

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

UNIVERSITY OF CENTRAL FLORIDA,

Appellant,

v.

Case No. 5D19-370

BOSTON CULINARY GROUP, INC.
D/B/A CENTERPLATE,

Appellee.

_____ /

Opinion filed September 4, 2020

Administrative Appeal from
the Division of Administrative
Hearings

Michael D. Crosbie, Nicole L. Ballante and
Jennifer P. Sommerville, of Shutts & Bowen
L.L.P., Orlando, for Appellant.

Cindy A. LaQuidara, Thomas Ingram, R.
Dale Noll and Howard Jay Harrington, of
Akerman LLP, Jacksonville, for Appellee.

PER CURIAM.

We affirm all issues in this appeal from a final administrative action, and we write only to note that we find competent, substantial evidence to support the administrative law judge's conclusion that the University of Central Florida participated in the bid proceeding for an improper purpose. See Brown v. Agency for Health Care Admin., 890

So. 2d 1170, 1171 (Fla. 5th DCA 2004) (“If supported by competent, substantial evidence, the order must be affirmed, absent a showing of a material error in procedure, an incorrect interpretation of law, or an abuse of discretion.”). Finding no basis to reverse the challenged order, we accordingly affirm the award of attorney’s fees in this matter.

AFFIRMED.

ORFINGER and GROSSHANS, JJ., concur.
HARRIS, J., dissents, with opinion.

The University of Central Florida (“UCF”) appeals an order from the administrative law judge (“ALJ”) awarding attorney’s fees and costs to Boston Culinary Group, Inc. d/b/a Centerplate (“Centerplate”). UCF raises several challenges to the attorney’s fee order, only one of which I would find to have merit. I find the record in this case devoid of any evidence, much less competent, substantial evidence, that would establish that UCF *participated in the bid protest proceeding* for an improper purpose. I would therefore reverse the order awarding attorney’s fees and costs to Centerplate.

In 2017, UCF issued an Invitation to Negotiate (“ITN”) seeking to hire a company to operate a concessions program on the university’s main campus. UCF received four proposals in response to the ITN; pertinent here are the ones from Centerplate and from Ovarious Food Services L.P. d/b/a Spectra Food Services & Hospitality (“Spectra”). Ultimately, UCF posted its notice of intent to award the contract to Spectra.

Centerplate filed a formal bid protest pursuant to the ITN and the Florida Board of Governor’s Regulations (“BOGR”) 18.002 and 18.003, alleging, among other things, that UCF had improper meetings with Spectra prior to posting its notice of intent to award the contract to Spectra; that UCF had deviated from its own specifications with the ITN; and that UCF utilized a flawed scoring system as it had, in part, calculated scores before Centerplate’s best and final offer was submitted.

An ALJ was eventually appointed to conduct a quasi-judicial hearing pursuant to BOGR 18.002. After that final hearing, the ALJ entered a recommended order in which it found numerous instances of improper conduct by UCF throughout the ITN process. There is ample evidence in the record to support these findings.

Centerplate soon thereafter moved for attorney's fees and costs, pursuant to BOGR 18.002(22), which provides:

(22) Costs and Attorney Fees. If the Quasi-Judicial Officer determines that the non-prevailing party has participated in the hearing for an improper purpose, the Quasi-Judicial Officer may award attorney's fees and costs to the prevailing party, as appropriate. If the Quasi-Judicial Officer awards the university attorney's fees and/or costs, upon Protestor's payment of such costs, the university shall return the solicitation protest bond to the Protestor. "Improper purpose" means participation in the protest proceeding primarily to harass, cause unnecessary delay, frivolous purpose; needlessly increasing costs of litigation, licensing, or securing the approval of an activity; or filing a meritless protest.

After conducting a hearing on Centerplate's motion for fees, the ALJ determined that UCF participated in the proceedings for an improper purpose. The findings by the ALJ to support this determination included UCF's pattern of conduct in developing the ITN, that UCF knew its actions in the ITN process were unauthorized, and that UCF favored Spectra throughout the process. All of these activities occurred during the ITN process and prior to the bid protest proceeding.

The ALJ further found that UCF employed some form of artifice in order to allow Spectra to provide concession services during the protest proceedings and that UCF was aware of its wrongdoing yet proceeded with the bid protest proceeding. I cannot see how any of the findings by the ALJ could be sufficient to establish Centerplate's entitlement to fees under BOGR 18.002(22). Engaging in improper conduct, before or even during the bid protest proceeding, is not sufficient to support a finding that UCF *participated* in the proceeding for an improper purpose. Furthermore, UCF exercising its right to participate in a hearing would have to be found to have been *primarily* intended to harass

Centerplate, to cause delay, or be for some frivolous purpose. There is absolutely no evidence to support a finding that UCF's actual participation in the bid protest proceeding was done *primarily* for any of those reasons. In fact, the ALJ made the specific finding that the "improper purpose" UCF engaged in was that it maintained and pursued the award of a contract in violation of its own rules and the terms of its ITN. That finding is clearly not the same as participating in the bid protest proceeding primarily for an improper purpose.

Although UCF's hands are far from clean in this matter and an award of fees and costs against it certainly seems just, the controlling regulations simply do not allow it. There is no evidence in this record that would establish the necessary triggering event that would authorize the award of attorney's fees against UCF. Therefore, I would reverse the order awarding fees.