

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

AMERICAN LIGHTING AND
SIGNALIZATION, LLC,

Petitioner,

vs.

Case No. 21-1728BID

FLORIDA DEPARTMENT OF
TRANSPORTATION,

Respondent,

and

DBI SERVICES, LLC,

Intervenor.

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this case was conducted before Administrative Law Judge Mary Li Creasy of the Division of Administrative Hearings ("DOAH"), live in Tallahassee, Florida, and by Zoom video teleconference on June 22 and 23, 2021.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether Respondent's, Florida Department of Transportation ("the Department"), decision to award a contract to Intervenor, DBi Services, Inc. ("DBi" or "Intervenor"), pursuant to the Bid Solicitation Notice and the Specifications Package (jointly referred to as "Solicitation") for Contract No. E5X18 (highway lighting maintenance in District Five), was contrary to its governing statutes, rules, or policies, or the solicitation specifications; and, if so, whether the award was contrary to competition, clearly erroneous, arbitrary, or capricious.

PRELIMINARY STATEMENT

On February 23, 2021, the Department issued a Solicitation for the performance of highway lighting maintenance work in District Five, inclusive of the counties of Brevard, Flagler, Lake, Marion, Orange, Osceola, Seminole, Sumter, and Volusia. The Solicitation was issued under Contract No. E5X18 and Financial Project No. 427957-1-72-25. Petitioner, American Lighting and Signalization, LLC ("ALS"), and DBi submitted bids in response to the Solicitation. On April 1, 2021, the Department awarded the Contract arising out of the Solicitation to DBi. ALS timely filed a Notice of Protest, followed by a Formal Written Protest and Petition for Formal Administrative Hearing

("Petition"), pursuant to sections 120.569, 120.57(1) and (3), and 337.11, Florida Statutes, and Florida Administrative Code Chapters 28-106, 28-110, and 14-91.

On May 28, 2021, the Department referred the Petition to DOAH to conduct formal administrative proceedings pursuant to chapter 120. As a specifically-named entity whose substantial interests were being determined in the proceeding, DBi became a party by entering an appearance pursuant to rule 28-106.205(3). On June 11, 2021, ALS filed an Unopposed Motion for Leave to File Amended Formal Written Protest and Petition for Administrative Hearing ("Amended Petition"). The motion was granted on June 14, 2021, and the Amended Petition was deemed filed.

The final hearing was held as scheduled on June 22 and 23, 2021, with counsel appearing in person and witnesses appearing both in person and via Zoom. ALS presented the testimony of Deanna Hutchison, the Department's State Administrator for Maintenance Contracting; Michelle Sloan, District Procurement Manager for Department District Five; Christine Barone, Deputy District Maintenance Engineer for Department District Five; Richard Calledare, Region Manager for ALS; and Jeffrey Schechtman, Chief Operating Officer for DBi. ALS also called one expert witness, Curtis Falany. The Department and DBi did not present any witnesses. However, the parties agreed that the Department and DBi would conduct their cross-examination at the end of the direct examination of ALS' witnesses and that cross-examination would not be limited to the scope of direct to avoid calling witnesses multiple times and in the interest of efficiency.

The parties stipulated to the admission of Joint Exhibits 1 through 8. ALS' Exhibits 2, 3, and 9 through 12 were admitted into evidence. The

Department's Exhibits 10, 12 through 19, and 22 through 25 were admitted into evidence. DBi's Exhibits 1 and 3 through 7 were admitted into evidence.

The three-volume Transcript of the hearing was filed on August 9, 2021. The parties timely submitted proposed recommended orders, which were considered in the drafting of this Recommended Order. All references to the Florida Statutes refer to the 2020 version, unless otherwise specified.

FINDINGS OF FACT

The Parties

1. The Department is an executive agency of the state of Florida responsible for coordinating the planning of a safe, viable, and balanced state transportation system, serving all regions of Florida. § 334.044(1), Fla. Stat. The Department is tasked with providing a statewide transportation system that ensures the mobility of people and goods, enhances economic prosperity, and preserves the quality of Florida's environment and communities.

§ 334.046(2), Fla. Stat. To that end, the Department has authority to enter into contracts for the construction and maintenance of all roads under its jurisdiction. § 337.11(1), Fla. Stat.

2. DBi is a transportation infrastructure asset operations and maintenance contractor that provides services primarily to owners of highway infrastructure, such as the Department, across the country. Most of the contracts DBi enters are performance-based contracts. DBi has performed more than 20 maintenance contracts for the Department.

3. ALS is a certified electrical contractor specializing in highway lighting maintenance, roadway lighting, and traffic signalization, which previously performed work for the Department through DBi as its subcontractor on multiple occasions.

The Solicitation

4. On February 23, 2021, the Department issued a Solicitation for the performance of highway lighting maintenance work in District Five. District Five comprises Brevard, Flagler, Lake, Marion, Orange, Osceola, Seminole, Sumter, and Volusia counties.

5. The Solicitation provided that "[t]he work under this Contract consists of maintaining the highway lighting system, including overhead, underdeck and sign lighting, at various locations throughout District Five."

6. The Solicitation included two documents: (a) a Bid Solicitation Notice and (b) a Specifications Package containing Special Provisions that are specific to Contract No. E5X18. By its own terms, the Specifications Package replaced or added to specifications contained in the Department's Standard Specifications for Road and Bridge Construction, January 2021 edition.

7. To the extent not modified by the Specifications Package, the definitions supplied in the Standard Specifications apply to terms used in the Specifications Package. The January 2021 Standard Specifications for Road and Bridge Construction define "bidder" as an individual, firm, or corporation submitting a proposal for the proposed work. It also separately defines "contractor" as the individual, firm, joint venture, or company contracting with the Department to perform the work. These definitions applied to the procurement of Contract No. E5X18.

8. The Solicitation described the contract as a lump-sum "performance" contract or performance-based contract. This means that the Department will pay the winning contractor a fixed monthly price for maintaining certain performance levels. The goal of a performance contract is to achieve an ultimate result: to maintain a level of service as defined within the specifications and scope of the contract—here, the Department's highway lighting system throughout District Five. If the contractor satisfies its contractual obligations—whether by self-performing the work or by subcontracting the work—the contractor is paid on a lump-sum basis.

9. With a performance contract, the Department does not know whether any of the work is subcontracted or whether the contractor self-performs the work. With a performance maintenance contract, the Department's Special Provisions typically do not require bidders to submit proof of licensure with their bids. It is up to the contractor, after contract execution, to conduct field assessments, to determine work needs, to determine what activities need to be performed, and whether any licensure is required to perform those activities.

10. Performance contracts are distinguished from "task" or "work-directed" contracts, in which the Department, itself, identifies the work needs and issues work orders, or task orders, directing the contractor to furnish specific quantities for specific locations. With the Department's work-directed contracts, the Special Provisions generally require proof of licensure at bid time.

11. The Bid Solicitation Notice contained the following requirement(s):

EXPERTISE REQUIRED: For this Contract, the Contractor is required to have at least three years of experience in the performance of Highway Lighting, or the Project Superintendent must have at least three years of like experience as a Superintendent. A Contractor that presently has a certificate of prequalification with the Department in both "Underground Utilities (Electric)" and "Traffic Signal" will suffice to meet the above requirements.

12. The Solicitation included a form titled "Experience in Highway Lighting" ("Experience Form"), by which a bidder could demonstrate compliance with the Solicitation's expertise requirement. The Experience Form contained blank spaces in which a bidder was to list qualifying projects, as well as a space a bidder could mark with an "X" to indicate that it is prequalified with the Department in both Underground Utilities (Electric)

and Traffic Signal, depending on how the bidder elected to meet the Solicitation's expertise requirement.

13. To be eligible to bid on Contract No. E5X18, bidders were required to have either three years' experience in highway lighting or possess a certificate of prequalification with the Department in both Underground Utilities (Electric) and Traffic Signal. The Solicitation left it up to the bidder which method would be used.

14. One of the special provisions in the Specifications Package, under the heading "Contractor Responsibility," was a modification of Article 715-2.1 of the Standard Specifications, which was deleted and replaced with the following:

A license to do business as a certified or registered electrical contractor pursuant to Chapter 489, Part II, Florida Statutes is required. Provide a journeyman electrician possessing a valid journeyman electrician's license to supervise all work, Provide copies of all licenses, certificates, and registrations to document compliance with this Article upon request by the Engineer.

15. The Specifications Package also provided in Article 8-1, titled "Subletting or Assigning of Contracts," that the "Contractor" may "sublet," or subcontract, the contract work. Article 8-1 provided that to subcontract any work, the Contractor must submit a written request to the Department's Engineer. This provision further stated that such a request is approved by default unless the Engineer notifies the Contractor within five business days of receipt of the request that the Department does not consent to the request.

16. The Solicitation further stated that the Department's Proposal Budget Estimate for the contract was \$476,000.00. No timely challenge to the Solicitation specifications was ever filed.

The Parties' Submissions and the Intended Award

17. On or before the March 25, 2021, due date, DBi and ALS submitted bids to the Department in response to the Solicitation.

18. DBi's bid total was \$547,308.00. DBi attested to having the requisite experience, listing three Department highway lighting contracts on which it served as prime contractor, spanning from July 2014 to June 2020. DBi also indicated that it was prequalified with the Department in both Underground Utilities (Electric) and Traffic Signal. Jeffrey Schechtman, DBi's Chief Operating Officer, testified that this indication of being prequalified was made in error, but that DBi nonetheless provided the information in the experience section which met the expertise requirement.

19. ALS' bid total was \$799,200.00. ALS also attested to having the requisite experience, claiming prequalification with the Department in both Underground Utilities (Electric) and Traffic Signal. Although it is undisputed that ALS has many years of experience in highway lighting, ALS chose not to list any qualifying projects, and instead relied solely on its prequalification for its bid proposal.

20. On March 25, 2021, the Department issued the Vendor Ranking for the Solicitation, which indicated that DBi was responsive and had submitted the lowest bid, and the Technical Review Committee recommended the Department award Contract No. E5X18 to DBi. On April 1, 2021, the Contract Awards Committee indicated an intent to award Contract No. E5X18 to DBi. On April 6, 2021, ALS filed, with the Department, its notice of intent to protest and, on April 14, its Petition. ALS filed an Amended Petition on June 11, 2021.

The Protest

21. ALS contends that both the Solicitation and section 489, part II, Florida Statutes, required each bidder to hold an electrical contracting

license, issued by the Florida Department of Business and Professional Regulation, at the time of bid submission.

22. According to ALS, because DBi lacks such a license, DBi is nonresponsive and nonresponsible, and the Department's intended award to DBi is clearly erroneous, contrary to competition, arbitrary, or capricious.

23. Additionally, ALS contends that DBi does not have the highway lighting expertise required by the Solicitation.

DBi and the Department Responses

24. DBi admits that it did not have an electrical contractor license at the time of bid submission and does not have a certificate of prequalification. However, both DBi and the Department assert that neither the Solicitation nor chapter 489, part II, require it. Rather, the license requirement is not for the bidder, but for the contractor (the entity that is successfully awarded the project) and can be satisfied by using the services of a licensed subcontractor.

25. Further, DBi asserts that it properly listed three highway lighting projects which it supervised, thereby demonstrating the requisite experience.

26. Both DBi and the Department question ALS' standing to bring this protest because, although ALS indicated it holds prequalification in both Underground Utilities (Electric) and Traffic Signal, ALS does not possess prequalification for Underground Utilities.

27. To the extent ALS argues the Solicitation, by its scope of work, necessitates that a bidder has a license in electrical contracting, ALS is attempting to litigate an untimely specifications challenge.

The License Requirement

28. ALS contends "the entirety of the work [under Contract No. E5X18] constitutes electrical contracting for which an electrical contracting license is absolutely required." Amended Petition, ¶ 45. According to ALS, the

requirement is set forth both expressly in the Solicitation and by the nature of the work described therein.

29. ALS points to Article 715-2.1 of the Specifications Package, entitled "Contractor Responsibility": "A license to do business as a certified or registered electrical contractor pursuant to Chapter 489, Part II, Florida Statutes is required."

30. Chapter 489, part II, governs electrical contracting. Under the statute, only certified or registered electrical contractors are permitted to perform electrical contracting in Florida. § 489.516(2), Fla. Stat. ("No person who is not certified or registered shall engage in the business of contracting in this state.").

31. DBi and the Department stipulated on the record that most of the work described in the Specifications Package is electrical contracting work that requires an electrical contractor's license under chapter 489, part II. ALS expert, Curtis Falany, testified to the same. Mr. Falany conceded that under chapter 489, part II, work requiring an electrical contracting license begins the first time a worker approaches an electrically energized device and begins to manipulate it. Mr. Falany further admitted it is possible that, after Contract No. E5X18 is executed, a month could elapse without any such work needing to be performed.

32. DBi does not dispute that work requiring electrical contracting licensure will likely arise under Contract No. E5X18, but contends that, in this performance maintenance contract, exactly what work will be performed is entirely speculative at this point. Further, while ALS refers to the Specifications Package as the contract's "scope of work," DBi asserts that the Specifications Package is a set of specifications that would apply to work that may need to be performed under the contract.

33. Although ALS' argument, that intended electrical contracting work must be awarded to a licensed contractor, makes common sense, it ignores

the explicit language of the Specifications and the reality of a performance-based maintenance contract.

34. The only reference in the Specifications to a license requirement is under the heading "Contractor Responsibility," not "Bidder Responsibility."

35. In fact, when the Department intends to require the bidder to have the electrical license, it is quite capable of asking for proof of the same at the time of the bid submission. For example, the Department entered into evidence the solicitation for a District Seven highway lighting maintenance contract that ALS was recently awarded, Contract No. E7N92, in which the solicitation expressly provides bidders "must possess and submit with their bid a license to do business as a Certified or Registered Electrical Contractor pursuant to Chapter 489, Part II, Florida Statutes." The Solicitation here contains no such provision. Likewise, the "Experience in Highway Lighting" form bidders were required to submit with their bids did not mention licensure.

36. ALS contends DBi may not subcontract electrical work to a licensed electrical contractor. However, this ignores Article 8-1 of the Specifications, entitled, "Subletting or Assigning of Contracts," which states that the "Contractor" may "sublet," or subcontract, the contract work. The Department's witnesses testified that this means the contractor may subcontract up to 100 percent of the contract work. There is no provision in the Solicitation directing bidders to identify their subcontractors when submitting their bids. Indeed, with performance-based contracts, the Department typically does not ever learn whether any of the work is subcontracted or whether the work is self-performed.

37. The competent, substantial evidence showed that not all work that might be performed under Contract No. E5X18 directly involves electrical work. For example, maintenance of traffic (referred to as "MOT"), tree trimming, and the general assessment of what work is needed typically do not involve installing, repairing, altering, adding to, or designing electrical

wiring, fixtures, appliances, apparatus, raceways, conduit, or any part thereof that generates, transmits, transforms, or utilizes electrical energy in any form. *See* § 489.505(12), Fla. Stat.

38. Consequently, the undersigned finds that Contract No. E5X18 is not an electrical contract per se, but rather is a performance maintenance contract that—like a broader, general performance maintenance contract—should eventually involve electrical work that requires electrical contracting licensure. The undersigned also finds that, while such work is likely to occur, whether and when it will is entirely speculative. Accordingly, only requiring the actual contractor (either on its own or through a subcontractor) instead of the bidder to possess an electrical contractor's license at the time of work, is the only logical interpretation of the Solicitation language.

The Experience Requirement

39. As discussed above, the Solicitation instructed each bidder to demonstrate, using one of two methods, the expertise that qualifies it to perform the contract. Bidders could describe "at least three years of experience in the performance of Highway Lighting" *or* show that they were prequalified by the Department in two specified work classes.

40. On the "Experience in Highway Lighting" form each bidder was required to submit, DBi listed three contracts, all performance-based contracts with the Department's District Five, and all active contracts when bids for Contract No. E5X18 were submitted. In the space to describe the "Type of Work Performed," DBi stated, "Asset Maintenance/Highway Lighting." In the space to specify "Prime or Sub," DBi stated, "Prime."¹

41. ALS contends DBi lacks the required expertise in two ways: (1) DBi did not self-perform the electrical work on those contracts but instead subcontracted the work; and (2) those contracts were "asset maintenance"

¹ DBi also checked the "prequalified" box, but its Chief Operating Officer testified that this was an error.

contracts, not "highway lighting maintenance" contracts. DBi readily admits that ALS performed some of the electrical work as a subcontractor on each contract listed and contends that DBi's position as prime contractor on all three contracts renders the work it subcontracted DBi's experience for purposes of the Solicitation.

42. That the contracts DBi listed were general asset maintenance contracts instead of, specifically, lighting maintenance contracts, does not matter here. The Solicitation expressly refers to Contract No. E5X18 as a "Maintenance Performance Contract" and lists as the sole work item "Highway Lighting Maintenance." The Department considers highway lighting to be an asset of the Department, which is consistent with calling Contract No. E5X18 a maintenance contract.

43. Further, Ms. Hutchison, the State Administrator for Maintenance Contracting, testified, although some of the Department's asset maintenance contracts are broad in scope and cover all work in a geographic area, that is not always the case; sometimes an asset maintenance contract is specific to only one type of work. The Solicitation provided that a bidder could demonstrate expertise by showing it had "at least three years of experience in the performance of Highway Lighting." The Solicitation does not state that experience must be direct- or self-performed or that the bidder may not include experience of subcontractors.

44. From the Department's and DBi's perspectives, DBi "performed" those contracts—including the electrical work—within the meaning of the Solicitation's expertise provision. DBi is the one that contracted with the Department and is responsible to ensure all work under the contracts is timely completed in accordance with the contracts' terms. DBi is the one that invoiced the Department and the one the Department has paid and pays for all work under the contracts. And because, like the contract at issue here, these contracts are performance contracts, DBi was and is the one responsible for determining what work needs to be performed and how. DBi

does not simply oversee others' performance of work items determined to be necessary by the Department, as occurs with a work-item contract. That certain work was performed by subcontractors does not negate that DBi successfully completed the contracts.

45. The Department's practice, when procuring performance-based contracts, of treating a prime contractor's experience to include the experience of subcontractors is rational, reasonable, and justifiable. Accordingly, DBi met the experience requirement of the Solicitation.

46. In contrast, ALS did not meet the experience requirement. ALS did not list three years' experience in highway lighting work, instead choosing to demonstrate expertise solely through its Department-issued prequalification. ALS submitted a copy of its current Certificate of Qualification and checked the "prequalified" box on the Experience in Highway Lighting form, representing that it held *both* Underground Utilities (Electric) and Traffic Signal prequalification. However, ALS' Certificate of Qualification reflects that ALS is prequalified in the work classes Traffic Signal and Electrical Work, but not Underground Utilities (Electric).

47. ALS attempted to show, through the testimony of its Region Manager Richard Calledare, that Electrical Work is a "major" work class and Underground Utilities (Electric) is a "minor" work class subsumed within the umbrella of Electrical Work and that, therefore, ALS was effectively prequalified in both work classes. In support, Mr. Calledare suggested that the undersigned should "check the [Department's] website." However the website was not introduced into evidence and constitutes uncorroborated hearsay which cannot support a finding of fact.

48. ALS presented no competent, substantial evidence supporting this argument—no evidence as to what major and minor work classes are and no evidence that the Electrical Work work class encompasses Underground Utilities (Electric). Further, the only evidence ALS presented was testimony from Mr. Calledare, yet there was no evidence Mr. Calledare was ever

employed by the Department or had any specialized knowledge or other qualification that would render his perspective on this issue competent and substantial evidence sufficient to support a finding that ALS' prequalification in Electrical Work sufficed to meet the Underground Utilities (Electric) requirement.

49. In contrast, the Department presented competent, substantial evidence showing that ALS' argument fails. As Mr. Caledare conceded, the Solicitation's plain language makes no mention of the work class Electrical Work. The Department's current list of qualified contractors shows that multiple contractors are prequalified in both these classes, demonstrating that a contractor can be prequalified in Electrical Work without being prequalified in Underground Utilities (Electric) and reflecting that being prequalified in Electrical Work is not the same as being prequalified in Underground Utilities (Electric). Deanna Hutchison, a Department State Administrator for Maintenance Contracting, testified that Underground Utilities (Electric) and Electrical Work are separate, mutually exclusive classifications and that Electrical Work is not inclusive of Underground Utilities (Electric).

50. ALS' failure to hold a Department-issued prequalification in Underground Utilities (Electric), as well as Traffic Signal, and failure to demonstrate the required expertise by any other means, rendered ALS' bid nonresponsive.²

CONCLUSIONS OF LAW

51. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1) and (3).

² Although on initial review the Department deemed ALS to be responsive despite ALS' failure to be prequalified in the required work classes, that review was only cursory because ALS was only the second-lowest bidder and the Department intended to move forward with DBi. Had ALS been the low bidder, the Department would have conducted an in-depth review of ALS' pre-qualifications and likely deemed ALS to be nonresponsive.

52. Pursuant to section 120.57(3)(f), the burden of proof rests with ALS as the party opposing the proposed agency action. *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). ALS must sustain its burden of proof by a preponderance of the evidence. See *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

53. Section 120.57(3)(f) provides, in part, as follows:

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.

54. An arbitrary decision is one that is not supported by facts or logic, or is despotic. See *Agrico Chemical Co. v. State Dep't of Env'tl. Reg.*, 365 So. 2d 759 (Fla. 1st DCA 1978). Under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." *Adam Smith Enters., Inc. v. State Dep't of Env'tl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989); see also *Dravo Basic Materials Co. v. State Dep't of Transp.*, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992) ("If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious.").

55. Florida's First District Court of Appeal articulated the "capricious" standard as follows:

A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or despotic. Administrative discretion must be reasoned and based upon competent substantial evidence. Competent substantial evidence has been described as such evidence as a reasonable person would accept as adequate to support a conclusion.

Agrico Chemical Co., 365 So. 2d at 763.

56. The "clearly erroneous" standard has been explained by the Florida Supreme Court as follows:

A finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. Such a mistake will be found to have occurred where findings are not supported by substantial evidence, are contrary to the clear weight of the evidence, or are based on an erroneous view of the law. Similarly, it has been held that a finding is clearly erroneous where it bears no rational relationship to the supporting evidentiary data, where it is based on a mistake as to the effect of the evidence, or where, although there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces the court that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.

Dorsey v. State, 868 So. 2d 1192, 1209 n.16 (Fla. 2003).

57. To establish that the actions challenged in this proceeding are "contrary to competition," ALS must establish that those actions, at a minimum:

- (a) create the appearance of and opportunity for favoritism;
- (b) erode public confidence that contracts are awarded equitably and economically;
- (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or
- (d) are unethical, dishonest, illegal, or fraudulent.

See § 287.001, Fla. Stat.; and *Harry Pepper & Assoc., Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

58. Most significantly, DOAH does not sit as a substitute for the Department regarding whether to award the contract to a particular vendor. If the Department's decision to award to DBi is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious and must be upheld. *Dravo Basic*, 602 So. 2d at 632, 634 n.3. Indeed, a state agency is afforded wide discretion in soliciting and accepting bids, and its decision, when based on an honest exercise of its discretion, will not be overturned even if the decision may appear erroneous and reasonable people may disagree. *Liberty Cty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982).

ALS Submitted a Nonresponsive Bid and Lacks Standing

59. Standing is a jurisdictional threshold issue in a chapter 120 administrative proceeding, the equivalent of subject-matter jurisdiction. See, e.g., *Abbott Labs. v. Mylan Pharms., Inc.*, 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009); *Grand Dunes, Ltd. v. Walton Cty.*, 714 So. 2d 473, 475 (Fla. 1st DCA 1998). To be entitled to proceed with a bid protest, a petitioner must first establish its standing. See, e.g., *Sprint Payphone Servs., Inc. v. Dep't of Corrections*, Case No. 01-0189BID, ¶ 36 (Fla. DOAH Apr. 6, 2001; Fla. DOC Apr. 24, 2001). DOAH lacks jurisdiction to reach the merits of a petition unless and until the petitioner affirmatively establishes standing. See, e.g.,

Unisys Corp. v. Dep't of Child. & Fam. Servs., Case No. 05-3144BID, ¶ 81 (Fla. DOAH Feb. 2, 2006; Fla. DCF Feb. 21, 2006); *Sprint Payphone, Id.* at ¶ 37.

60. To have standing to challenge agency action under chapter 120, a petitioner must demonstrate that the agency action affected the petitioner's substantial interests. *See, e.g.*, § 120.569(1), Fla. Stat. (2016); *Westinghouse Elec. Corp. v. Jacksonville Transp. Auth.*, 491 So. 2d 1238, 1240–41 (Fla. 1st DCA 1986). In a bid protest, the petitioner must establish that its substantial interests are affected by demonstrating that it would be eligible for an award of the contract if it were to prevail on its arguments. *Intercont'l Props. Inc. v. Dep't of HRS*, 606 So. 2d 380, 384 (Fla. 3rd DCA 1992).

61. A bidder that submits a nonresponsive bid or proposal is not eligible for award of a contract and, therefore, does not have substantial interests affected by the award. *See, e.g.*, *Westinghouse*, 491 So. 2d at 1240–41 (petitioner that submitted nonresponsive price proposal lacked standing to protest); *Preston Carroll Co. v. Fla. Keys Aqueduct Auth.*, 400 So. 2d 524, 525 (Fla. 3d DCA 1981) (bidder not in line for contract award "was unable to demonstrate that it was substantially affected; it therefore lacked standing to protest the award of the contract to another bidder").

62. As a matter of law, the Solicitation required each bidder relying on Department prequalification to demonstrate its expertise to be prequalified in *both* the work class Underground Utilities (Electric) and the work class Traffic Signal.

63. ALS failed to show that it meets the Solicitation's expertise requirements, as it did not show any experience in highway lighting, or that of a superintendent, nor is it prequalified with the Department in both Underground Utilities (Electric) and Traffic Signal.

64. ALS' argument, that the work class Underground Utilities (Electric), as a minor work class, is subsumed within ALS' prequalification for the work class Electrical Work, a major work class in which ALS is prequalified, is

unpersuasive. ALS' contention is contrary to the Solicitation's plain language and contrary to the testimony of Department employees who regularly deal with the Department's various prequalification categories. There is simply no provision in the Solicitation that allows prequalification in the work class Electrical Work to suffice to demonstrate expertise. Under the principle *expressio unius est exclusio alterius*, that the Solicitation listed two prequalification work classes and omitted all others reflects that the Department did not intend for any other work classes to suffice.

65. Additionally, ALS presented no competent, substantial evidence regarding the interplay between major and minor work classes and no competent, substantial evidence showing that its prequalification in Electrical Work encompasses prequalification in Underground Utilities (Electric).

66. Here, as a nonresponsive bidder, that is ineligible for contract award, ALS simply is not affected by the award to DBi. Thus, whether the award to DBi violated the Department's governing statutes, its rules or policies, or the Solicitation specifications, cannot be determined in this proceeding.

DBi's Bid Was Responsive to the Solicitation

67. Even were ALS deemed to be responsive, ALS' protest still would need to be dismissed. ALS alleges that DBi's bid was not responsive to the Solicitation's requirements and that DBi is therefore a nonresponsive bidder, due to it not being a licensed electrical contractor and not meeting the expertise requirement. The evidence, as described above, demonstrates that DBi's bid was responsive to the Solicitation for Contract No. E5X18 because it conformed in all material aspects to the Solicitation.

68. The Bid Solicitation Notice does not make any reference to electrical contracting licensure. The only reference in the Solicitation to an electrical contracting license is in the contractual specifications that expressly apply to the contractor—not the bidder—during the course of contract performance.

Article 715-2.1, titled "Contractor Responsibility" and found in the Specifications Package, provides that the license is required, and that proof of licensure must be provided to the Department's Engineer only if requested.

69. Importantly, under the Solicitation, any licensing responsibilities of the winning bidder take effect only upon contract execution. The Specifications Package is part of the Solicitation because it informs the bidder of what its duties and responsibilities will be if it becomes the "Contractor"—that is, if selected to perform the contract. The specifications in a Specifications Package are not requirements that must be met at the time of bid unless the bid solicitation notice itself provides as much. Here, the Bid Solicitation Notice did not.

70. Article 1-3 of the Standard Specifications (Definitions) defines the word "Contractor" to mean "[t]he individual, firm, joint venture, or company contracting with the Department to perform the work." That article defines the word "Bidder" as "[a]n individual, firm, or corporation submitting a proposal for the proposed work." Thus, where a provision of the Standard Specifications or the Specifications Package uses the word "Contractor" but not the word "Bidder," the provision does not apply to bidders, but only to the party that enters the contract with the Department.

71. ALS' arguments, that DBi is not properly licensed and cannot subcontract the electrical work, also fails. Article 8-1 of the Specifications Package plainly contemplates subcontracting. This provision tells the Contractor how to obtain subcontracting approval, and no provision of the Solicitation prohibits subcontracting.

72. The sole legal prohibition on a contractor's subcontracting electrical work is found in section 489.113, which is contained in chapter 489, part I, titled "Construction Contracting." That statute first provides that "[a] contractor shall subcontract all electrical ... work, unless such contractor holds a state certificate or registration in the ... trade category." § 489.113(3), Fla. Stat. Clearly then, a general contractor's subcontracting electrical work

is not outright prohibited. Section 489.113 also provides that a prime contractor may not subcontract electrical work where such work constitutes the majority of the prime contract's work. § 489.113(9)(a), Fla. Stat.

73. But chapter 489, part I, does not apply to the contractor that is awarded Contract No. E5X18 and, therefore, does not apply to DBi. Section 489.103(1) provides that part I does not apply to "[c]ontractors in work on bridges, roads, streets, [or] highways ... , and services incidental thereto." The phrase "services incidental thereto" is defined by rule (promulgated by the Construction Industry Licensing Board "in agreement with" the Florida Department of Transportation, § 489.103(1), Fla. Stat.) as "all work on bridges, roads, streets, highways, and railroads." Fla. Admin. Code R. 61G4-12.011(9). Simply put, contractors working on the Department's roadway contracts are exempt from chapter 489, part I.

74. DBi also met the three years' experience "in the performance of highway lighting work" requirement of the Solicitation by listing three Department contracts for which it serves as the prime contractor.

75. Ultimately, DBi was responsible for ensuring that the three contracts it listed as experience were fully and properly completed. Based on the Solicitation, other governing documents, and the Department's long-held perspective, that DBi accomplished the work furnished under those contracts, constitutes DBi's "experience" within the meaning of the Solicitation. ALS has failed to establish that DBi lacks the requisite experience.

76. 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. § 120.57(3)(b), Fla. Stat. To the extent ALS suggests that chapter 489 necessitates that a bidder hold an electrical contractor's license at the time of bid submission, it constitutes an untimely specifications challenge.

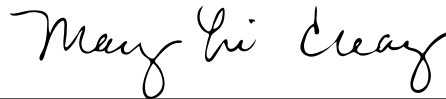
77. ALS has not established, by a preponderance of the evidence, that the Department acted contrary to its governing statutes, rules or policies, or the

Solicitation. ALS has further failed to establish, by a preponderance of the evidence, that the Department's decision to award the contract at issue to DBi is arbitrary, capricious, clearly erroneous, or contrary to competition. ALS has not met its burden, and the Department's decision must not be disturbed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the protest filed by American Lighting and Signalization, LLC, should be dismissed, and the Department of Transportation should enter a final order awarding Contract No. E5X18 to DBi.

DONE AND ENTERED this 27th day of September, 2021, in Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of September, 2021.

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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.