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

AMERICAN LIGHTING AND SIGNALIZATION, LLC,

Petitioner,

vs.

DOT Case No. 21-017
DOAH Case No. 21-1728BID

FLORIDA DEPARTMENT OF TRANSPORTATION,

Respondent,

and

DBI SERVICES, LLC,

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, The Honorable Mary Li Creasy, in June 2021. The ALJ entered a Recommended Order on September 27, 2021 (attached). American Lighting and Signalization, LLC, timely filed exceptions. The Department and DBi Services, LLC, timely filed responses to ALS's exceptions.

Standards for agency rulings on exceptions

Where a party to a bid protest files exceptions to a recommended order within 10 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.; 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. Regulation, Div. of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). "It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." *Id.*

There is a fundamental difference between the deference an agency must accord to findings of historical 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 determine 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).

Exception 1: ALS takes exception to paragraphs 8, 9, 10, 33, 37, and 38 of the Recommended Order. The basic contention of Exception 1 is that Contract EX518 is for electrical contracting and not maintenance.

The challenged paragraphs are all labeled findings of fact. ALS contends that these paragraphs are "contrary to the overwhelming evidence that the Contract is for electrical contracting." DBi correctly notes that the Department's review of findings of historical fact is limited to whether the findings are supported by competent, substantial evidence. Under Florida law, the ALJ resolves conflicts in the evidence. *Young v. Dep't of Educ.*, 943 So. 2d 901, 902 (Fla. 1st DCA 2006); *Heifetz*, 475 So. 2d at 1281. "The fact that other evidence exists, which would lead to a different conclusion, is of no import." *His Kids Daycare v. Fla. Unemp't Appeals Comm'n*, 904 So. 2d 477, 480 (Fla. 1st DCA 2005). So long as competent substantial evidence supports the ALJ's factual findings, affirmance is required even if the Department "might have reached a different conclusion had it been the initial arbitrator of the factual issues[.]" *Harbor Ventures, Inc. v. Hutches*, 278 So. 2d 328, 329 (Fla. 2d DCA 1973). The responses to the exceptions identify competent, substantial record evidence supporting the ALJ's conclusions.

ALS correctly notes that the Department is not bound by the labels in the Recommended Order and that the nature of the finding controls. The challenged paragraphs all interpret the solicitation package and contract specifications. They are thus conclusions of law, *Companion Prop. & Cas. Ins. Co. v. Category 5 Mgmt. Group, LLC*, 189 So. 3d 905, 908 (Fla. 1st DCA 2016), over which the Department has substantive jurisdiction, *Cyriacks Envtl. Consulting Svcs., Inc. v. Dep't of Transp.*, 2017 WL 392830, at *3 (FDOT Final Order January 24, 2017) (finding ALJ's interpretation of Department's RFP is a conclusion of law within the Department's substantive jurisdiction); *aff'd*, 239 So. 3d 4 (Fla. 1st DCA 2018), or matters infused with policy considerations committed to agency discretion, *Baptist Hosp.*, 500 So. 2d at 623.

The Department finds that ALS's proposed substituted conclusions of law are not as or more reasonable than the ALJ's conclusions of law in the challenged paragraphs. Alternatively, the Department declines to exercise its discretion to substitute its policy views of the solicitation package and contract documents for those of the ALJ.

To the extent the challenged paragraphs are findings of historical fact, they are supported by competent, substantial evidence. The Department cannot reweigh the evidence to fit a desired conclusion, even if other record evidence would

support that conclusion. *Young*, 943 So. 2d at 902; *Heifetz*, 475 So. 2d at 1281; *His Kids Daycare*, 904 So. 2d at 480; *Harbor Ventures*, 278 So. 2d at 329.

Exception 1 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 2: ALS takes exception to paragraphs 31, 33, 34, 35, 68, 69, and 70 of the recommended order. The basic contention of Exception 2 is that DBi was required to be licensed under Chapter 489 (Part II), Florida Statutes, at the time of bidding.

ALS contends that the challenged paragraphs "are not supported by competent, substantial evidence in the record and do not comply with the essential requirements of law." DBi correctly notes that under Section 120.57(1)(*l*), the Department may reject or modify a finding of fact if it first determines from a review of the entire record, and states with particularity in the order, that the "proceedings on which the findings were based did not comply with the essential requirements of law." ALS does not claim a violation of due process or otherwise raise a procedural challenge.

As in Exception 1, Exception 2 contends the ALJ's legal conclusions on what the contract documents and solicitation package required or did not require are not supported by competent, substantial evidence. The Department recognizes that the legal conclusions in paragraphs 31 and 33-35 are labeled findings of fact, but as ALS concedes the Department is not bound by labels.

The challenged paragraphs are legal conclusions within the Department's substantive jurisdiction, *Companion Prop.*, 189 So. 3d at 908; *Cyriacks Envtl.*, 2017 WL 392830, at *3 (*aff'd*, 239 So. 3d 4), or are matters infused with policy considerations committed to agency discretion, *Baptist Hosp.*, 500 So. 2d at 623. The Department finds that ALS's proposed substituted conclusions of law are not as or more reasonable than the ALJ's conclusions of law in the challenged paragraphs. Alternatively, the Department declines to exercise its discretion to substitute its policy views of the solicitation package and contract documents for those of the ALJ.

To the extent the challenged paragraphs are findings of historical fact, they are supported by competent, substantial evidence. The Department cannot reweigh the evidence to fit a desired conclusion, even if other record evidence would support that conclusion. *Young*, 943 So. 2d at 902; *Heifetz*, 475 So. 2d at 1281; *His Kids Daycare*, 904 So. 2d at 480; *Harbor Ventures*, 278 So. 2d at 329.

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

Exception 3: ALS takes exception to paragraphs 36, 71, 72, and 73 of the recommended order. The basic contention of Exception 3 is that DBi cannot subcontract electrical work to a licensed electrical contractor.

Once again, ALS contends that the challenged paragraphs "are not supported by competent, substantial evidence in the record and do not comply with the

essential requirements of law." The Department incorporates its ruling on the essential requirements of law argument raised in Exception 2 by reference.

As in Exceptions 1 and 2, Exception 3 contends the ALJ's legal conclusions on what the contract documents and solicitation package required or did not require are not supported by competent, substantial evidence. The Department recognizes that the legal conclusion in paragraph 36 is labeled a finding of fact, but as ALS concedes the Department is not bound by labels.

The challenged paragraphs are legal conclusions within the Department's substantive jurisdiction, *Companion Prop.*, 189 So. 3d at 908; *Cyriacks Envtl.*, 2017 WL 392830, at *3 (*aff'd*, 239 So. 3d 4), or are matters infused with policy considerations committed to agency discretion, *Baptist Hosp.*, 500 So. 2d at 623. The Department finds that ALS's proposed substituted conclusions of law are not as or more reasonable than the ALJ's conclusions of law in the challenged paragraphs. Alternatively, the Department declines to exercise its discretion to substitute its policy views of the solicitation package and contract documents for those of the ALJ.

To the extent the challenged paragraphs are findings of historical fact, they are supported by competent, substantial evidence. The Department cannot reweigh the evidence to fit a desired conclusion, even if other record evidence would

support that conclusion. *Young*, 943 So. 2d at 902; *Heifetz*, 475 So. 2d at 1281; *His Kids Daycare*, 904 So. 2d at 480; *Harbor Ventures*, 278 So. 2d at 329.

Exception 3 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 4: ALS takes exception to paragraphs 42, 43, 44, 45, 74, and 75 of the recommended order. The basic contention of Exception 4 is that DBi did not satisfy the solicitation's experience requirement.

The findings of historical facts in the challenged paragraphs are that the Department considers highway lighting to be an asset of the Department, that some Department asset maintenance contracts broadly cover a geographic area while others are specific to one type of work, that the Department and DBi are of the view that DBi performed the work of the contracts DBi listed to satisfy the solicitation's experience requirement, and that the Department's practice is to include subcontracted work when evaluating the experience of prime contractors. These findings of historical fact are supported by competent, substantial record evidence. The Department cannot reweigh the evidence to fit a desired conclusion, even if other record evidence would support that conclusion.

All other conclusions in the challenged paragraphs, regardless of label, are conclusions of law within the Department's substantive jurisdiction or are matters infused with policy considerations committed to agency discretion. The Department finds that ALS's proposed substituted conclusions of law are not as or

more reasonable than the ALJ's conclusions of law in the challenged paragraphs. Alternatively, the Department declines to exercise its discretion to substitute its policy views of the solicitation package and contract documents for those of the ALJ.

Exception 4 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 5: Incorporating its first four exceptions by reference, ALS takes exception to paragraph 67's conclusion that DBi was a responsive bidder. The Department incorporates its rulings on Exceptions 1-4 by reference.

Exception 5 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 6: ALS takes exception to paragraphs 46-50 and 62-66. The basic contention of Exception 6 is that ALS submitted a responsive bid and had standing to protest and the ALJ erred by finding otherwise.

ALS takes exception to the ALJ's finding that ALS presented "no evidence" that "Underground Utilities (Electric)" is subsumed within "Electrical Work" by referencing testimony of its Regional Manager, Richard Calledare. Paragraphs 47 and 48 of the recommended order summarize Mr. Calledare's testimony. The recommended order concludes that because there was no evidence that Mr. Calledare was ever employed by the Department or was otherwise knowledgeable on whether "Electrical Work" suffices to meet the Underground Utilities (Electric)

requirement, Mr. Calledare's testimony was not compelling. The Department cannot reweigh evidence to reach a desired conclusion.

Whether ALS has standing is a legal question that is not within the Department's substantive jurisdiction. *S. Broward Hosp. Dist. v. Agency For Health Care Admin.*, 141 So. 3d 678, 681 (Fla. 1st DCA 2014). The Department thus cannot reject or modify the ALJ's conclusion that ALS lacks standing.

Because Department procurements are governed by the Florida Transportation Code, *see generally* Chapter 337, Florida Statutes, whether ALS submitted a responsive bid is a legal question within the Department's substantive jurisdiction or is a matter infused with policy considerations committed to agency discretion. The Department finds that ALS's proposed substituted conclusions of law are not as or more reasonable than the ALJ's conclusions of law in the challenged paragraphs. Alternatively, the Department declines to exercise its discretion to substitute its policy views of whether ALS submitted a responsive bid for those of the ALJ.

Exception 6 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 7: ALS takes exception to paragraphs 27 and 76 of the recommended order.

Paragraph 76 is a conclusion of law that "to the extent" ALS contends that Chapter 489, Florida Statutes, requires that a bidder hold an electrical contractor's

license at the time of bidding, ALS raises an untimely specifications challenge. Paragraph 27, while labeled a finding of fact, comes to the same conclusion.

Whether a specifications challenge conforms to the requirements of the APA is a question of law outside the Department's substantive expertise. The Department thus cannot reject or modify the challenged paragraphs.

Exception 7 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 8: ALS takes exception to paragraph 77 of the recommended order, which finds that ALS failed to carry its burden of proof. It incorporates its other exceptions by reference. The Department incorporates its rulings on the other exceptions by reference. Also, whether a party meets their burden of proof is a question of fact. J.D., 114 So. 3d at 1133 (citations omitted). The ALJ's finding that ALS failed to meet its burden is supported by competent, substantial evidence.

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

It is hereby ORDERED that

1. The protest filed by American Lighting and Signalization, LLC, is dismissed;
2. The Department's uncontested motion for costs is GRANTED. ALS shall pay the sum of $5,240.55 to the Department within 30 days of the date of this order or the amount shall be deducted from the bond posted by Petitioner.

DONE and ORDERED this 27th day of October, 2021.

for

Kevin J. Thibault, P.E.
Secretary
Florida Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
2021 OCT 27 PM 12:10

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.

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KEVIN J. THIBAULT, P.E.
SECRETARY

DELEGATION OF AUTHORITY

I, Kevin J. Thibault, P.E., Secretary of the Florida Department of Transportation, delegate to Torey Alston as the Chief of Staff and Courtney Drummond, P.E. as the Assistant Secretary for Engineering and Operations, and Stacy Miller, P.E., as the Assistant Secretary for Finance and Administration, the authority and responsibility to take action on my behalf at anytime during my absence from the Department headquarters in Tallahassee. I also rescind any prior delegations to the contrary.

Kevin J. Thibault, P.E., Secretary
Florida Department of Transportation

4·23·2020

Date