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

CALIPER SYSTEMS, INC., d/b/a
CALIPER CORPORATION,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

DOT Case No. 17-088
DOAH Case No. 18-0384BID

Respondent,

and

PTV AMERICA, INC.,

Intervenor.
_____/

FINAL ORDER

This bid protest case was referred to the Division of Administrative Hearings. Pursuant to notice a hearing was conducted before the assigned Administrative Law Judge, Hon. Robert A. Meale, in February 2018. The ALJ entered a Recommended Order on April 20, 2018 (attached). Caliper and PTV timely filed exceptions. The Department did not file exceptions, but did timely file responses to the other parties' exceptions.

Standards for agency rulings on exceptions

Where a party files exceptions to a recommended order within 15 days of its entry, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not

include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat.; see also Fla. Admin. Code R. 28-106.217(1) ("Exceptions shall identify the disputed portion of the recommended order by page number or paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.").

"As with recommended orders in other formal hearings, the agency may reject the administrative law judge's findings of fact in a bid protest only if the findings of fact are not supported by competent and substantial evidence or if the proceedings did not comply with the essential requirements of law." Gtech Corp. v. Dep't of the Lottery, 737 So. 2d 615, 619 (Fla. 1st DCA 1999); § 120.57(1)(*l*), Fla. Stat. "Competent, substantial evidence is such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred or such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." Bill Salter Adver., Inc. v. Dep't of Transp., 974 So. 2d 548, 550-551 (Fla. 1st DCA 2008) (citations and internal quotations omitted). "Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact." Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). "If the ALJ's findings of fact are supported by competent, substantial evidence, the agency cannot reject them even to make alternate findings that are also supported by competent, substantial evidence." Lantz v. Smith, 106 So. 3d 518, 521 (Fla. 1st DCA 2013). 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.

There is a fundamental difference between the deference an agency must accord to findings of evidentiary fact and findings of ultimate fact infused by policy considerations. "Matters that are susceptible of ordinary methods of proof, such as determining the credibility of witnesses or the weight to accord evidence, are factual matters to be determined by the hearing officer. On the other hand, matters infused with overriding policy considerations are left to agency discretion." Baptist Hosp., Inc. v. Dep't of Health & Rehab. Servs., 500 So. 2d 620, 623 (Fla. 1st DCA 1986); see also McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 579 (Fla. 1st DCA 1977) ("[W]here the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility, a reviewing court will give correspondingly less weight to the hearing officer's findings in determining the substantiality of evidence supporting the agency's substituted findings.").

The Department may reject or modify conclusions of law over which it has substantive jurisdiction. Gtech, 737 So. 2d at 619; § 120.57(1)(*l*), Fla. Stat. (2016). In a bid protest, "the ALJ is charged with reviewing the agency's proposed action against appellate-like 'standard[s] of proof.'" J.D. v. Fla. Dep't of Children and Families, 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013) (citing § 120.57(3)(f), Fla. Stat.) (internal quotations and brackets in original). The DOAH hearing is de novo, "but its purpose is to evaluate the action taken by the agency." Id. The ALJ does not "sit as a substitute" for the Department and make a determination whether to award the bid de novo. Id. at 1133 (citations omitted). The Department "is not bound by the ALJ's legal conclusion as to whether the intended action was an abuse of discretion, but the agency's review of that issue is circumscribed by the standards in section 120.57(1)(*l*)." Id. Thus, even if the ALJ determines as a factual matter that the protesting bidder met its burden, and concludes as a legal matter that the agency should not award the contract as proposed, the agency head retains discretion to award

the contract "so long as the final order 'states with particularity its reasons for rejecting or modifying such conclusion of law . . . and make[s] a finding that its substituted conclusion of law . . . is as or more reasonable that that which was rejected or modified." Id. (quoting § 120.57(1)(*l*), Fla. Stat.) (ellipses in original).

Rulings on Caliper's Exceptions

Exception 1: Caliper takes exception to paragraph 39's finding that Caliper's proposal is non-responsive because it imposes substantial annual support fees on "free" university licenses, even though the Price Proposal Form in the RFP (RO ¶ 2) includes the price of the "Annual License Renewal" for three years, and because it fails to provide free copies of the software for students.

While paragraph 39 is labeled a finding of fact, the Department is not bound by that label. Sch. Bd. of Leon County v. Hargis, 400 So. 2d 103, 107 (Fla. 1st DCA 1981); Battaglia Properties v. Fla. Land & Water Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1993). Whether a bid is responsive is a legal conclusion over which the Department has jurisdiction. Walker v. Dep't of Envtl. Prot., Final Order No. 96-2019 (DEP March 11, 1997), available at 1997 WL 1052673, at *4; see also Tropabest Foods, Inc. v. Dep't of Gen. Servs., 493 So. 2d 50, 51 (Fla. 1st DCA 1986) (analyzing invitation to bid as legal instrument in determining whether vendor was responsive). The Department finds Caliper's proposed substituted conclusion of law that Caliper's proposal was responsive is not as or more reasonable than the ALJ's conclusion of law.

Alternatively, whether a bid is responsive may be deemed a finding of ultimate fact, infused by policy considerations for which the Department has special responsibility. (RO ¶ 58); see also Baptist Hosp., 500 So. 2d at 623; McDonald, 346 So. 2d at 579. The Department declines to exercise its discretion to reject the ALJ's finding of ultimate fact that Caliper's proposal was not responsive. Caliper's Exception 1 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 2: Caliper takes exception to paragraph 49, arguing it "inaccurately characterizes the nature of Caliper's evidence demonstrating the irrational scoring of PTV's proposal." It argues that the Department's evaluators concluded that PTV met the RFP requirements, but "there is no way any rational and fair person could reach this conclusion based on the record." Caliper also challenges the ALJ's finding that it relied "mostly" on the testimony of its principal, and argues paragraph 49 "unnecessarily observes" it is difficult for a bid protest petitioner to carry its burden of proving an agency's scoring was clearly erroneous without the testimony of at least one independent expert.

Caliper does not argue the factual findings in paragraph 49 are unsupported by competent, substantial evidence. Caliper's exception asks the Department to reweigh the evidence to reach a desired conclusion. The Department cannot do so. 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."); Lantz, 106 So. 3d at 521. Caliper's Exception 2 is rejected.
§ 120.57(1)(*l*), Fla. Stat.

Exception 3: Caliper takes exception to paragraph 52, which credits the testimony of Evaluators 1 and 2 and finds Caliper "failed to prove" the scoring of Scope of Services 3 was clearly erroneous. Caliper claims paragraph 52 "inaccurately and inadequately reviews the Department's defective scoring of PTV's proposal" and "fails to account for most of the evidence presented on this point."

Whether a party meets its burden of proof is a question of fact. J.D., 114 So. 3d at 1133. Caliper does not argue the factual findings in paragraph 52 are unsupported by competent, substantial evidence. Instead, Caliper again asks the Department to reweigh the evidence to reach

a desired conclusion. The Department cannot do so. Bill Salter Adver., 974 So. 2d at 551; Lantz, 106 So. 3d at 521. Caliper's Exception 3 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 4: Caliper takes exception to paragraph 54's finding that Caliper's proposal was non-responsive, and essentially incorporates its Exception 1 by reference. The Department incorporates its ruling on that exception by reference. Caliper's Exception 4 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 5: Caliper takes exception to paragraph 55, which finds Caliper failed to prove the Department's scores for Scope of Services 7 were clearly erroneous in favor of PTV's proposal. Caliper argues paragraph 55 "inaccurately and inadequately reviews the Department's defective scoring of PTV's proposal" and "fails to account for most of the evidence presented on this point."

Whether a party meets its burden of proof is a question of fact. J.D., 114 So. 3d at 1133. Caliper does not argue the factual findings in paragraph 55 are unsupported by competent, substantial evidence. Instead, Caliper again asks the Department to reweigh the evidence to reach a desired conclusion. The Department cannot do so. Bill Salter Adver., 974 So. 2d at 551; Lantz, 106 So. 3d at 521. Caliper's Exception 5 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 6: Caliper takes exception to paragraph 63, which concludes for the reasons stated in the recommended order's findings of fact, Caliper "failed to prove" the Department's scoring of Caliper's proposal and PTV's proposal was clearly erroneous. Caliper argues that the Department's scoring of its proposal was not at issue, and argues that it did in fact prove the scoring of PTV's proposal was "clearly erroneous, contrary to completion [sic], arbitrary and capricious."

Taking its second argument first, whether a party meets its burden of proof is a question of fact. J.D., 114 So. 3d at 1133. Caliper does not argue the factual findings in paragraph 55 are unsupported by competent, substantial evidence. Instead, Caliper again asks the Department to

reweigh the evidence to reach a desired conclusion. The Department cannot do so. Bill Salter Adver., 974 So. 2d at 551; Lantz, 106 So. 3d at 521.

As for its first argument, even if Caliper is correct that its protest "does not depend on the Department awarding any more points than it did[,]" Caliper fails to explain how this would obviate the ALJ's finding that the Department's scoring of Caliper's proposal was not clearly erroneous. Caliper's Exception 6 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 7: Caliper takes exception to an unnumbered statement in the recommended order that its Exhibits 1 and 2 "were admitted, but not for the truth." Caliper argues that Exhibits 1 and 2 fall within various exceptions to the rule against hearsay.

Exception 7 does not ask the Department to reach a substituted conclusion of law. In fact, and in contrast to Caliper's other exceptions, Exception 7 does not ask the Department to take any action at all.

Even if Caliper had made a proper exception to the ALJ's statement, the Florida Evidence Code is not within the Department's substantive jurisdiction. Barfield v. Dep't of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001). Caliper's Exception 7 is rejected. Id.; § 120.57(1)(*l*), Fla. Stat.

Rulings on PTV's exceptions

Exception 1: PTV takes exception to paragraphs 13, 16, 58, 61, and 62 "to the extent" they find the Department "did not conduct a complete responsiveness review" of PTV's proposal.

The first hurdle this exception faces is that the term "complete responsiveness review" is not found anywhere in the recommended order, much less the identified paragraphs. PTV is thus in the unusual posture of taking exception to five paragraphs "to the extent" they find something they do not find.

PTV is on firmer ground where it argues paragraph 16's finding that "none" of the Department's evaluators conducted "any" examination of the proposals for responsiveness is not supported by competent, substantial evidence. The words "any" and "none" are categorical; their use means the finding is not based on weight or credibility. The finding that "none" of the evaluators conducted "any" examination for responsiveness is not supported by competent, substantial evidence if there is competent, substantial evidence that at least one evaluator conducted any kind of responsiveness examination of any proposal.

PTV's exceptions cite several pages of the hearing transcript in support of its argument that the evaluators conducted a more extensive examination than the ALJ allowed. Some of this testimony is in the present tense, i.e., one examiner testified that he "find[s]" PTV's proposal responsive (Tr. 369) and another did not "see" any response he would deem nonresponsive (Tr. 416). Other testimony reflects the past. (Tr. 413) (Q. "Did you give thoughtful consideration to how well PTV's and Caliper's proposals met the scope of services?" A. "Yes."); (Tr. 508) (Q. "Did you find that – by your review, did PTV's proposal to 7.4 responsive [sic] to the RFP Section 7.4?" A. "Yes, absolutely."); (Tr. 522-3) (Q. "First, as a TRC member, were you required to review the responses that you received from the vendors for responsiveness to make sure that they actually responded to the proposal?" A. "In terms of the requirements to the scopes of services, yes." ... Q. "And the question again is, you've testified that they responded, my question to you is, did you find that response responsive?" A. "I did.").

Caliper does not challenge PTV's statement that this testimony was uncontroverted. This uncontroverted, competent, and substantial evidence negates the ALJ's categorical statement that no evaluator did any responsiveness review.

The Department finds the finding of fact in paragraph 16 that "[n]one" of the Department's evaluators conducted "any" examination of the proposals for responsiveness is not supported by competent, substantial evidence. The Department substitutes the finding that three of the Department's evaluators examined the responses for responsiveness beyond determining whether the proposers were registered to do business in Florida and verifying that each proposal contained a Technical Proposal and Price Proposal.

While this substituted finding may preserve the reputations of the Department's evaluators for thoroughness, it has no effect on the outcome. Paragraph 16 "deems" that the Department determined PTV's proposal was responsive, which is tantamount to a finding of fact that the Department did so. Stringham v. Salt Lake City, 201 P.2d 758, 760 (1949) (defining "deem" as "consider, judge, decide, or conclude").

PTV's Exception 1 is accepted as stated above, and is otherwise rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 2: PTV takes exception to paragraphs 19-26[1] and the "factual findings" in paragraphs 58, 61 and 62. It argues that no competent, substantial evidence supports the ALJ's finding of "fact" that scope of services section 6.1 required a response, or that the proposers had to take section 6.1 into account when responding to section 7.3.2.

Paragraphs 19-25 interpret the RFP. The Department is not bound by the ALJ's label of paragraphs 19-25 as findings of fact. Hargis, 400 So. 2d at 107. The RFP is a legal instrument

[1] Exception 2 begins "PTV takes exception to finding of fact numbers 19, 20, 12, 22, 23, 24" (as well as what PTV calls the findings of fact in paragraphs 58, 61, and 62) but the text of the exception identifies paragraphs 19-26. PTV does not explain the incongruity. It is unclear whether PTV intended to limit Exception 2 to paragraphs 19-24 (plus 58, 61 and 62) or to include paragraphs 25 and 26. To facilitate meaningful review, the Department deems Exception 2 as an exception to paragraphs 19-26 and 58, 61, and 62.

and its interpretation is a question of law over which the Department has jurisdiction. Walker, 1997 WL 1052673, at *4; Tropabest Foods, 493 So. 2d at 51. The recommended order itself is consistent: paragraph 25 rejects the Department's "argument to disregard Scope of Services 6 as a source of mandatories" as a "misreading of the RFP."

The Department finds PTV's proposed conclusions of law are not as or more reasonable than the conclusions of law in paragraphs 19-25.

PTV takes exception to paragraph 26 in its Exception 3 with additional context. The Department's ruling on Exception 3 is incorporated by reference.

Paragraph 58 is a conclusion of law on the different burdens of proof for evidentiary facts vs. ultimate facts. It also concludes that whether a proposal deviates from an RFP or whether the deviation is material is subject to the clearly erroneous standard. Paragraph 61 is a conclusion of law that deviations from the RFP may render a proposal nonresponsive, but that the procuring agency may waive minor irregularities. The first sentence of Paragraph 62 is a conclusion of law that the Department's actions in determining responsiveness and scoring proposals is subject to the clearly erroneous standard.

Burdens of proof and standards for assessing responsiveness are conclusions of law that are outside the Department's substantive jurisdiction. The Department thus cannot reject or modify paragraphs 58 and 61, or the first sentence in paragraph 62. Barfield, 805 So. 2d at 1011.

The second sentence of paragraph 62 finds Caliper proved the Department's determination of responsiveness was clearly erroneous as to conversions of models, access as co-licensees for universities in their teaching capacity, and affordable access for universities as consultants. Whether a party meets its burden of proof is a question of fact. J.D., 114 So. 3d at 1133. The Department is not bound by the ALJ's label of paragraph 62. Hargis, 400 So. 2d at 107.

While the Department must accept the ALJ's factual finding that Caliper met its burden of proof, it is not bound by the ALJ's legal conclusion that the Department's proposed action was clearly erroneous. J.D., 114 So. 3d at 1133. The Department is "free" to modify or reject that legal conclusion within the constraints of Section 120.57(1)(*l*), Florida Statutes. Id. at 1133-4. The Department finds that PTV's proposed substituted conclusion of law is not as or more reasonable than the ALJ's conclusion of law.

The last sentence of paragraph 62 finds the Department's clearly erroneous determinations of responsiveness resulted in an intended award that is contrary to competition and the RFP. Again, the Department is not bound by this legal conclusion, and may reject it within the bounds of Section 120.57(1)(*l*). J.D., 114 So. 3d at 1133. The Department finds that PTV's proposed substituted conclusion of law is not as or more reasonable than the ALJ's conclusion of law.

PTV's Exception 2 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 3: PTV takes exception to 26-31 and the "factual findings" in paragraphs 58, 61 and 62.

Paragraph 26 is a finding of fact on how PTV's proposal responds to the RFP's Scope of Services 7.3.2. It largely consists of a block quote from PTV's proposal. PTV's exceptions use the same block quote.

The exception is not to the block quote itself, but to the ALJ's characterization of PTV's response as proposing to covert the Department's present Citilabs model, but not all of the models used by metropolitan planning organizations (RO ¶ 3) and local agencies. The recommended order contrasts this response with Caliper's, which the ALJ characterizes as an "unconditional" undertaking to convert the Department's Citilabs model as well as local activity-based models. (RO ¶ 27.) The recommended order goes on to explain the differences in the responses more fully.

(RO ¶¶ 28-31.) These are factual findings, supported by competent, substantial evidence, and the Department cannot reject them. PTV argues that the record includes competent, substantial evidence that would support different findings, but the Department cannot reject findings of fact on that basis. Lantz, 106 So. 3d at 521.

As for paragraphs 58, 61, and 62, the Department incorporates by reference its ruling on PTV's Exception 2. PTV's Exception 3 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 4: PTV takes exception to paragraphs 36-41 and the "factual findings" in paragraphs 58, 61 and 62. Paragraphs 36 and 37 primarily consist of block quotes from the responses of PTV and Caliper, respectively, to the RFP's Scope of Services 7.4, which states that universities will have no-cost teaching licenses, that the Department will make the selected software available to other public agencies, and requires affordable access to private firms (RO ¶ 34). Paragraph 38 finds that PTV's response is nonresponsive because it provides free access to professors and additional classroom licenses for up to 60 students, but provides for "academic pricing" for additional licenses. The ALJ found this was an impermissible condition on the requirement to treat universities as co-licensees. Paragraph 41 finds PTV's response is nonresponsive because it only extended preferential pricing to firms certified as disadvantaged business entities.

It is unclear why PTV nominally takes exception to paragraphs 39 and 40, which find that Caliper's response was also nonresponsive, albeit for different reasons. Regarding paragraph 39, the Department incorporates by reference its ruling on Caliper's first exception. Paragraph 40 is considered below.

The ALJ's findings of fact on how PTV and Caliper responded to Scope of Services 7.4 (RO ¶¶ 36-37) are findings of evidentiary fact, supported by competent, substantial evidence, and thus cannot be rejected or modified. § 120.57(1)(*l*), Fla. Stat.

The Department is not bound by the ALJ's label of paragraphs 38-41 as findings of fact. Hargis, 400 So. 2d at 107. The ALJ's legal conclusions that those responses were nonresponsive (RO ¶¶ 38-41) are within the Department's substantive expertise. Walker, 1997 WL 1052673, at *4; Tropabest Foods, 493 So. 2d at 51. The Department finds PTV's proposed substituted conclusion of law that PTV's proposal was responsive is not as or more reasonable than the ALJ's conclusion of law. PTV does not propose a substituted conclusion of law for paragraphs 39 and 40.

Alternatively, whether a bid is responsive may be deemed a finding of ultimate fact, infused by policy considerations for which the Department has special responsibility. (RO ¶ 58); see also Baptist Hosp., 500 So. 2d at 623; McDonald, 346 So. 2d at 579. The Department declines to exercise its discretion to reject the ALJ's finding of ultimate fact that PTV's proposal was not responsive.

As for paragraphs 58, 61, and 62, the Department incorporates by reference its ruling on PTV's Exception 2. PTV's Exception 4 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 5: PTV takes exception to paragraphs 32 and 42 and the "factual findings" in paragraphs 58, 61 and 62. Paragraph 32 finds PTV's nonresponsiveness to Scope of Services 6.1 and 7.3.2 conferred a competitive advantage. Paragraph 42 makes the same finding vis-à-vis Scope of Services 7.4.

It appears that PTV's Exception 5 is missing a paragraph. If PTV is arguing that whether a bid deviation confers a competitive advantage is a conclusion of law, PTV is correct. Harry

Pepper & Assocs., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977); Liberty Cty. v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982). The Department is not bound by the ALJ's label. Hargis, 400 So. 2d at 107. The Department finds that whether a bid deviation confers a competitive advantage on a Department procurement is a legal conclusion within its substantive jurisdiction. The Department also finds that PTV's proposed substituted conclusions of law are not as or more reasonable than the ALJ's conclusions of law.

As for paragraphs 58, 61, and 62, the Department incorporates by reference its ruling on PTV's Exception 2. PTV's Exception 5 is rejected. § 120.57(1)(*l*), Fla. Stat.

Findings of Fact

Except as otherwise stated herein, the Department adopts the Findings of Fact in the Recommended Order and incorporates them by reference.

Conclusions of Law

Except as otherwise stated herein, the Department adopts the Conclusions of Law in the Recommended Order and incorporates them by reference.

Order

The Department accepts the ALJ's recommendation and rejects PTV's proposal as nonresponsive.

DONE and **ORDERED** this 21st day of May, 2018.

Mike 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:

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