Z, TO RECOMMENDED ORDER OF ADMINISTRATIVE JUDGE DARREN A. SCWARTZ DATED AUGUST 28, 2017

Intervenor, Blue Ray'Z, files the following written exceptions to the recommended order entered by the Administrative Judge. At the outset, Intervenor, Blue Ray'Z, the lowest bidder by almost 20% below the Petitioner ($128,630.00 Blue Ray'Z, $158,446.00 All Seasons), observes that Administrative Law Judge Schwartz attempts to mask his unnerving Recommended Order by failing to require Petitioner, All Seasons, to meet its required burden of proof by substantial, competent evidence that DOT **failed to exercise** its lawful, long-established "wide" discretion in an "honest exercise of this discretion, even if it may appear erroneous and even if reasonable persons may disagree." See Supreme Court of Florida decision *Liberty County v. Baxter's Asphalt*, 421 So.2d 505 (Fla. 1982), p.507. [This decision was followed by a later Supreme Court of Florida decision, *Department of Transportation v. Groves-Watkins*, 530 So 2d 912 (Fla.

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1988), holding, "In *Liberty County*, we recognized the broad discretion legislatively accorded public agencies and held that an agency's decision based upon an honest exercise of this discretion cannot be overturned absent a finding of 'illegality, fraud, oppression or misconduct. .... In short, the hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly." [p.914] The administrative law judge, in an apparently intentional mislabeling as a Finding of Fact, enters (paragraph 38 of his order) what is actually a Conclusion of Law:

"In sum, Blue is not a responsive and responsible vendor, and DOT's proposed action is contrary to the bid specifications, clearly erroneous, contrary to competition, arbitrary and capricious."

This ill-advised, improperly labeled "Finding of Fact," in actuality a "Conclusion of Law," should and must be rejected under established standards allowing agencies to reject conclusions of law in that the administrative judge's own recitation of the several DOT witnesses' testimony (Mr. Robinson, Mr. Chua, Ms. Trisa Thomas, Mr. Alvarez, Ms. Sheree Merting, and Ms. Amanda Cruz) fails utterly to support this Conclusion, mislabeled a Finding, or in any manner show that DOT that failed to exercise "in an honest discretion" its "wide discretion." Equally significant, casting doubt as to the judge's role even as a "reasonable person who may disagree" (See *Liberty* case above), as his own foregone order overturning the award of Blue's bid, the significantly lowest bidder, flies in the face of the judge's own acceptance (paragraph 39) that "...the burden of proof rests with All Seasons as the party opposing the proposed agency action." There was no proof offered by the Petitioner that DOT did not act honestly, thoroughly and properly in the several persons and several layers of review of bids

including telephoning and speaking with persons and entities who used Blue's services and were completely satisfied.

What is equally **not** reasonable and, at the least improper, is the failure of the administrative judge to uphold the clear, long recognized goal of public agencies to carefully address and fulfill the saving of public funds by upholding the bids of low bidders. In the decision of *Intercontinental Properties, Inc. v. State Department of Health and Rehabilitative Services*, 606 So 2d 380 (Fla. 3rd DCA 1992) the court ruled in overturning DOT's failure to award the bid to the low bidder as "...it is arbitrary for it to accept a higher bid:"

> "There is a very strong public interest in favor of saving tax dollars in awarding public contracts. There is no public interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, where the low bidder did not derive any unfair competitive advantage by reason of the technical omission." P.386
>
> Also, the court held:
>
> "At the least, a party protesting an award to the low bidder must be prepared to show that not only that the low bid was deficient, but must also show that the protestor's own bid does not suffer from the same deficiency as the lower bid." p.384

A reading of the recommended order shows that the judge recognized that DOT awarded "...the bid to Blue because it was the lowest bidder," but without considering whether Blue "**demonstrated prior experience** specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work specified in the scope of work" (paragraph 35). However, in the next paragraph 37, the judge seems hoisted by his own petard when he concludes that the failure of Blue to "demonstrate in the **Certificate of Experience Documentation form** that it had prior experience specifically related to HVAC maintenance, repair, installation, and replacement services," while summarizing the several similar projects completed by Blue. The Judge finally concluded that

Blue's low bid should be rejected solely because of the judge's self-established standards of a sufficiently higher number of jobs, rejecting Blue's testimony, as owner operator, describing (a form of demonstrating) several jobs with DOT's confirmation of satisfaction and quality by the customers, including DOT. Also, the judge failed to consider the testimony of DOT witnesses who spoke with Blue's customers and verified satisfactory work by Blue.

[It is distressing to the Petitioner to appear before a judge who has, as the language of the Judge confirms in his use in the record "of only 12 HVAC units" (paragraph 19), "of only eight HVAC units at two locations" (paragraph 20), "of only three HVAC units in three locations" (paragraph 23) and "of only two HVAC units at one store location" (paragraph 25)], that the judge himself demonstrated that he was predisposed to rule against DOT and reject the low bid of Intervenor Blue Ray'Z. There is not a crumb of evidence in the record that a bidder must complete the Certification of Experience form by listing at least a specific number of units maintained, repaired or installed, the judge's ruling being an example of form over substance.

The overriding conclusion to be reached is that the Administrative Judge demonstrated that he acted and ruled as though he were the public agency/entity/person lawfully empowered to award or not the contract to the lowest bidder. This judge-assumed role is not proper, is contrary to Florida law and bid letting practice, would be needlessly costly to the State of Florida and is contrary to the public interest.

Although the hearing before the hearing officer was a *de novo* proceeding, that simply means that there was an evidentiary hearing during which each party had a full and fair opportunity to develop an evidentiary record for administrative review purposes. It does not mean, as the hearing officer apparently thought, that the hearing officer sits as a substitute for the Department and makes a determination whether to award the bid *de novo*. Instead, the hearing

officer sits in a review capacity, and must determine whether the bid review criteria set forth in *Baxter's Asphalt* has been satisfied...

"In the present case, there was no sound reason for the hearing officer to override the judgment of the Department in awarding this contract to Coliseum." (the low bidder) *Intercontinental Properties, Inc.* p.386. Intervener, Blue Ray'Z, urges the Department to reject the Administrative Judge's Recommended Order. The order is deficient in both form and substance and is contrary to Florida law and bid letting practice. The question/issue/ruling to be considered by DOT is whether there is any "sound reason to override the judgment of DOT in awarding the contract to" Blue Ray'Z, the low bidder with documented and verified experience. The overriding factor should be whether the judge's unsupported Conclusion of Law set forth in paragraph 58 and others should be honored by DOT and sustained:

"Moreover, as detailed above, DOT's failure to consider whether Blue's prior experience is specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, tactical scope and volume of work to that specified in the scope of work **is arbitrary and capricious**. (Emphasis added.) DOT simply cannot ignore the experience criteria it put in the ITB, which was required as a condition of responsiveness determination."

Intervenor Blue Ray'Z states without qualification and without resorting to unsupported, naked argument that the Recommended Order should be rejected by DOT and the contract awarded to Blue Ray'Z so that work can begin and the public interest can be honored.

CERTIFICATE OF SERVICE

I HERBY CERTIFY that I have this 7th day of September 2017, electronically filed/delivered via U.S. Mail and/or Electronic Mail a true and correct copy of the foregoing to

the parties named in the following service list.

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs. Case No. 17-3184BID

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

BLUE RAY'Z HEATING AND AIR CONDITIONING, LLC,

Intervenor.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings for final hearing on June 27, 2017, in Orlando, Florida.

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STATEMENT OF THE ISSUES

Whether Respondent, Department of Transportation's ("DOT"), notice of intent to award a contract to Intervenor, Blue Ray'z Heating and Air Conditioning, LLC ("Blue"), for maintenance, repair, installation, and replacement of heating, ventilation, and air conditioning ("HVAC") equipment and components located at various facilities along Florida's Turnpike System, is contrary to DOT's governing statutes, rules, or the bid specifications, and contrary to competition, clearly erroneous, or arbitrary and capricious.

PRELIMINARY STATEMENT

On March 10, 2017, DOT published its bid solicitation for ITB-DOT-16/17-8017-AC, seeking bids from contractors for maintenance, repair, installation, and replacement of HVAC equipment and components at various facilities along Florida's Turnpike System. DOT received bids from four proposers on or before April 4, 2017. On April 11, 2017, DOT posted a notice of intent to award the contract to Blue.

On April 13, 2017, Petitioner, E.R. Reeves Corp., d/b/a All Seasons Air Conditioning ("All Seasons"), timely filed a notice of intent to protest the award. On April 19, 2017, All Seasons timely filed a separate formal written protest and protest bond. On May 10, 2017, DOT entered an Order of Dismissal without Prejudice, requiring All Seasons to file an amended petition within ten days. On May, 19, 2017, All Seasons filed its Amended Petition.

On May 31, 2017, DOT referred the matter to the Division of Administrative Hearings ("DOAH"), to assign an Administrative Law Judge to conduct the final hearing. On June 7, 2017, Blue filed a motion to intervene. On June 7, 2017, the undersigned entered an Order setting this matter for final hearing on June 27, 2017. On June 8, 2017, the undersigned entered an Order granting the motion to intervene. On June 23, 2017, the parties filed their Joint Pre-hearing Statement. On June 23, 2017, All Seasons filed a motion to amend the petition, which DOT opposed. On June 26, 2017, a telephonic hearing on the motion was held, with counsel for the parties participating in the hearing. On June 26, 2017, the undersigned entered an Order granting the motion.

The final hearing commenced as scheduled on June 27, 2017, with all parties present. At the hearing, Joint Exhibits 1 through 17 were received in evidence upon stipulation of the parties. All Seasons presented the in-person testimony of

Leonard Robinson, Alan Chua, Trisa Thomas, Santiago Alvarez, Anthony Davis, and Lee-Ann Reeves. All Seasons' Exhibits 1, 5, 6, 10, and 11 were received in evidence.[1/] DOT presented the in-person testimony of Leonard Robinson, Alan Chua, Trisa Thomas, Santiago Alvarez, and Sheree Merting. Blue presented the in-person testimony of Anthony Davis.

The two-volume final hearing Transcript was filed at DOAH on July 27, 2017. On August 7, 2017, All Seasons and DOT timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order. Blue did not file a proposed recommended order.

The stipulated facts in the parties' Joint Pre-hearing Statement have been incorporated herein as indicated below. Unless otherwise indicated, all statutory references refer to the 2016 Florida Statutes.

FINDINGS OF FACT

1. DOT is an agency of the state of Florida tasked with procuring the construction of all roads designated as part of the State Highway System, the State Park Road System, or any roads placed under DOT's supervision by law.

2. On March 10, 2017, DOT published its bid solicitation for ITB-DOT-16/17-8017-AC (the "ITB"), seeking bids from contractors for maintenance, repair, installation, and replacement of HVAC equipment and components at various

facilities along Florida's Turnpike (SR 91) milepost 172.0 to milepost 312.0; Southern Connector (SR 417) milepost 0.0 to milepost 6.5; Beachline Expressway (SR 528) milepost 0.0 to milepost 8.4; Seminole Expressway (SR 417) milepost 37.7 to milepost 55.0; and Daniel Webster Western Beltway (SR 429) milepost 0.9 to milepost 11.0.

3. The scope of work of the ITB requires all labor, materials, and incidentals necessary to provide maintenance and repair of 232 HVAC units located at 65 facilities along Florida's Turnpike System. The contract is for one year, with three one-year renewal periods.

4. The 65 facilities span the distance from Wildwood in the north at milepost 304 to past Yeehaw Junction in the south to milepost 172, and from a westernmost point on State Road 429 at milepost 11 (Orlando area) to the easternmost section of State Road 417.

5. Under the ITB, the vendor is required to conduct bimonthly preventative maintenance services on each HVAC unit; a total of five visits per site, per year. The vendor is also required during the first month of the contract and any subsequent annual renewal periods to conduct one annual preventative maintenance service. The annual maintenance is typically more extensive than the 60-day maintenance. However,

the bi-monthly and annual maintenance services require, on average, 30 minutes for each of the 232 HVAC units.

6. The vendor is also required to provide unscheduled, emergency services to diagnose problems and make necessary repairs of units that are not operating properly. An unscheduled repair could take several hours to complete, and there have been occasions where more than one unit needed a repair at the same time.

7. The vendor must be available 24 hours a day, seven days a week, 52 weeks a year, to provide unscheduled, emergency services. Most air conditioning work is treated as an emergency, which requires the vendor to respond within three hours.

8. The ITB includes specifications, schedules, a list of facilities, and other materials.

9. Section 9.1 of the ITB requires bidders to meet certain minimum qualifications, including demonstrating the experience necessary to satisfactorily perform the services within the scope of work. Of particular relevance to the instant case is the following language on page 12 of the ITB:

> • Certification of Experience
>
> The organized business enterprise (e.g. corporation, LLC or sole proprietorship) shall have been licensed and actively involved in the type of business requested for a minimum of three (3) years. Prior experience shall specifically be related to HVAC maintenance, repair, installation and

> replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the Scope of Work for this Contract. Submit documentation of the work experience with the bid package.

10. Pursuant to section 9.2, "[f]ailure by the bidder to provide the above item(s) will constitute a non-responsive determination. Bids found to be non-responsive will not be considered."

11. The Certification of Experience requirement is also referenced on page 2 of the ITB, followed by this statement: "The Department will review carefully to determine if the Vendor is responsive, responsible and qualified in the area of work contemplated by this Contract."

12. A two-page "Certification of Experience Documentation" form is located on pages 23 and 24 of the ITB. The form reiterates, in pertinent part:

> Prior experience shall specifically be related to the technical scope and volume of work to that specified in the scope of work for this Contract. Submit documentation of the work experience with the bid package.
>
> The Department will review carefully to determine if the Vendor(s) is responsive, responsible and qualified in the area of work contemplated by this Contract.
>
> Describe your work experience in detail for the minimum period required, beginning with your current or most recent project. Use a separate block to describe each project. (Print out additional copies of the form or attach additional sheets as necessary.)

13. The form includes many lines, spaces, and separate blocks for bidders to provide the client names, addresses, and telephone numbers; dates of service; dollar value of each project; client project manager for each project; and a description of each project. The form includes enough lines and spaces for bidders to provide the required information for up to seven clients. The bidders are directed to attach additional sheets as necessary.

14. The deadline for submission of bids was Tuesday, April 4, 2017, at 2:30 p.m.

15. On April 4, 2017, DOT received and opened bids from four vendors in response to the ITB, which revealed the following bid tabulation prices: (1) All Seasons ($158,446.00); (2) Blue ($128,630.00); (3) Kenyon & Partners, LLC ($279,183.00); and (4) Florida Drawbridges, Inc. ($331,183.00).

16. On April 4, 2017, DOT posted a notice of intent to award the contract for the work described in the ITB to Blue.

17. Notwithstanding the requirement for each bidder to demonstrate prior experience "specifically . . . related to HVAC maintenance, repair, installation and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the Scope of Work for this Contract," Blue failed to demonstrate such experience in the Certification of Experience Documentation form.

18. The first client listed on Blue's Certification of Experience Documentation form is the Florida Department of Juvenile Justice ("DJJ"). With regard to this client, Blue indicated service dates of June 2015 to present and a project dollar value of $5,000.00 per year. As to the project description, Blue stated: "Provide HVAC Maintenance, Repair & Service @ Orange Regional Juvenile Detention Center."

19. At hearing, Mr. Davis, the sole owner and operator of Blue, conceded the work involved a total of only 12 HVAC units, in two DJJ buildings, and at the same location.

20. The second client listed is Florida Environmental Compliance Corp. ("FECC"). With regard to this client, Blue indicated service dates of 2012 to present and no dollar value for the project was provided. As to the project description, Blue stated: "HVAC Maintenance, Repair & Service. Installation."

21. At hearing, Mr. Davis conceded the work for FECC involved a total of only eight HVAC units at two locations (Polk County-two units, and Orlando-six units).

22. The third client listed is DOT. With regard to this client, Blue indicated service dates of July through August 2015, and the dollar value of the project was $21,300.00. As to the project description, Blue stated: "Installation of Recorder Room Ductless split system."

23. At hearing, Mr. Davis conceded the work for DOT involved the installation of only three HVAC units in three locations at a cost of $7,100.00 each.

24. The fourth client listed is CVS. With regard to this client, Blue indicated service dates of July through August 2014, and the dollar value of the project was $17,000.00. As to the project description, Blue stated: "Installation of Mini split system in CVS store clinics."

25. At hearing, Mr. Davis conceded the work for CVS involved the installation of only two HVAC units at one store location.[2/]

26. DOT did not review Blue's Certification of Experience Documentation form to determine whether Blue demonstrated the necessary qualifications and experience required by the ITB.

27. At hearing, none of the witnesses presented by DOT could testify as to Blue's demonstration of prior experience, specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work.

28. Leonard Robinson, a contract manager for Jacobs Engineering, the consultant for the project, testified he was involved only "to a very small extent" in the review of Blue's bid. Mr. Robinson testified that "the only thing I had to do was

to award the bid per the lowest bidder as written in the contract and state the reason why I'm doing so and also sign the Conflict of Interest form. That is it." Mr. Robinson did not review Blue's qualifications or past experience, and he could not say that Blue could perform the work described in the ITB.

29. Alan Chua is the capital improvement procurement administrator for Jacobs Engineering. Mr. Chua evaluated Blue's bid to determine whether it corresponded to the engineer's estimate. He testified he reviewed the Certification of Experience Documentation form, but only as to the dates and to the limited extent necessary to determine whether the projects listed by Blue satisfied the three years of experience required by the contract. Mr. Chua conceded he did not review the project descriptions for the four referenced clients identified on the form, and he could not say whether any of the four projects identified on the form were similar in volume or technical scope to that specified in the ITB.

30. Trisa Thomas is a contracts development manager for Jacobs Engineering. Ms. Thomas testified she reviewed the Certification Experience Documentation form. Ms. Thomas testified she reviewed the dates to determine whether the projects listed by Blue satisfied the three years or more of experience required by the contract. She further testified she reviewed the dates, project manager, and project descriptions.

As to the project descriptions, Ms. Thomas testified she reviewed the type of work Blue did for the company to see if it was related to the work specified in the ITB. However, she did not consider the volume of Blue's work.

31. Significantly, Ms. Thomas testified:

> Q: Okay. All right. Do you know why the dollar value of the project is on the Certification of Experience Documentation?
>
> A: Just to get an idea what they--how much they probably performed.
>
> Q: So would that help you get an idea of the volume of work that they performed for that client?
>
> A: I'm not even really sure if that played a factor.
>
> Q: And when you say, I'm not sure if that played a factor, what--what are you referring to?
>
> A: Well I guess what I'm saying is, I'm--that's really not where my concentration is. I'm looking at the years, the project description, what they--the type of work they performed for the--for that agency, and if the references are credible or, you know, satisfactory.
>
> Q: Okay. And when you say they're satisfactory, what do you look at to determine if they're satisfactory?
>
> A: Based on the service that they provided to them, the vendor will let us know how pleased they were with the work that they provided to their agency.
>
> Q: All right. Looking at this Joint Exhibit 5, pages 5 and 6, which places did

Blue Ray'z perform HVAC maintenance, repair, installation and repair services that were of the same technical scope as the Invitation to Bid?

A: I see on the Certification of Experience where they provided HVAC repair and service installation. Also I see where they provided installation of a recorder room. But the volume, there's--I don't--I wouldn't be able to determine that.

Q: And let me ask my question again. So which places did Blue Ray'z perform HVAC maintenance, repair, installation and replacement services that were of the similar technical scope?

A: I don't know.

Q: What maintenance, repair and installation or replacement services did Blue Ray'z provide to another vendor that was similar to the volume of work specified in the Invitation to Bid?

A: The volume work? I don't know.

Q: Do you know if the bid by Blue Ray'z was reviewed by anybody to determine if the experience was similar in size, technical scope and volume of work specified in the Scope of Work?

A: I don't know.

Tr., Vol. I, pp. 121-123.

32. Santiago Alvarez is the facilities and telecommunications administrator for the Turnpike Enterprise, which is part of DOT. Mr. Alvarez testified he did not review the Certification of Experience Documentation form in any detail.

He just looked to confirm the documents were included in the bid package.

33. Sheree Merting is the contract services administrator for DOT's Turnpike Enterprise. Ms. Merting testified she was not involved in the evaluation of Blue's bid.

34. Amanda Cruz is a contract analyst for DOT. She did not review Blue's bid to determine whether Blue was qualified by having the experience required by the ITB.

35. DOT established specific requirements for the ITB to determine responsiveness and then failed to determine if Blue had prior work experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work.

36. DOT awarded the bid to Blue because it was the lowest bidder, without considering whether Blue demonstrated prior experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work.

37. DOT awarded the bid to Blue because it was the lowest bidder, even though Blue failed to demonstrate in the Certification of Experience Documentation form that it had prior experience specifically related to HVAC maintenance, repair,

installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work.

38. In sum, Blue is not a responsive and responsible vendor, and DOT's proposed action is contrary to the bid specifications, clearly erroneous, contrary to competition, arbitrary and capricious.[3/]

CONCLUSIONS OF LAW

39. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(3), Florida Statutes.

40. Pursuant to section 120.57(3)(f), the burden of proof rests with All Seasons as the party opposing the proposed agency action. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). All Seasons must sustain its burden of proof by a preponderance of the evidence. See Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

41. Section 120.57(3)(f) provides in part as follows:

> Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's

> rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

42. The phrase "de novo proceeding," as used in section 120.57(3)(f), describes a form of intra-agency review. "The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." State Contracting, 709 So. 2d at 609.

43. A bid protest proceeding is not simply a record review of the information that was before the agency. Rather, a new evidentiary record based upon the facts established at DOAH is developed. J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127, 1132-33 (Fla. 1st DCA 2013).

44. While facts are determined based upon new evidence, applicants are not permitted to retroactively submit information required by the ITB, but omitted from their response. Section 120.57(3) provides that "no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered." The application must therefore stand on its own, as originally submitted, in light of determined facts. § 120.57(3), Fla. Stat.

45. After determining the relevant facts based on the evidence presented at hearing, the agency's intended action will be upheld unless it is contrary to the governing statutes, the agency's rules, or the bid specifications. The agency's intended action must also remain undisturbed unless it is clearly erroneous, contrary to competition, arbitrary, or capricious.

46. The Florida Supreme Court explained the clearly erroneous standard as follows:

> A finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. Such a mistake will be found to have occurred where findings are not supported by substantial evidence, are contrary to the clear weight of the evidence, or are based on an erroneous view of the law. Similarly, it has been held that a finding is clearly erroneous where it bears no rational relationship to the supporting evidentiary data, where it is based on a mistake as to the effect of the evidence, or where, although there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces the court that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.

Dorsey v. State, 868 So. 2d 1192, 1209 n.16 (Fla. 2003).

47. The contrary to competition standard precludes actions which, at a minimum: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. Phil's Expert Tree Serv., Inc. v. Broward Cnty. Sch. Bd., Case No. 06-4499BID, 2007 Fla. Div. Admin. Hear. LEXIS 161, at *23 (Fla. DOAH Mar. 19, 2007); Care Access PSN, LLC v. Ag. for Health Care Admin., Case No. 13-4113BID, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *54 (Fla. DOAH Jan. 2, 2014).

48. An action is "arbitrary if it is not supported by logic or the necessary facts," and "capricious if it is adopted without thought or reason or is irrational." Hadi v. Lib. Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. J.D., 114 So. 3d at 1130. Thus, under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." Adam Smith Enters., Inc. v. Dep't of

Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Nevertheless,

> the reviewing court must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of each of these factors to its final decision.

Id.

49. Turning to the merits of the instant case, DOT's proposed action in awarding the bid to Blue is contrary to the bid specifications, clearly erroneous, contrary to competition, and arbitrary and capricious.

50. As detailed above, Blue's bid was nonresponsive and deviated materially from bid specifications of the ITB. The plain language of the ITB required Blue to demonstrate in the Certificate of Experience Documentation form, as a condition of responsiveness, that it had prior experience specifically "related to HVAC maintenance, repair, installation and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the Scope of Work for this Contract." Blue failed to comply with the plain and ordinary language of the ITB to demonstrate such experience. Manor v. Redding Dev., Case No. 1D16-2553, 2017 Fla. App. LEXIS 11944, at *7 (Fla. 1st DCA Aug. 21, 2017)("Florida

Housing was required to interpret the RFA consistently with its plain and unambiguous language.").[4/]

51. DOT does not contend that the language within the experience requirement of the ITB or form is ambiguous. Instead, DOT argues that Blue met the experience requirement or, in the alternative, the requirement constituted a minor irregularity that DOT could waive.

52. It has long been recognized that "[a]lthough a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. State Dep't of Gen. Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

53. In addition, courts have considered the following criteria in determining whether a variance is material and thus non-waivable:

> [F]irst, 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, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

> [S]ometimes it is said that a bid may be rejected or disregarded if there is a material variance between the bid and the advertisement. A minor variance, however, will not invalidate the bid. In this context a variance is material if it gives the bidder a substantial advantage over the other bidders, and thereby restricts or stifles competition.

Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *33 (quoting Robinson Elec. Co. v. Dade Cnty., 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982)).

54. In the present case, Blue's failure to demonstrate in the Certificate of Experience Documentation form prior experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work, is material.

55. The experience requirement, which was designed to winnow the field, should rarely, if ever, be waived as immaterial. This is because an experience requirement acts as a barrier to access into the competition, discouraging some would-be bidders who lack a required characteristic, from submitting a bid. Phil's Expert Tree Serv., Inc., 2007 Fla. Div. Admin. Hear. LEXIS 161, at *34.

56. The experience specification prescribes an attribute that the successful bidder must possess: three years of experience specifically related to HVAC maintenance, repair,

installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work. The obvious intent of this provision is to weed out unwanted potential bidders who lack such experience. Id.

57. To waive this experience requirement lowers the bar for the low bidder, giving the appearance of preferential treatment which compromises the integrity of the competitive bidding process. Id.[5/]

58. Moreover, as detailed above, DOT's failure to consider whether Blue's prior experience is specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work, is arbitrary and capricious. DOT simply cannot ignore the experience criteria it put in the ITB, which was required as a condition of responsiveness, and which DOT stated it would carefully review as part of its responsiveness determination.

59. DOT purports to justify its intended action based on testimony at hearing indicating that the specifications in the current ITB were boiler-plate and simply borrowed from language in other project bid specifications. The fact that DOT may have used boiler-plate language from other project bid specifications

does not excuse DOT's failure to consider the criteria required to be met and reviewed in response to the ITB.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Department of Transportation, enter a final order rescinding the proposed award to Intervenor, Blue Ray'z Heating and Air Conditioning, LLC.

DONE AND ENTERED this 28th day of August, 2017, in Tallahassee, Leon County, Florida.

DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of August, 2017.

ENDNOTES

[1/] All Seasons' Exhibit 11 is the transcript of the deposition of Amanda Cruz and accompanying exhibits to the deposition. At the hearing, the parties offered the deposition of Ms. Cruz in lieu of her in-person testimony.

[2/] At hearing, Mr. Davis conceded that Blue has no employees. Blue operates out of two vehicles, one of which is a van owned by Mr. Davis, individually. All of Blue's equipment and supplies are stored in these two vehicles.

All Seasons was the vendor for DOT for four years under the prior contract before its expiration and the subject rebid. All Seasons had seven employees and seven vehicles dedicated to performing services for DOT.

[3/] In paragraph 11 of its Proposed Recommended Order, DOT states that the "vendor to which this contract is awarded is permitted to subcontract up to 40% of the work to another entity qualified to perform the work, including emergencies which demand a three-hour response time." DOT also contends that Blue is a "Class B air conditioning contractor." That a vendor holds a certain license that allows it to do certain work and might be permitted to subcontract up to 40 percent of the work after receiving the award does not excuse the requirement of the ITB that a bidder demonstrate its minimum experience in its response to the bid as required by the ITB.

In other sections of its Proposed Recommended Order, DOT attempts to bolster Blue's lack of experience in response to the ITB by referring to the following testimony of Mr. Davis presented at the hearing that: (1) "Blue plans on hiring at least one additional full-time employee and one additional part-time employee if it is awarded the contract. . . ." (paragraph 45); (2) "Blue owns or has access to all equipment necessary to fulfill the terms of the contract" (paragraph 46); (3) "Blue routinely maintains over 500 units simultaneously, with multiple customers" (paragraph 48); and (4) "Blue's dollar value in receipts in 2016 was approximately $180,000.00" (paragraph 50).

The undersigned finds Mr. Davis's testimony unpersuasive, and it is not credited. In determining whether Blue's bid is responsive to the ITB, DOT and Blue are bound by the information Blue submitted to DOT in the Certificate of Experience Documentation form in response to the ITB before the bids were opened. To allow the aforementioned information to be considered once the bids are opened would violate section 120.57(3)(f), Florida Statutes, which specifically provides, that "[i]n a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered . . . ."

[4/] In Manor, the First District Court of Appeal recently addressed the Florida Housing Finance Corporation's reversal of its prior determination that Brownsville was eligible for federal low-income tax credits following an evidentiary hearing before an Administrative Law Judge ("ALJ")at DOAH. The court held that

Brownsville's application for affordable housing credits "clearly complied with all of the RFA requirements at the application stage by submitting the required forms, providing a DLP, and providing the appropriate assurances that it intended to comply with all of the RFA terms." The court found the ALJ erred in focusing on the fact that Brownsville had not commenced the "clustering process" at the time of application, and there was no guarantee that clustering would be approved. In reaching this conclusion, Judge Roberts found:

> However, nothing in the RFA required Brownsville to begin the clustering process or guarantee approval as of the application stage. This is underscored by the fact that an applicant was not required to submit a costly site plan at the application stage. Instead, the configuration of a proposed development would be fleshed out in the final site plan approval process, which occurs after the application stage during the credit underwriting. The RFA's plain language clearly recognized the distinct stages in the process by providing that a scattered site applicant must demonstrate compliance with the RFA "during the credit underwriting process."

Manor, 2017 Fla. App. LEXIS 11944, at *8-10.

Thus, central to the Manor court's holding was that the RFA did not require the information the ALJ determined was non-responsive to the RFA. In fact, the plain language of the RFA in Manor recognized that the information could be provided during the credit underwriting process after the response to the RFA. In the instant case, Blue was required, as a condition of responsiveness, to demonstrate its prior experience specifically related to HVAC maintenance, repair, installation, and replacement services of commercial facilities similar in size, technical scope, and volume of work to that specified in the scope of work in the Certification of Experience Documentation form submitted to DOT in response to the ITB. Blue's failure to demonstrate the required experience, required by the plain language of the ITB, makes its bid nonresponsive and a material deviation.

[5/] In its amended petition, All Seasons contends that Blue's bid is also nonresponsive because Blue failed to submit with its bid

Addendum #2. Addendum #2 was merely an acknowledgement of receipt of notice of a non-mandatory site visit and served as a mechanism to assure potential bidders were notified that a site visit would be available, should those bidders later claim they were not notified of the option. All Seasons' argument in this regard is rejected.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.