

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CROSS CONSTRUCTION SERVICES, INC.,

Petitioner,

vs.

Case No. 20-4214BID

DEPARTMENT OF TRANSPORTATION,

Respondent.

_____/

CROSS ENVIRONMENTAL SERVICES, INC.

Petitioner,

vs.

Case No. 20-4216BID

DEPARTMENT OF TRANSPORTATION,

Respondent.

_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by ZOOM video teleconference on October 26, 2020, before the Division of Administrative Hearings by its designated Administrative Law Judge Linzie F. Bogan.

APPEARANCES

For Cross Construction Services, Inc.:	Brian A. Leung, Esquire Holcomb & Leung, P.A. 3203 West Cypress Street Tampa, Florida 33607
For Cross Environmental Services, Inc.:	Diane E. H. Watson, Esquire Post Office Box 1299 Crystal Springs, Florida 33524

For Respondent: Richard E. Shine, Esquire
Douglas Dell Dolan, Esquire
Florida Department of Transportation
605 Suwannee Street, MS 58
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STATEMENT OF THE ISSUE

Whether the Department's action to reject all bids submitted in response to DOT-RFP-20-5003-DAA, relating to asbestos abatement, demolition, and removal services, is illegal, arbitrary, dishonest, or fraudulent.

PRELIMINARY STATEMENT

The instant proceeding involves a protest of a decision by the Florida Department of Transportation (Department or FDOT) to reject all proposals received in response to procurement DOT-RFP-20-5003-DAA (RFP). Through the RFP, the Department sought to award two contracts for asbestos abatement, removal, and demolition services in the Department's District 5. The Department received five responses to the RFP, three of which the Department deemed to be non-responsive to the RFP. Cross Construction Services, Inc. (CCS), and Cross Environmental Services, Inc. (CES), were initially designated by the Department as intended awardees. The Department, however, elected not to award the contracts and notified the parties that all bids were rejected, the procurement cancelled, and that the Department intended to re-advertise the procurement. CCS and CES each filed a timely protest of the Department's decision to reject all bids.

On September 18, 2020, the protests filed by Petitioners were referred to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge. By agreement of the parties, the cases were consolidated. The final hearing was initially scheduled for October 16, 2020, but after a brief continuance the matter was heard on October 26, 2020.

At the final hearing, CCS offered testimony from its company president, Tyler Lillibride, and FDOT employees Jim Stroz and Jennifer Allcock. CES also offered testimony from Mr. Stroz and Ms. Allcock, and its company president, James Smith. The Department offered testimony from its employee Michelle Sloan, and Tim Yeager of Simpson Environmental Services, LLC (Simpson).

Joint Exhibits 1 through 10 were admitted into evidence. CCS Exhibits 1 through 15 were admitted into evidence. CES Exhibits 10 through 16 were admitted into evidence. FDOT Exhibits 11, 13, and 15 were also admitted into evidence.

A two-volume Transcript of the final hearing was filed with DOAH on November 16, 2020. The parties each filed a Proposed Recommended Order, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Stipulated Facts (verbatim)

1. The Department is an agency of the State of Florida tasked with procuring the services for Districtwide Asbestos Abatement and Demolition and Removal Services for Right of Way property under the Department's supervision by law.

2. The Department published a bid solicitation for DOT-RFP-20-5003-DAA, seeking bids to provide District Five Asbestos Abatement and Demolition and Removal Services for FDOT.

3. The RFP included specifications, qualification requirements, instructions on what would be required of responders, a bid price proposal sheet, and the award criteria.

4. Cross Construction and Cross Environmental submitted bids in response to the RFP.

5. Cross Construction's and Cross Environmental's bids were evaluated by the Department.

6. There is no debate, challenge, or disagreement raised in the Petitions with regard to the Technical Scores submitted by the responding firms to the RFP, only disagreement on three pay items.

7. On June 15, 2020, the Department's Selection Committee reviewed and discussed the information presented as to the Technical and Pricing scores of the Responding firms, asked for an additional bid item analysis, and indicated that it would reconvene at a future date for a decision.

8. On June 22, 2020, the Selection Committee reviewed, discussed, and confirmed the recommendation presented by the results of the Technical Review Committee scorings and the Project Manager's Bid Price analysis and selected Cross Construction and Cross Environmental as Intended Awardees. The Selection committee also found that Johnson's Excavation and Services Inc., [Johnson] and Simpson Environmental LLC [Simpson] were deemed non-responsive due to irregular, and unbalanced pay items prices.

9. On August 24, 2020, the Department's Selection Committee decided to cancel the Procurement with the intent to readvertise with adjustments to the Scope and Pricing Structure and decided to reject all proposals.

B. Additional Findings of Fact

10. The "three pay items" referenced in paragraph six of the stipulated facts are the items that ultimately caused the Department to reject all bids in the instant dispute. The three pay items are collectively referred to as mobilization pay items.

11. The RFP directs that bids are to contain two parts. Part I is the technical proposal, and Part II is the price proposal.

12. Section 30.3 of the RFP provides that proposers "shall complete the Bid Price Proposal Form No. 2 and submit [the form] as part of the Price

Proposal Package ... [and that] [t]he Procurement Office and/or the Project Manager/TRC will review and evaluate the price proposals and prepare a summary of its price evaluation.”

13. Five bidders submitted proposals in response to the RFP. One bidder did not advance beyond the initial review phase because its technical proposal did not meet minimum bid standards. The remaining bidders were CCS, CES, Simpson, and Johnson. Price proposals submitted by each of the remaining bidders were evaluated by the Department.

14. Section 3 of the RFP provides a general outline of the process associated with awarding the contract. The steps are: “Pre-Proposal Conference; Public Opening (Technical Proposals); Price Proposal Opening & Intended Award Meeting; and, Selection Committee Meeting Summarizing Evaluations and Determining Anticipated Award.”

15. The agenda for the “Price Proposal Opening & Intended Award Meeting,” as established by the RFP, provides as follows:

- Opening remarks of approx. 2 minutes by Department Procurement Office personnel.
- Public input period – To allow a reasonable amount of time for public input related to the RFP solicitation.
- At conclusion of public period, the Technical evaluation scores will be summarized.
- Announce the firms that did not achieve the minimum technical score.
- Announce the firms that achieved the minimum technical score and their price(s) as price proposals are opened.
- Calculate price scores and add to technical scores to arrive at total scores.
- Announce Proposer with highest Total Score as Intended Award.

- Announce time and date the decision will be posted on the Vendor Bid System (VBS).
- Adjourn.

16. Section 30.4 b. of the RFP provides that a proposer can be awarded a maximum of 30 points for its price proposal. This section also provides that “[p]rice evaluation is the process of examining a prospective price without evaluation of the separate cost elements and proposed profit of the potential provider.”

17. On June 15, 2020, the selection review committee met publicly for the purpose of opening price proposals and announcing an intended award. Price proposals were opened, and the eligible bidders received the following price scores: CCS - 11.09; CES - 13.22; Johnson - 19.76; and Simpson - 30.

18. In terms of total score, which combined both the technical and price scores, Simpson received a score of 113.00, which was the highest score, followed by CES (107.55), CCS (103.76), and Johnson (101.76).

19. After opening and considering the price proposals of the respective bidders, the selection committee did not announce an intended award at the meeting on June 15, 2020, but instead requested that the project manager “do further analysis on the pay items for any potential imbalance.” The project manager, through a staff member, performed the additional analysis and determined that Johnson and Simpson submitted “irregular, unbalanced pay items” which resulted in their respective bids being deemed non-responsive and thus not eligible for award. The “irregular, unbalanced pay items” are the three mobilization pay items at issue in the instant matter, and are identified on the bid price proposal sheet as items AB200, AB201, and AB202.

20. Simpson bid \$400 for item AB200, \$100 for item AB201, and \$50 for item AB202.

21. Johnson bid \$250 for item AB200, \$250 for item AB201, and \$100 for item AB202.

22. CCS bid \$1 for item AB200, \$1 for item AB201, and \$1 for item AB202.

23. CES bid \$1 for item AB200, 75 cents for item AB201, and 50 cents for item AB202.

24. The Department, in evaluating the bidders' mobilization pay items, considered costs associated with abatement two structures, a 1,500 and 2,250 square feet structure respectively.

25. For the 1,500-square-foot structure, CCS' AB200 mobilization costs totaled \$1,500. For the 2,250-square-foot structure, CCS' AB201 mobilization costs totaled \$2,250.

26. For the 1,500-square-foot structure, CES' AB200 mobilization costs totaled \$1,500. For the 2,250-square-foot structure, CES' AB201 mobilization costs totaled \$1,687.50.

27. For the 1,500-square-foot structure, Johnson's AB200 mobilization costs totaled \$375,000. For the 2,250-square-foot structure, Johnson's AB201 mobilization costs totaled \$562,500.

28. For the 1,500-square-foot structure, Simpson's AB200 mobilization costs totaled \$600,000. For the 2,250-square-foot structure, Simpson's AB201 mobilization costs totaled \$225,000.

29. On June 22, 2020, the selection committee reconvened and announced CCS and CES as intended awardees of the contract. The Department also announced at this meeting that Johnson and Simpson were "deemed non-responsive due to irregular, unbalanced pay item prices."

30. On June 24, 2020, Simpson filed a Notice of Protest wherein the company informed the Department of its intent to formally protest the intended award of contracts to CCS and CES.

31. On or about July 6, 2020, Simpson filed with the Department its "formal written petition of protest." Although Simpson's formal protest is dated July 6, 2020, CCS and CES contend that Simpson's protest was

actually filed on July 7, 2020, thereby making the protest untimely by a day. The Department did not refer Simpson's formal protest to DOAH for final hearing, but instead considered the issues presented by Simpson in its protest and then attempted to negotiate a resolution with Simpson, CCS, and CES. Those efforts were unsuccessful.

32. The question of the timeliness of the formal bid protest filed by Simpson is not before the undersigned. Nevertheless, the undisputed facts as to Simpson's protest, as demonstrated by the record herein, are as follows. On June 24, 2020, Simpson filed notice of its intent to protest the RFP. On June 29, 2020, CCS received notice that a bid protest was filed with respect to the RFP. On July 1, 2020, CES filed a public records request "for public records related to the bid protest made to the" RFP. On or about July 6, 2020, Simpson filed its formal written protest with respect to the RFP, and although the evidence is not clear as to the date, it is undisputed that the Department received affidavits from Simpson explaining the factual circumstances surrounding the filing of the company's formal written protest. On July 15, 2020, the Department notified CCS and CES that "in response to the Formal Written Protest filed by Simpson Environmental Services, the Department will hold a settlement conference" on Friday, July 17, 2020. On July 21, 2020, Simpson, CES, and CCS notified the Department that they "reached an agreed upon settlement proposal." On August 11, 2020, the Department, after considering the settlement proposal for several weeks, notified Simpson, CES, and CCS that the Department would discuss the RFP at a public meeting to be held on August 24, 2020. As previously noted, it was during the meeting on August 24, 2020, when the Department announced that all proposals received in response to RFP were rejected.

33. CES, on or about July 1, 2020, submitted to the Department a public records request wherein the company sought a copy of documents related to Simpson's protest. In response to the request, the Department provided CES a copy of the formal written protest filed by Simpson. It is undisputed that

the initial copy provided to CES by the Department did not show either the date or time of receipt of the document filed by Simpson. At some point after the settlement conference, the Department provided to CES a date and time stamped copy of Simpson's formal written protest. There was no evidence presented explaining the circumstances or the process which resulted in the Department providing different copies of Simpson's formal written protest to CES, and the remaining evidence does not provide a sufficient foundation to reasonably infer that the Department acted with nefarious motives when providing different versions of the documents to CES.

34. Simpson's formal protest contains the following statement with respect to the price proposal that the company submitted in response to the RFP:

Petitioner's individual bid price items were based in fact, were reasonable and were in conformity with standard industry rates for similar asbestos abatement and demolition and removal projects. Petitioner's bid price items were also patently similar to bid price items that Petitioner has previously submitted in response to past FDOT proposal requests that ultimately resulted in the corresponding contracts having been awarded to Petitioner. Indeed, Petitioner has a longstanding relationship with the FDOT as Petitioner has previously contracted with FDOT as a vendor performing asbestos abatement services on numerous projects over the course of the past eight years. Petitioner's price items for bid proposals have remained consistent for each of its past projects with FDOT. Petitioner's price items for the instant bid proposal did not differ or vary in any material aspect from those proposed by Petitioner for previous projects that FDOT has deemed reasonable.

35. Michelle Sloan works for the Department as a district procurement manager, and was assigned to manage the instant RFP. Ms. Sloan testified

that because Simpson protested the Department's intended decision to award the contracts to CCS and CES, and specifically referenced in its protest "that their bid for mobilization was in conformance with industry standards, as well as previous bids submitted to the agency that were deemed responsive," she conducted additional review of the Simpson and Johnson bids.

36. Ms. Sloan testified that after reviewing the RFP, the price sheets related thereto, Simpson's protest, and the additional analysis of the pay items conducted following the June 15, 2020, selection committee meeting, she concluded that material ambiguities existed in the RFP's mobilization pay items and recommended to the district secretary that the Department "reject all [bids] and re-advertise with a revised pricing sheet and instructions."

37. On August 24, 2020, the selection committee, following public notice, accepted Ms. Sloan's recommendation, rejected all proposals, and canceled the procurement with the "intent to re-advertise with adjustments to the Scope and Pricing structure." A review of the credible evidence demonstrates a rational basis for the conclusions reached by Ms. Sloan and members of the selection committee.

38. Exhibit C of the RFP is titled "Price Proposal/Detailed and Contractual Price Sheet." The first page of this document provides a general description of the asbestos removal and abatement pay items. The general pay items are as follows:

AB100 Fees [as] determined from the Department of Environmental Protection based upon regulated material.

AB200 One-time fee necessary to mobilize for full isolation, per parcel, when abatement with isolation is required.

AB300 Fees to be charged by square feet for preparation [of] structure before abatement can commence.

AB400 Fees to be charged by square feet, to abate asbestos from various surfacing material such as ceiling, walls, beams, plaster, sheetrock and fireproofing using conventional containment methods.

AB500 Fees to be charged either by square foot, linear foot or fittings to abate asbestos from various mechanical systems such as boilers, stacks ducts, fittings, pipes, flutes and flanges.

AB600 Fees to be charged either by square foot, linear foot or fittings to abate asbestos from various mechanical systems such as boilers, stacks, ducts, pipe, fittings and jackets which involve the use of a Glove bag.

AB700 Fees to be charged by square foot, to abate asbestos from various roofing materials such as cement roof shingles, flashing, rolled roof, felts, wood shingles and mobile home coating.

AB800 Fees to be charged by square foot or piece to abate asbestos from various materials such as floor tile, mastic adhesive, sheet vinyl, carpet, wood sub-floor, concrete sub-floor, vibrator dampers, wallboard, metal ductwork and sinks with insulation and heat shields (light fixture).

AB900 Fees to be charge[d] by landfill for asbestos disposal.

39. The bid price proposal sheet, which is form number 2 of the RFP, provides a listing of specific pay items related to the general “AB ---” items listed in Exhibit C to the RFP. Below is an example of some of the specific pay items listed on the bid price proposal sheet:

[See table on next page]

Item Number	Description	(A) Estimated Quantity	Unit	(B) Unit Price	Total Bid Amount (A x B)
	ASBESTOS REMOVAL ABATEMENT				
AB200	Mobilization for structures less than 2,000 Sq. FT.	1	SQ. FT.		
AB201	Mobilization for structures [from] 2001 – 5000 Sq. FT.	1	SQ. FT.		
AB202	Mobilization for structures over 5001 Sq. FT.	1	SQ. FT.		
AB300	Mask and Seal	1	SQ. FT.		
AB401	Remove ACM plaster/lathe including all surface materials	1	SQ. FT.		
AB501	Remove insulation from fittings	1	LF.		
AB603	Remove insulation from boilers, stacks or ducts piping	1	LF.		
AB703	Remove roofing cement	1	SQ. FT.		
AB810	Remove carpet and mastic adhesive	1	SQ. FT.		
AB820	Remove sinks with insulation	1	SQ. FT.		
AB901	Non-Friable	1	SQ. FT.		

40. General pay item category AB200, as described on Exhibit C, does not reference a “unit of measurement,” but instead notes that items within this category are to be determined on a “one-time – per parcel” basis. When the AB200 general pay item category is compared to the specific pay items for this category enumerated on the bid price proposal sheet (i.e., AB200, AB201, and AB202), it is evident that the unit of measurement “square feet” is listed as the basis for calculating the bid amount for this item when no such unit of measurement is stated for this item on Exhibit C.

41. Comparatively, general pay item categories AB300 through AB800 each expressly references a specific unit of measurement (i.e., square foot, linear foot, or by the “piece”), and these units of measurement carry over to and are consistently reflected on the bid price proposal sheet for the specific pay items enumerated therein.

42. By inserting a unit of measurement (i.e., square feet) in the mobilization pay items listed on the bid price proposal sheet, when the general description on Exhibit C instructs that they are “one-time, per parcel” pay items, the Department created a material ambiguity in the bidding process.

CONCLUSIONS OF LAW

43. DOAH has jurisdiction over the subject matter of, and parties to, this proceeding, pursuant to sections 120.569 and 120.57(1) and (3), Florida Statutes (2020).¹

44. The bid protests filed by CCS and CES were timely filed, and both entities have otherwise complied with all rules and laws relating to the filing of the respective bid protests.

45. CCS and CES, as responders to the RFP, and as intended awardees of the contracts until the Department decided to reject all bids, have standing to challenge the Department’s decisions at issue in Case Nos. 20-4214 and 20-4216.

46. These consolidated proceedings are governed by section 120.57(3), which states in pertinent part:

Agencies subject to this chapter shall use the uniform rules of procedure, which provide procedures for the resolution of protests arising from the contract solicitation or award process. Such rules shall at least provide that:

(a) The agency shall provide notice of a decision or intended decision concerning a solicitation, contract award, or exceptional purchase by electronic posting. This notice shall contain the following statement: “Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond

¹ All subsequent references to Florida Statutes will be to the 2020 version, unless otherwise indicated.

shall constitute a waiver of proceedings under chapter 120, Florida Statutes.”

(b) Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision. With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation. The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based. Saturdays, Sundays, and state holidays shall be excluded in the computation of the 72-hour time periods provided by this paragraph.

(c) Upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.

(d) 1. The agency shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of a formal written protest.

2. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of the formal written protest, and if there is no disputed issue of material fact, an informal proceeding shall be conducted pursuant to subsection (2) and applicable agency rules before a person whose qualifications have been prescribed by rules of the agency.

3. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of the formal written protest, and if there is a disputed issue of material fact, the agency shall refer the protest to the division by electronic means through the division's website for proceedings under subsection (1).

* * *

(f) In 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. In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered. 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. In any bid-protest proceeding contesting an intended agency

action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

47. As the parties challenging the Department's proposed agency action, CCS and CES bear the burden of proof in these proceedings. § 120.57(3)(f), Fla. Stat.; *State Contracting and Eng'g. Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

48. As an overarching principle, public bodies in Florida are legislatively afforded wide discretion in soliciting and accepting bids and proposals, and their procurement decisions, when based on an honest exercise of that discretion, will not be overturned, even if the decisions may appear erroneous and even if reasonable persons may disagree. *Liberty Cty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 506 (Fla. 1982).

49. The standard of review applicable to the Department's action of rejecting all proposals is whether that action was illegal, arbitrary, dishonest, or fraudulent. *Dep't of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 914 (Fla. 1988). Neither section 120.57 nor any related statutory provisions define the terms "illegal, arbitrary, dishonest, or fraudulent."

50. This legal standard imposes a stringent burden. As the court stated in *Gulf Real Properties, Inc. v. Department of Health and Rehabilitative Services*, 687 So. 2d 1336, 1338 (Fla. 1st DCA 1997), an agency's rejection of all bids must stand, absent a showing that the purpose or effect of the rejection is to defeat the object and integrity of competitive bidding.

51. Where an agency, in deciding to reject all replies, has engaged in an honest, lawful, and rational exercise of its "wide discretion in soliciting and accepting bids for public improvements" its decision will not be overturned, even if it may appear erroneous and even if reasonable persons may disagree. *Groves-Watkins Constructors*, 530 So. 2d at 913 (quoting from *Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d at 507).

52. An arbitrary decision is one that is not supported by facts or logic, or is despotic. *Agrico Chem. Co. v. Dep't of Env'tl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

53. An agency's discretion to reject all bids is not unbridled, however. In applying the "arbitrary" standard of review, it must be determined whether the agency has: (1) considered all the relevant factors; (2) given actual, good faith consideration to those factors; and (3) used reason rather than whim to progress from consideration of each of these factors to its final decision. *Adam Smith Enterprises, Inc. v. State Dep't of Env'tl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

54. It is commonly understood that "dishonest" conduct is demonstrated by acts which show a "lack of truth, honesty or trustworthiness." *See, e.g.*, <https://www.merriam-webster.com>

55. Under the common law, the essential elements of fraud are: (1) a false statement of fact; (2) known by the person making the statement to be false at the time it was made; (3) made for the purpose of inducing another to act in reliance thereon; (4) action by the other person in reliance on the correctness of the statement; and (5) resulting damage to the other person. *See Gandy v. Trans World Comput. Tech. Grp.*, 787 So. 2d 116, 118 (Fla. 2d DCA 2001).

56. Petitioners contend that the Department acted illegally, arbitrarily, dishonestly, or fraudulently when, despite knowing that Simpson's formal bid protest was untimely, it used Simpson's protest as the impetus to more closely scrutinize the bidders' proposals and the language of the RFP. Both Petitioners rely on the same core facts in support of their allegations that the Department acted in an "illegal, arbitrary, dishonest, or fraudulent" manner.

57. As an initial matter, there was no final agency action taken by the Department which determined that Simpson's formal bid protest was untimely. Nevertheless, even if Simpson's bid protest was untimely, this would simply mean that Simpson waived its right to protest. *Consultech of*

Jacksonville v. Dep't of Health, 876 So. 2d 731, 734 (Fla. 1st DCA 2004). The fact that a bidder may have waived its right to protest by filing an untimely petition “does not itself preclude Department action to reject all bids on the ground that the [RFP] was flawed.” *See LabCorp. v. Dep't of Health*, Case No. 12-0846 (Fla. DOAH May 7, 2012; Fla. DOH Jun. 21, 2012). While the evidence indicates that Simpson’s protest was the catalyst for the Department’s decision to further scrutinize the mobilization pay items, Petitioners do not cite any authority establishing that such action is antithetical to maintaining the integrity of the competitive bidding process.

58. Petitioners also contend that the Department acted illegally and fraudulently by not following statutory requirements in processing Simpson’s bid protest. CES directly asserts, and CCS joins in the contention, that the “Department illegally proceeded as though Simpson’s formal protest was timely by arbitrarily conducting an informal conference in violation of 120.57(3)(b), Fla. Stat.”

59. The undisputed facts show that CES and CCS were aware of Simpson’s formal written protest by no later than July 15, 2020, the date on which the Department notified the parties of the forthcoming settlement conference. Consequently, as of July 15, 2020, CES and CCS were presumed to know the statutory time requirements imposed on the Department for processing bid disputes as set forth in section 120.57(3). Despite this knowledge, neither CES nor CCS initiated action to ensure that the Department processed Simpson’s formal written protest in a manner consistent with the time requirements set forth in section 120.57(3). *Cf. Teachers Educators Ass’n., Inc. v. Duval Cty. Sch. Dist.*, 763 So. 2d 1265 (Fla. 1st DCA 2000)(If an agency fails to take action on a petition for hearing, a party can compel action through a petition for writ of mandamus). Through their own deliberate inaction and voluntary participation in the very process that they now complain of, CES and CCS waived their right to complain that the Department’s failure to strictly adhere to the time requirements set forth

in section 120.57(3) should be considered as evidence of the Department's alleged improper favoritism towards Simpson. *See generally State Farm Mut. Auto. Ins. Co. v. Yenke*, 804 So. 2d 429, 432 (Fla. 5th DCA 2001) ("Waiver is the intentional or voluntary relinquishment of a known right, or conduct which implies the relinquishment of a known right.").

60. Even if CES and CCS did not waive their right to complain, it is noted that neither section 120.569, 120.57(1), nor 120.57(3) provide specific sanctions against a State agency for noncompliance with the time requirements contained therein. In certain administrative proceedings, the failure by an agency to comply with statutory time requirements is harmless error, unless the failure affects the fairness of the proceedings or the correctness of the final action taken by the agency. *See Carter v. Dep't of Bus. & Prof'l Reg.*, 633 So. 2d 3 (Fla. 1994). Assuming that this standard applies in the instant proceeding, Petitioners have failed to prove that the Department's failure to take action on Simpson's formal written protest within the time frame prescribed by section 120.57 and related statutes, altered the fairness or correctness of the decision by the Department to reject all proposals in such a way as to make the Department's actions illegal, arbitrary, dishonest, or fraudulent.

61. CCS and CES also contend that the "Department acted arbitrarily, dishonestly and fraudulently when it attempted to conceal Simpson's late-filed formal protest by providing CES the formal protest without the Department's date-stamp and then further waited until the conclusion of the informal hearing to advise CES of the late-filed formal protest."

62. In reviewing the Proposed Recommended Orders submitted herein by CCS and CES, the only evidence cited by the entities in support of their contention that the Department acted arbitrarily, dishonestly, and fraudulently is the fact that the Department initially provided a copy of Simpson's formal written protest that did not contain a date/time stamp, and then, after the meeting on July 17, 2020, provided to the parties a copy of

Simpson's protest containing a date/time stamp. There is a complete absence of evidence that in any way explains the circumstances surrounding the dissemination by the Department of Simpson's formal written protest to CCS and CES.

63. It is well established that fraud is not presumed, but must be proved. *See Barrett v. Quesnel*, 90 So. 2d 706 (Fla. 1956). Neither the facts relied upon by Petitioners nor the record when considered in its entirety establish that the Department acted arbitrarily, dishonestly, or fraudulently with respect to the copies of Simpson's formal written protest provided to the respective entities.

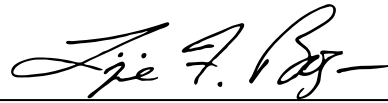
64. As noted above, the Department's decision to reject all bids was based on careful consideration of the flawed language of the RFP's mobilization pay items, and the impact that the flawed language had on the bids submitted in response to the RFP. Neither CCS nor CES presented credible evidence demonstrating that the Department's conclusions regarding the flawed language of the RFP were unsupported by the facts, were illogical or despotic, or otherwise anti-competitive.

65. For the reasons discussed above, CCS and CES failed to meet their burden to show that Department's action of rejecting all bids was illegal, arbitrary, dishonest, or fraudulent.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby Recommended that the Department of Transportation issue a final order in Case Nos. 20-4214 and 20-4216 finding that the rejection of all proposals in response to Request for Proposal RFP-DOT-20-5003-DAA was not illegal, arbitrary, dishonest, or fraudulent, and dismissing the two petitions.

DONE AND ENTERED this 14th day of December, 2020, in Tallahassee,
Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
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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.