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

CAPITAL ASPHALT, INC.,

Petitioner,

vs.

DOT Case No. 21-008
DOAH Case No. 21-2038BID

FLORIDA DEPARTMENT OF TRANSPORTATION,

Respondent.

_____/

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 Linzie F. Bogan, in July 2021. The ALJ entered a Recommended Order on October 25, 2021 (attached). Capital Asphalt, Inc., timely filed exceptions. The Department timely filed responses to Capital'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.").

I. Standards of review for findings of historical fact

"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).

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).

II. Standards of review for findings of ultimate fact

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.").

III. Standards of review for conclusions of law

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).

Rulings on exceptions

Exception 1: Capital argues the Recommended Order "failed to consider or apply" Sections 337.11(2) and (4) to this proceeding. The basic contention is that subsection (2), which requires the Department to ensure that all project descriptions and plans are complete and up to date before advertising for bids, should be read in pari materia with the Department's subsection (4) power to reject all bids, so the Department may legally reject all bids only when its project descriptions and plans are not complete, accurate, and up to date. (Exceptions ¶¶ 1-6.)

While Section 120.57 requires the Department to rule on timely exceptions to a recommended order, § 120.57(1)(k), Fla. Stat., it presupposes that the exceptions will be to conclusions of law or findings of fact the recommended order actually made. For example, Section 120.57(1)(k) provides that no ruling is required if an exception does not clearly identify the disputed portion of the recommended order. If a recommended order does not address an argument, the

Department cannot make the requisite finding that its "substituted conclusion" is as or more reasonable than the "rejected or modified" conclusion, § 120.57(1)(*l*), Fla. Stat., because there is nothing to reject or modify or substitute. The statute simply does not contemplate ruling on arguments that a recommended order does not address.

The Recommended Order does not expressly rule on Capital's argument that Section 337.11(2) limits the Department's power to reject all bids. This is probably because the argument was not raised until Capital filed its proposed recommended order. Instead, Capital argued that the Department chose not to use high polymer binder on other projects. (RO ¶ 31.)

In the Department's view, a ruling on the unaddressed argument of Exception 1 is not required, § 120.57(1)(k), Fla. Stat., and beyond the Department's power to grant even if the Department concluded the argument is well taken, § 120.57(1)(*l*), Fla. Stat. Without waiving these objections, to facilitate meaningful review the Department offers the following:

Section 120.57(3)(f), Florida Statutes, provides that in challenges to an agency's intended action to reject all bids, the ALJ's standard of review "shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent." The Recommended Order finds, with no exception taken, that Capital's "sole contention" was that the Department's intended action was arbitrary. To the extent

Capital's argument on the interplay between subsections (2) and (4) is an argument that the Department acted arbitrarily (*cf.* Exceptions ¶ 6), the Recommended Order concludes that Capital did not satisfy its burden to show that the Department's decision was arbitrary. (RO ¶ 47.) Capital did not take exception to Paragraph 47. Thus, to the extent Exception 1 contends the Department acted arbitrarily, the ALJ considered and rejected that argument and Capital failed to take exception.

Whether Capital met its burden is a question of fact. *J.D.*, 114 So. 3d at 1133 (citations omitted). The ALJ's finding that Capital did not meet its burden is supported by competent, substantial evidence. Alternatively, to the extent the ALJ's conclusion that the Department did not act arbitrarily is a conclusion of law, the parties have stipulated that the Department has substantive jurisdiction over Chapter 337. The Department finds that the proposed conclusion of law that the Department acted arbitrarily is not as or more reasonable than the ALJ's conclusion of law that the Department did not act arbitrarily.

To the extent the Department is authorized to rule on Exception 1, Exception 1 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 2: Capital argues the Recommended Order "failed to consider and apply" a provision in the solicitation notice that notifies prospective bidders that bids are likely to be rejected if the lowest bid exceeds the engineer's estimate by more than 10%. The basic contention is that because the bid solicitation notice

does not provide for a general reservation of the right to reject all bids, the Department is powerless to reject all bids where, as here, the lowest bid did not exceed the engineer's estimate by more than 10%.

As explained in the ruling on Capital's first exception, a ruling on Exception 2 is not required and is likely beyond the Department's power to grant. Without waiving these objections, to facilitate meaningful review the Department offers the following:

Capital misunderstands the Department's power to reject all bids. That power is vested by the Legislature, not a solicitation notice. As our Supreme Court has held, "Under section 337.11(3)[1], DOT is authorized *either* to award the contract to the lowest responsible bidder *or* reject all of the bids. *Dep't of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 914 (Fla. 1988) (emphasis in original). "If DOT rejects all bids, no statutory right exists in any bidder to have its bid accepted." *Id.* Capital's cases do not involve the Department and thus do not involve the express power to reject bids granted by subsection (4). Nothing in the solicitation notice purports to constrain the exercise of this power.

To the extent Exception 2 contends the Department acted arbitrarily (*cf.* Exceptions ¶ 11), the Recommended Order concludes that Capital did not satisfy its burden to show that the Department's decision was arbitrary. (RO ¶ 47.) Capital

[1] Recodified at Section 337.11(4). Ch. 90-136, § 46, at 565, Laws of Fla.

did not take exception to Paragraph 47. Thus, to the extent Exception 2 contends the Department acted arbitrarily, the ALJ considered and rejected that argument and Capital failed to take exception.

Whether Capital met its burden is a question of fact. *J.D.*, 114 So. 3d at 1133 (citations omitted). The ALJ's finding that Capital did not meet its burden is supported by competent, substantial evidence. Alternatively, to the extent the ALJ's conclusion that the Department did not act arbitrarily is a conclusion of law, the parties have stipulated that the Department has substantive jurisdiction over Chapter 337. The Department finds that the proposed conclusion of law that the Department acted arbitrarily is not as or more reasonable than the ALJ's conclusion of law that the Department did not act arbitrarily.

To the extent the Department is authorized to rule on Exception 2, Exception 2 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 3: Capital takes exception to Paragraph 27 of the Recommended Order; specifically, "the Administrative Law Judge's conclu[sion] that rejecting all bids would be more 'fiscally responsible' in 'controlling costs.'"

The Department does not understand Paragraph 27 as a conclusion by the ALJ that rejecting all bids would be more fiscally responsible and would better control costs. Rather, Paragraph 27 summarizes the testimony of Christopher Dicks, the Department's District 2 roadway design engineer: "Mr. Dicks opined

that a rejection of all bids, and a future reletting of the project, was the more fiscally responsible alternative because it placed the Department in a better position to control costs." This summary of Dicks' testimony is supported by competent, substantial evidence. If, as Capital apparently assumes, Paragraph 27 reflects the ALJ's findings as opposed to summarizing witness testimony, those findings are also supported by competent, substantial evidence. The Department cannot reweigh evidence to reach 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: Capital takes exception to Paragraph 32 on the grounds that it should be "revised" to include additional facts. The Department can only rule on the ALJ's findings, not make new ones. *Walker v. Bd. of Prof'l Eng'rs*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) ("Florida courts are in agreement that when competent substantial evidence in the record supports the ALJ's findings of fact, the agency may not reject them, modify them, substitute its findings, **or make new findings**.") (citation and internal quotations omitted, emphasis supplied).

Capital does not argue Paragraph 32 is not supported by competent, substantial evidence. The Department finds that Paragraph 32 is supported by competent, substantial evidence.

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

Exception 5: Capital argues additional facts should be included in the final order.

The Department need not rule on Exception 5 because it does not clearly identify the disputed portion of the recommended order by page number or paragraph and does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat.; Fla. Admin. Code R. 28-106.217(1). To facilitate meaningful review, the Department may only rule on the ALJ's findings, not make new ones. *Walker*, 946 So. 2d at 605.

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

Exception 6: Capital argues that the competitive bid process was undermined and thus the Department's decision to reject all bids was arbitrary.

The Department need not rule on Exception 5 because it does not clearly identify the disputed portion of the recommended order by page number or paragraph. § 120.57(1)(k), Fla. Stat.; Fla. Admin. Code R. 28-106.217(1). To facilitate meaningful review, the Recommended Order concludes that Capital did not satisfy its burden to show that the Department's decision was arbitrary. (RO ¶

47.) Capital did not take exception to Paragraph 47. Thus, the ALJ considered and rejected Capital's argument that the Department acted arbitrarily and Capital failed to take exception.

Whether Capital met its burden is a question of fact. *J.D.*, 114 So. 3d at 1133 (citations omitted). The ALJ's finding that Capital did not meet its burden is supported by competent, substantial evidence. Alternatively, to the extent the ALJ's conclusion that the Department did not act arbitrarily is a conclusion of law, the parties have stipulated that the Department has substantive jurisdiction over Chapter 337. The Department finds that the proposed conclusion of law that the Department acted arbitrarily is not as or more reasonable than the ALJ's conclusion of law that the Department did not act arbitrarily.

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

Exception 7: Capital takes exception to Paragraphs 24 and 33 of the Recommended Order. Paragraph 24 finds that while Capital disagreed with Howard Moseley's opinion on whether high polymer binder would be used, Moseley's "opinions were, on the whole, unimpeached by [Capital]." Similarly, Paragraph 33 finds that while Capital challenged many of Moseley's points, they were "not impeached to such an extent that the opinions expressed were proven irrational or unreasonable."

Capital contends that it was not required to impeach or disprove Moseley's opinions. In support, Capital states that it demonstrated Moseley's opinions were not based on new information.

It is unclear whether Capital contends that it did not have the burden of showing Moseley's opinions were irrational (and thus arbitrary) or if it contends that it carried that burden. If the former, Capital is mistaken. Capital did not take exception to the conclusion of law that Capital bore the burden of proof. (RO ¶ 38.) If the latter, the findings of fact in Paragraphs 24 and 33 are supported by competent, substantial evidence. The Department cannot reweigh the evidence to reach 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.

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 rejection of all bids submitted for project T2789 was not arbitrary;
2. the petition of Capital Asphalt, Inc., is hereby dismissed; and
3. The Department's uncontested motion for costs is GRANTED. Capital shall pay the sum of $4,181.07 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 23rd day of November, 2021.

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 NOV 23 AM 9:06

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, MS 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN 30 DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

The Honorable Linzie F. Bogan
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

George S. Reynolds IV, Assistant General Counsel
Douglas D. Dolan, Assistant General Counsel
Amber Greene, Clerk of Agency Proceedings
Florida Department of Transportation
605 Suwannee Street, MS 58
Tallahassee, Florida 32399-0458
george.reynolds@dot.state.fl.us
douglas.dolan@dot.state.fl.us
amber.greene@dot.state.fl.us

Thomas J. Guilday
Guilday Law, P.A.
1983 Centre Point Boulevard, Suite 200
Tallahassee, Florida 32308-7823
tom@guildaylaw.com
beth@guildaylaw.com

RON DESANTIS
GOVERNOR

Florida Department of Transportation
605 Suwannee Street
Tallahassee, FL 32399-0450

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