

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

CAPITAL ASPHALT, INC.,

Petitioner,

vs.

Case No. 21-2038BID

FLORIDA DEPARTMENT OF
TRANSPORTATION,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, via Zoom video conference on July 27 and 28, 2021, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas J. Guilday, Esquire
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For Respondent: Douglas Dell Dolan, Esquire
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STATEMENT OF THE ISSUE

Whether the Department acted in an arbitrary¹ manner when deciding to reject all bids submitted for contract number T2789 for construction in District 2 from Cedar Street to the Madison County line.

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 contract number T2789 (Contract or T2789). The Department issued an invitation to bid (ITB) containing the specifications for the Contract. Through the ITB, the Department sought to award a contract for “milling and resurfacing, base work, shoulder treatment, drainage improvements, highway signing, guardrail, and other incidental construction on [State Road] 55 from Cedar Street to the Madison County line.” The limits of the project are in Taylor County, Florida, which is within the Department’s District 2. The Department received two responses to the ITB, both of which were deemed responsive. Capital Asphalt, Inc. (Petitioner), was designated by the Department as the “low bidder” on the Contract. The Department, however, elected not to award the Contract and notified Petitioner that all bids were rejected, the procurement cancelled, and that the Department intended to re-advertise the procurement at a later date. Petitioner timely filed a protest of the Department’s decision to reject all bids.

¹ Paragraph 11 of the Petitioner’s Formal Notice of Bid Protest alleges that “FDOT’s decision to reject all bids is arbitrary as defined in Section 120.57(3), Florida Statutes,” and the prayer for relief “requests an Order finding the FDOT’s intended action to reject all bids was arbitrary and that Proposal T2789 should be awarded to Capital.” Because there are no allegations that the challenged decision was either “dishonest, or fraudulent,” the analysis herein is limited to whether the same was “arbitrary.” If the evidence demonstrates that the Department acted in an arbitrary manner, then, *ipso facto*, the Department also acted in an illegal manner.

On February 26, 2021, Petitioner filed a Notice of Protest regarding the Department's decision to reject all bids and re-solicit the Contract. On March 8, 2021, Petitioner, with respect to the Department's decision to reject all bids and re-solicit the Contract, filed a "Formal Notice of Bid Protest Pursuant to § 120.57(3), Florida Statutes."

On June 25, 2021, Petitioner's protest was referred to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge. The final hearing was conducted on July 27 and 28, 2021.

At the final hearing, Petitioner offered testimony from its company president, Edward M. Mitchell, III, and FDOT employees Michael Horst, Richard Miles, and Jose Hernando. The Department offered testimony from its employees Michael Horst, Jose Hernando, Howard Moseley, Robert Parks, Christopher Dicks, and James Driggers, Jr., and also from Petitioner's company president Mr. Mitchell.

Joint Exhibits 1 through 6 were admitted into evidence. Petitioner's Exhibits 3, 6 through 13, and 15 were admitted into evidence. FDOT Exhibits 7 through 31 were also admitted into evidence.

A three-volume Transcript of the final hearing was filed with DOAH on August 25, 2021. On September 1, 2021, an Order Granting Extension of Time was entered which authorized the filing of proposed recommended orders on or before September 20, 2021. The parties each filed a Proposed Recommended Order, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On or about December 23, 2020, the Department issued a Bid Solicitation Notice for contract T2789. Bidders were instructed to submit bids to the Department on or before 10:30 a.m. on January 27, 2021. The Bid Solicitation Notice advised that the Department sought to contract with a vendor to construct roadway improvements for “milling and resurfacing, base work, shoulder treatment, drainage improvements, highway signing, guardrail, and other incidental construction on [State Road] 55 from Cedar St[reet] to the Madison County Line.” State Road 55 is also known as US Highway 221 (US 221) and is in Taylor County, Florida. The Department intended to award the Contract to the responsible and responsive vendor who submitted the lowest responsive bid.

2. Of significance to the instant dispute, item 0337-7-83 of the Contract proposal calls for the use of “ASPHALT CONCRETE FRICTION COURSE, TRAFFIC C, FC-12.5, PG 76-22.” The additive PG 76-22 is a binder used for the roadway friction course.

3. The Bid Solicitation Notice states that “[t]he bid tabulation and intent to award will be posted on February 10, 2021 or February 24, 2021 at <http://www.fdot.gov/contracts/>, click the ‘Letting and Project Information’ and select letting date from the Listings Menu. The posting provides notice of the Department’s intent to award a contract or reject all bids.”

4. On January 27, 2021, the Department timely received two bids for T2789. Also, on January 27, 2021, the Department opened and evaluated the bids, and issued its “Preliminary Letting Results Report,” which identified Petitioner as having submitted the lowest responsive and responsible bid. The phrase “preliminary letting” appears to be an undefined term of art which is used to describe the process by which bids are unsealed and ranked.

5. On February 24, 2021, the Department announced as to T2789 that the decision was made to “REJECT ALL BIDS.”

6. Jose Hernando is a professional engineer, and has served as the Department's District 2 materials and research engineer for less than two years. In this capacity, Mr. Hernando directly supervises the District 2 geotechnical engineer, the concrete engineer, the pavement engineer, and the operations administrator. Mr. Hernando, prior to assuming his current responsibilities, served as the District 2 geotechnical engineer.

7. On or about February 2, 2021, which was less than a week after Petitioner was identified by the Department as the low bidder for T2789, Mr. Hernando received a call from Steve Sedwick, who at the time worked in private industry as a consultant. The identity of the business on whose behalf Mr. Sedwick was acting when he called Mr. Hernando was not offered by either party. Nevertheless, Mr. Hernando testified that the firm that Mr. Sedwick works for generally provides “recommendations or reviews” to the Department of projects handled by Mr. Sedwick’s employer.

8. According to Mr. Hernando, he was asked by Mr. Sedwick if the Department considered using a high polymer binder for project T2789 instead of PG 76-22 which was called for in the Contract’s specifications. PG 76-22 is “one step below high polymer,” and use of high polymer was incorporated into the Department’s standard specifications in July 2017. Mr. Sedwick previously served as the Department’s District 2 materials and research engineer, and he and Mr. Hernando often conversed about materials-related issues pertaining to the Department’s roadway projects.

9. Mr. Hernando testified that when he spoke with Mr. Sedwick “he did not know anything about ... project” T2789 and specifically did not know that Petitioner had been designated by the Department as low bidder.

10. After informing Mr. Sedwick that he would inquire about the use of high polymer binder for the project, Mr. Hernando contacted District 2 pavement engineer Michael Horst, since he defers to the pavement materials engineer for “these types of asphalt-related issues.” In his position as District 2 pavement materials engineer, Mr. Horst reports directly to

Mr. Hernando. Mr. Hernando met with Mr. Horst regarding Mr. Sedwick's inquiry and asked Mr. Horst if he could "look into it and see if there's any merit to it." There is no indication in the record that Mr. Hernando made any reference to M-CORES² during his meeting with Mr. Horst, or vice-versa.

11. Mr. Horst, after meeting with his supervisor Mr. Hernando, immediately called Mr. Moseley, who is the State bituminous materials engineer, because he wanted Mr. Moseley's recommendation on whether he thought it was a good idea to use high polymer on the project and to see if the product was available from the supplier.

12. Mr. Moseley is responsible for setting "policy, procedure, [and] specifications for asphalt construction on all Department projects [and] provide[s] technical support and guidance to each of the district offices, as needed." According to Mr. Horst, at no time during his conversation with Mr. Moseley did he recommend the use of high polymer binder on project T2789.

13. As the pavement materials engineer, Mr. Horst makes recommendations to District 2's roadway designer for milling and resurfacing, and he oversees the production of asphalt for construction projects.

14. Mr. Horst was familiar with project T2789 and had previously made materials recommendations in 2018 and 2020 for the roadway included within the construction limits of the project. Neither recommendation included the use of high polymer binder as part of the contract specifications.

15. Section 5 of the Department's Flexible Pavement Design Manual sets forth the criteria for selecting the appropriate asphalt binder and provides as follows:

² According to testimony offered by the Department, "[t]he M-CORES project was a legislative initiative to examine a new travel corridor along the western side of Florida from the southwest portion to the Georgia state line."

When High Polymer binder is being considered for a project, coordinate this decision with the State Bituminous Materials Engineers office at the [State Materials Office] SMO.

For open graded friction course mixtures, use PG 76-22 unless the underlying structural layer contains High Polymer. Use High Polymer in the FC-5 if the underlying structural layer contains High Polymer.

The Resilient Modulus of asphalt concrete is less under a slow-moving load than under a more dynamic, high speed load. As a result of this effect, slow moving or stopped trucks have a greater potential to cause rutting. For situations with slow-moving or standing truck traffic, and particularly those sections with a history of rutting, use a PG 76-22 binder or use a High Polymer binder when recommended by the SMO.

High Polymer should only be used in travel lanes and turn lanes with slow-moving or standing truck traffic or a history of raveling, rutting, or severe cracking... .

16. With respect to the 2018 recommendation for State Road 55 from Cedar Street on the north side of Perry to the Madison County line, Mr. Horst recommended the use of PG 76-22 binder under conditions where there was widely dispersed moderate to severe cracking, and “wheel path rutting ranges from 0.01 to 0.30.” As noted in the pavement design manual, the presence of “severe cracking,” in itself, satisfies the criteria for the use of high polymer binder. Nevertheless, Mr. Horst testified that he did not consult with the SMO regarding the use of high polymer binder because “the rutting wasn’t the magnitude to put high polymer binder on this roadway.”

17. According to Mr. Horst, the roadway in question was not resurfaced following his 2018 recommendation, but in 2020 was again considered by the Department for “bituminous resurfacing.” On February 20, 2020, Mr. Horst

issued a revised report for State Road 55 from Cedar Street on the north side of Perry to the Madison County line. Under the section of the revised report labeled “GENERAL CONDITION,” Mr. Horst noted the following:

The cracking is classified as Class IB, II, and II, Block-type cracking that is moderate to severe in extent. The wheel path rutting ranges from 0.01 " to 0.30 ". The structural condition of the roadway is considered poor due to cracking, separation, maintenance patches, small spalls, and rutting.

These are the same general conditions cited in his 2018 report, and Mr. Horst, consistent with his previous recommendation, again suggested the use of “PG 76-22 in all mixes due to heavy truck loads.” Mr. Horst’s recommendation for the use of PG 76-22 was accepted and incorporated into the bid specifications for T2789.

18. In explaining his “revised report,” Mr. Horst testified that he “did not update the pavement conditions survey” portion of the report since he “did not do additional field work to determine whether roadway conditions had substantially changed.”

19. Mr. Moseley testified that with respect to T2789, he was contacted by Mr. Horst who “indicated he was concerned about the traffic from the M-CORES project, and wondered if high polymer binder should be considered for the project.” Mr. Horst, on the other hand, testified that he was vaguely familiar with the M-CORES project, but did not have any specific information about areas that would be impacted by the project. There was no testimony elicited from Mr. Horst that he expressed to Mr. Moseley concerns about the need to use high polymer based on considerations related to M-CORES. Nevertheless, it is undisputed that Mr. Horst spoke with Mr. Moseley about whether T2789 was a candidate for the use of high polymer binder.

20. Mr. Moseley testified that requests for approval of the use of high polymer binder are generally granted. Mr. Moseley also testified that it is “very uncommon” to consider changing to high polymer binder after a project

has let, but decisions of this type are not his responsibility to make because his “primary focus is whether high polymer binder is warranted from an engineering perspective.”³

21. After speaking with Mr. Horst, Mr. Moseley considered a number of factors before concluding that high polymer binder should be used for T2789. Mr. Moseley consulted the 2020 pavement condition survey data for the area. He understood that the project is in Taylor County, which is prone to karst formations (subsurface voids) that can become sink holes. Mr. Moseley also consulted with his supervisor Timothy Ruelke, director of materials, who also has significant experience with the area for which T2789 was planned. Mr. Moseley and Mr. Ruelke examined the State Road 200 rutting investigation final report, which was issued by the Department on September 23, 2020, and noted similarities to the proposed project location. They also noted that the Shady Grove area, which is within the proposed project limits, is prone to highly compressible soils.

22. Mr. Moseley formalized his response to Mr. Horst’s inquiry in an email dated February 4, 2021. The email provides as follows:

From: Moseley, Howard
Sent: Thursday, February 4, 2021 5:28 PM
To: Hernando, Jose; Horst, Michael
Cc: Ruelke, Timothy J.
Subject 441058-1-52-01, US 221 High Polymer Binder Usage

Jose/Mike,

Based on our conversations earlier this week, I concur with the recommendation to use high polymer binder on the US 221 project in Taylor County and approve its use. There are several reasons why this project will benefit from the use of high polymer binder.

³ The “letting” of a contract generally means the process of “choosing one from among the number of bidders, and the formal making of the contract with him.” *Black’s Law Dictionary* 813 (5th ed. 1979). To be clear, there was never a “letting” of T2789 because no contract was ever awarded to Petitioner.

- * Traffic is likely to increase significantly in the future with the M-CORES project.⁴
- * This corridor receives a significant amount of heavily-loaded log trucks going to the Georgia Pacific Foley Plant and Paper Mill near the southern end of this project.
- * Compaction is limited to the static mode only due to the karst formations below the surface through the corridor.
- * The need for the pavement design to remain at grade through the Shady Grove area due to the highly-compressible soils that were successfully mitigated several years ago.
- * A recent forensic investigation on State Road 200 indicated the combination of heavily-loaded log trucks, and reduced density due to compaction being limited to the static mode, could increase the rutting susceptibility of projects. High polymer binder has been shown to reduce rutting susceptibility and cracking in asphalt pavements.

23. As noted above, Mr. Moseley's email indicates that he concurs "with the recommendation to use high polymer binder" on T2789. Messrs. Hernando and Horst testified that neither of them made a recommendation for the use of high polymer binder, so it is not clear from the evidence as to which "recommendation" is referenced by Mr. Moseley. Nevertheless, Mr. Horst, upon receipt of Mr. Moseley's recommendation, joined in supporting the use of high polymer binder for the project.

⁴ Several bills were filed during the 2021 legislative session which were intended to repeal the M-CORES program in its entirety. On or about June 24, 2021, the Governor approved legislation which appears to have effectively terminated the M-CORES project. When Mr. Moseley transmitted his memorandum on February 4, 2021, M-CORES was still a viable project.

24. While Petitioner took exception to many of the points expressed by Mr. Moseley in his email, Mr. Moseley's opinions were, on the whole, unimpeached by Petitioner.

25. Following Mr. Moseley's recommendation, Robert Parks, District 2's director of transportation development, discussed with District 2 Secretary Greg Evans the potential future demands on US 221 and the desire for stronger pavement due to heavy truck traffic. Mr. Parks is responsible for multiple stages of the project process, including initial planning, final design, and project letting. Mr. Parks normally relies on recommendations made from SMO.

26. Mr. Parks discussed the recommendation for the use of high polymer binder with Christopher Dicks, who is the District 2 roadway design engineer. Mr. Dicks manages the department that produces design work in-house for Department projects. Because the recommendation, if approved, would require a change to the construction plans, it was necessary for Mr. Dicks to weigh in on the proposed change.

27. When considering the recommendation, Mr. Dicks noted that approval of a supplemental agreement with the low bidder for the use of high polymer binder in T2789 would likely result in a cost overrun for the project, and that reletting the contract would avoid such an overrun. 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. Mr. Dicks concurred with Mr. Moseley's recommendation to use high polymer binder in T2789 and recommended the Department reject all bids received in the procurement of T2789.

28. Mr. Parks discussed the recommendation with Jamie Driggers, Jr., who works for the Department as the District 2 program management administrator and supervises the work program, program services, local programs, and specifications and estimates office.

29. The specifications and estimates office is the conduit between the roadway design and the contracts office, and is responsible for delivering to the contracts office the plans, specifications, and supporting documents for a project.

30. After consulting with Mr. Parks, Mr. Driggers communicated to Ronda Taylor in the Department's central office that it was the District's intention to recommend the rejection of all bids. Ms. Taylor produced a bid analysis memorializing the Department's decision to reject all bids, and noted therein that the justification for the decision was because "an error was found in the pavement design." Mr. Driggers testified that he did not recall using the quoted terminology in his discussion with Ms. Taylor and speculated that Ms. Taylor developed the language for the justification based on her personal interpretation of their discussion. Neither party called Ms. Taylor to testify in the instant proceeding.

31. In support of its contention that the Department acted in an arbitrary manner when deciding to reject all bids for T2789, Petitioner cites several "comparator projects" where, according to Petitioner, similar conditions to T2789 exist and the Department elected not to use high polymer binder. While the evidence shows instances where the Department elected to either use or not use high polymer binder for other projects, Petitioner's evidence is insufficient to prove that the Department's decision to reject all bids was done in an arbitrary manner.

32. For example, comparator projects T3746 and E3T54 are projects located in Jefferson County, which is in the Department's District 3, and for these projects the northbound traffic on US 221 north of Interstate 10 is less than the traffic on US 221 in Taylor County. The Department's materials recommendations for projects T2714 and T2721 were made in January of 2016, and August 2015 for project T2691. In 2015 and 2016, high polymer binder was still in the developmental stage and not yet incorporated into the Department's standard specifications for road and bridge construction.

33. While it appears that M-CORES is no longer viable, there is no indication that Mr. Moseley, or any of the other decision makers herein, were aware of the demise of the program when the decision was made to reject all bids so as to allow for the use of high polymer binder on project T2789. The remaining bullet points contained in Mr. Moseley's memorandum of February 4, 2021, were challenged by Petitioner, but not impeached to such an extent that the opinions expressed were proven irrational or unreasonable.

CONCLUSIONS OF LAW

34. 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 (2021).⁵

35. The bid protest filed by Petitioner was timely filed, and Petitioner has otherwise complied with all rules and laws relating to the filing of the bid protest.

36. Petitioner, as a responder to the Bid Solicitation Notice, and as low bidder of the Contract until the Department decided to reject all bids, has standing to challenge the Department's decisions at issue.

37. This proceeding is 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

⁵ All subsequent references to Florida Statutes will be to the 2021 version, unless otherwise indicated.

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 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.

38. As the party challenging the Department's proposed agency action, Petitioner bears the burden of proof in this proceeding. § 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).

39. 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 Cnty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 506 (Fla. 1982).

40. 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."

41. 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.

42. 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).

43. As previously noted, Petitioner’s sole contention in its Formal Notice of Bid Protest is that “FDOT’s decision to reject all bids is arbitrary as defined in section 120.57(3), Florida Statutes.” 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).

44. 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 Enters., Inc. v. State Dep’t of Env’tl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

45. The foundation of the Department’s rationale for its decision to reject all bids is unambiguously set forth in Howard Moseley’s email of February 4, 2021. While Petitioner has made it clear that it disagrees with Mr. Moseley’s opinions, Petitioner has, nevertheless, failed to impeach Mr. Moseley’s opinions to the point to where those opinions can be characterized as a pretext for anti-competitive conduct by the Department.

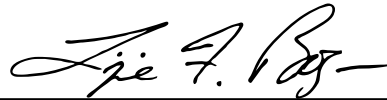
46. The evidence demonstrates that the Department’s decision to use high polymer binder for T2789 was well reasoned, and developed in good faith after appropriate consideration of myriad relevant factors related to the project.

47. For the reasons discussed above, Petitioner failed to meet its burden to show that the Department’s action of rejecting all bids was “arbitrary.”

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 DOAH Case No. 21-2038 finding that the rejection of all bids submitted for project T2789 was not arbitrary, and dismissing the petition.

DONE AND ENTERED this 25th day of October, 2021, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of October, 2021.

COPIES FURNISHED:

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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.