

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALL SEASONS LANDSCAPE
CONTRACTORS, INC.,

Petitioner,

vs.

Case No. 19-0499RU

DEPARTMENT OF TRANSPORTATION,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice and a stipulated record, this matter is before Yolonda Y. Green, a duly assigned Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("Division").

APPEARANCES

For Petitioner: Brant Hargrove, Esquire
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For Respondent: Susan Schwartz, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether a liquidated damages term in the Department's specification for Invitation to Bid ("ITB")

constitutes an unadopted rule, as defined in section 120.52(20), Florida Statutes, in violation of section 120.54(1)(a).

PRELIMINARY STATEMENT

On January 28, 2019, Petitioner, All Seasons Landscape Contractors, Inc. ("Petitioner" or "All Seasons"), filed its Petition for Rule Challenge Under Section 120.56, Florida Statutes, requesting an administrative determination that a statement in Respondent, Department of Transportation's ("Respondent" or "Department"), standard construction and maintenance contract constitutes a rule under section 120.52 and imposes liquidated damages without promulgating any rule to do so, in violation of section 120.54(1)(a).

On February 5, 2019, the undersigned conducted a status conference, during which the parties agreed that this case was appropriate for a summary final order based on a stipulated record and motions for summary final order.

On February 12, 2019, the parties filed their Joint Pre-hearing Stipulation with Stipulated Exhibits 1 through 5. On the same date, the parties filed their respective Motions for Summary Final Order. All filings have been considered in the preparation of this Final Order.

On February 15, 2019, oral argument on the parties' motion for summary final order was held in Tallahassee, Florida.

References to statutes are to Florida Statutes (2017), unless otherwise noted.

FINDINGS OF FACT

Parties

1. All Seasons is a licensed maintenance contractor with more than 30 years of experience bidding on and performing Department maintenance contracts. All Seasons is currently performing on Department projects and intends to bid on future projects.

2. The Department is a state agency authorized by section 337.11, Florida Statutes, to contract for the construction and maintenance of roads within the state highway system, the state park road system, and roads placed under its supervision.

Applicable Statute

3. The statute at issue in this proceeding, section 337.18(2), provides in pertinent part.

337.18 Surety bonds for construction or maintenance contracts; requirement with respect to contract award; bond requirements; defaults; damage assessments.

* * *

(2) The department shall provide in its contracts for the determination of default on the part of any contractor for cause attributable to such contractor. The department shall have no liability for anticipated profits for unfinished work on

a contract which has been determined to be in default. Every contract let by the department for the performance of work shall contain a provision for payment to the department by the contractor of liquidated damages due to failure of the contractor to complete the contract work within the time stipulated in the contract or within such additional time as may have been granted by the department. The contractual provision shall include a reasonable estimate of the damages that would be incurred by the department as a result of such failure. The department shall establish a schedule of daily liquidated damage charges, based on original contract amounts, for construction contracts entered into by the department, which schedule shall be incorporated by reference into the contract. The department shall update the schedule of liquidated damages at least once every 2 years, but no more often than once a year. The schedule shall, at a minimum, be based on the average construction, engineering, and inspection costs experienced by the department on contracts over the 2 preceding fiscal years. The schedule shall also include anticipated costs of project-related delays and inconveniences to the department and traveling public. Anticipated costs may include, but are not limited to, road user costs, a portion of the projected revenues that will be lost due to failure to timely open a project to revenue-producing traffic, costs resulting from retaining detours for an extended time, and other similar costs. Any such liquidated damages paid to the department shall be deposited to the credit of the fund from which payment for the work contracted was authorized.

4. The statute requires that the Department adopt regulations for determination of default.

Background

5. On February 6, 2018, the Department issued an ITB for Contract No. E3R69-R0, to perform mechanical sweeping of designated roads and bridges in addition to edging and sweeping of sidewalks and curb edgings on designated locations in Gadsden and Leon counties. A specification package was included with the ITB referencing the January 2018 Edition of the Department's Standard Specifications for Road and Bridge Construction ("Standard Specifications"). The Standard Specifications are revised two times each year.

6. The specifications package included a 37-page "Special Provisions" supplement to the Standard Specifications. Article 5-1.7 of the Special Provisions provided a work schedule, requiring the successful bidder to begin work within 14 calendar days from receipt of the initial work document, and within five working days from receipt of any subsequent work document, and states:

If the Contractor does not begin work by the end of the date specified in this Subarticle, or the assignment of work in the Work Document is not complete within the number of days stipulated in the Work Document, then the Contractor and the Department agree that the Department will assess the Contractor, per day, not as a penalty but as liquidated damages, 1% of the total Work Document amount or the amount shown in Subarticle 8-10.2 (Amount of Liquidated Damages), whichever is less.

7. The Department's contract solicitations incorporate the Department's Standard Specifications. Sections 8-10.1 and 8-10.2 of the Standard Specifications for January 2018 provided:

Section 8-10.1 Highway Code Requirements Pertaining to Liquidated Damages: Section 337.18, paragraph (2) of the Florida Statutes, requires that the Department adopt regulations for the determination of default and provides that the Contractor pay liquidated damages to the Department for any failure of the Contractor to complete the Contract work within the Contract Time. These Code requirements govern, and are herewith made a part of the Contract.

Section 8-10.2 Amount of Liquidated Damages: Applicable liquidated damages are the amounts established in the following schedule:

Original Contract Amount	Daily Charge Per Calendar Day
\$50,000 and under.	\$.956
Over \$50,000 but less than \$250,000...	\$.964
\$250,000 but less than \$500,000.....	\$1,241
\$500,000 but less than \$2,500,000.....	\$1,665
\$2,500,000 but less than \$5,000,000...	\$2,712
\$5,000,000 but less than \$10,000,000..	\$3,447
\$10,000,000 but less than \$15,000,000.	\$4,866
\$15,000,000 but less than \$20,000,000.	\$5,818
\$20,000,000 and over.	\$9,198
plus 0.00005 of any amount over \$20 million (Round to nearest whole dollar).	

8. On March 8, 2018, All Seasons submitted a bid on Contract No. E3R69-R0.

9. In April 2018, Respondent awarded All Seasons Contract No. E3R69-R0, which All Seasons accepted. In the contract, All

Seasons agreed to perform the work as described in the ITB as follows:

[I]n the manner and to the full extent as set forth in the Proposal, Standard Specifications as Amended by the Specifications Package and any Supplemental Specifications Packages, and the Plans, under security as set forth in the attached bond, all of which are adopted and made a part of this Contract and incorporated by reference herein, and to the satisfaction of the duly authorized representatives of the Department of Transportation, who shall have at all times full opportunity to inspect the materials to be furnished and the work to be performed under this contract.

10. All Seasons did not protest the terms, conditions, or specifications of the contract during the timeframe provided for such challenges.

11. The Standard Specifications has not been adopted as a rule pursuant to the rulemaking procedures in section 120.54.

12. The liquidated damages clause has not been adopted as a rule pursuant to the rulemaking procedures in section 120.54.

Challenged Statement

13. On January 28, 2019, Petitioner initiated this proceeding by filing a petition for Rule Challenge Under Section 120.56, Florida Statutes, which alleged that the liquidated damages clause in the specifications for Contract No. E3R69-R0 was an unadopted rule that violates section 120.54(1)(a) ("Challenged Statement").

Standing

14. Petitioner performs on Department projects and intends to bid on future projects. The liquidated damages clause is included in each contract. As a result, Petitioner is substantially affected by the Challenged Statement.

Feasibility and Practicability of Rulemaking

15. Although Respondent asserts that rulemaking for the Challenged Statement is not feasible or practicable, it did not present evidence to support its argument.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.56(4), 120.569, and 120.57(1), Florida Statutes (2018).

17. Based on the Findings of Fact above, it is determined that Petitioner is a substantially affected entity who has standing to contest the Challenged Statement as an unadopted rule in this proceeding.

18. The sole issue for consideration in this proceeding is whether the Challenged Statement is a "rule," as that term is defined in section 120.52(16).

19. Section 120.52(16) defines a rule as:

[E]ach agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the

procedure or practice requirements of any agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

20. An "unadopted rule" is defined as an agency statement that meets the definition of the term "rule," but that has not been adopted pursuant to the requirements of section 120.54. § 120.52(20), Fla. Stat.

21. Agencies must adopt, as rules, those statements meeting the definition of a rule. As set forth in section 120.54(1) (a):

Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

22. When a person is substantially affected by an unadopted rule, a remedy to challenge the application of the unadopted rule is established in section 120.56(4), which provides, in pertinent part, that:

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1) (a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

* * *

(d) If an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

23. Petitioner has the burden in this proceeding to prove that the Challenged Statement regarding liquidated damages meets the definition of a rule, and that the Department has not adopted the statement by rulemaking procedures. Ag. for Pers. with Disab. v. C.B., 130 So. 3d 713, 717 (Fla. 1st DCA 2013); see also Sw. Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 908 (Fla. 2d DCA 2001).

24. The standard of proof is by a preponderance of the evidence. § 120.56(1)(e), Fla. Stat.

25. Whether an agency statement is a rule turns not on the agency's characterization of the statement by some appellation other than "rule," but, rather, on the effect of the statement. Dep't of Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).

26. The fundamental issue of whether the alleged statement is a "rule" centers around the statement's "general applicability."

27. An agency statement is "generally applicable" if it is intended by its own effect "to create rights, or to require compliance, or otherwise have the direct and consistent effect

of law.” Coventry First, LLC v. Off. of Ins. Reg., 38 So. 3d 200 (Fla. 1st DCA 2010) (quoting McDonald v. Dep’t of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977)). Furthermore:

“[a]n agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law, is a rule.” When deciding whether a challenged action constitutes a rule, a court analyzes the action's general applicability, requirement of compliance, or direct and consistent effect of law.

Fla. Dep't of Fin. Servs. v. Cap. Collateral Reg'l Counsel Middle Region, 969 So. 2d 527, 530 (Fla. 1st DCA 2007)

(citations omitted); see also State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010).

28. The circumstances in this matter involve a contractual term within the Standard Specifications that has been incorporated into a contractual agreement. Both parties rely upon Department of Transportation v. Blackhawk Quarry Co., 528 So. 2d 447 (Fla. 5th DCA 1988), in support of their positions. In Blackhawk, at issue was whether the definition of material contained within the Department’s Standard Specifications constituted an unadopted rule.^{1/} Id. In considering whether the provisions examined therein were a rule, the court noted:

[T]he First District found that wage rate determinations applicable to a public construction contract were not rules

because each determination was applicable only to construction of the particular public building specified in the determination and had no prospective application to any other contract.

528 So. 2d at 449 (quoting from State Department of Commerce v. Matthews Corp., 358 So. 2d 256, 258 (Fla. 1st DCA 1978)). The court reversed the finding that the statement was an unadopted rule because the section at issue set out specifications which were considered a contractual term between the Department and the contractor.

29. A similar case that involved an unadopted rule challenge to a specification provision, which was incorporated into construction contracts for the Orlando-Orange County Expressway, was addressed by ALJ Robert Meale in Hubbard Construction Company v. Orlando-Orange County Expressway Authority, Case No. 95-3903RU (Fla. DOAH Nov. 7, 1995), aff'd (on other grounds), 682 So. 2d 566 (Fla. 5th DCA 1996). ALJ Meale's analysis is adopted and incorporated herein as follows:

22. The Gray Book, including Article 3-8, applies to parties only after it has been incorporated into a contract. Thus Article 3-8 is not "generally applicable" because it is not, in the words of the court in McDonald v. Department of Banking and Finance, 346 So. 2d 569, 581 (Fla. 1st DCA 1977) a statement that is "intended by [its] own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law."

Based on this reasoning, two courts have consequently held that the Standard Specification for Road and Bridge Construction of the Department of Transportation does not constitute a rule when incorporated by reference into construction contracts. Department of Transportation v. Blackhawk Quarry Company of Florida, Inc., 528 So. 2d 447 (Fla. 5th DCA), rev. den. 536 So. 2d 243 (Fla. 1988) and San Marco Contracting Company v. Department of Transportation, 386 So. 2d 615 (Fla. 1st DCA 1980).

30. The Petition in this matter must be dismissed as the evidence does not demonstrate that the Challenged Statement meets the definition of an unadopted rule. Similar to the wage determinations, the liquidated damages clause applies to specific contracts to address failure to meet timeline. The clause is only applicable to the specified contract, for a specified project, and for a specified time period. By the description of the work performed in each contract, it is clear that the contract provision is specified for the particular project, i.e., clean up in Leon and Gadsden County. Moreover, the contractor here was permitted to challenge the liquidated damages formula by way of a specification challenge. See § 120.57(3), Fla. Stat. Furthermore, while the clause is incorporated into each construction and maintenance contract, it applies after the parties enter a contract. Once the parties enter the agreement, the liquidated damages clause has no effect beyond the four corners of that contract. Thus, outside of the

respective contract, the Challenged Statement does not have its own effect to create rights, or to require compliance, or otherwise have the direct and consistent effect of law.

31. Based on the foregoing, Petitioner has failed to demonstrate the existence of an agency statement that meets the definition of an unadopted rule to establish that Respondent violated section 120.56(4).

32. Given the undersigned's conclusion reached regarding whether the Challenged Statement is an unadopted rule, it is not necessary to address whether rulemaking would be feasible here.

33. Respondent also argues that the liquidated damages clause goes beyond the authority of section 337.18(2), by developing a schedule without any set criteria and applying it to maintenance contracts. However, this proceeding was brought pursuant to section 120.56(4), which is limited to whether the agency statement is a rule that has not been adopted pursuant to rulemaking procedures in violation of section 120.54(1)(a). Whether the statement was an invalid exercise of delegated legislative authority is a challenge that is not applicable here.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that All Seasons' Rule Challenge Under Section 120.56, Florida Statutes, is hereby DISMISSED.

DONE AND ORDERED this 18th day of March, 2019, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of March, 2019.

ENDNOTE

^{1/} In Blackhawk, the mine owner also challenged the Standard Operating Procedure used to approve source material for Department roadways, which is not critical to the germane issue in this matter.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.