

DRAFT

BEFORE THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT

PHOSPHORUS FREE WATER
SOLUTIONS, LLC,

Petitioner,

vs.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Respondent,

Order No. SFWMD 2021-____-FOF-CONT

DOAH Case No. 21-1794BID

And

FERRATE SOLUTIONS, CORP.,

Intervenor.

FINAL ORDER

After reviewing the administrative law judge's ("ALJ") Recommended Order, the exceptions filed by the parties, and the proceeding's record before the ALJ, this Final Order denies South Florida Water Management District Staff's ("District Staff") exceptions and adopts the ALJ's Recommended Order.

SUMMARY OF RECOMMENDED ORDER

The ALJ recommended that the South Florida Water Management District ("District") enter a final order finding that Ferrate Solutions, Corp. ("Ferrate") is not a responsible bidder; rescind the proposed award to Ferrate; and award the contract to the only remaining responsive and responsible bidder, Phosphorus Free Water Solutions, LLC ("Phosphorus Free"). The ALJ's Recommended Order is attached and incorporated herein by reference. The ALJ found that Ferrate was not a responsible bidder because it lacked the requisite years of experience under the District's Request For Bids (RFB) at

issue in this proceeding. The ALJ further found that Ferrate Solutions improperly communicated with a District employee during the bidding process in contravention of Section 1.7 of the RFB.

STANDARD OF REVIEW FOR RECOMMENDED ORDERS

I. FINDINGS OF FACT

Section 120.57, Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify an ALJ's findings, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence..."¹ The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value, or weight of the evidence.² Instead, "competent substantial evidence" refers to the existence of some evidence for each essential element and as to its admissibility under the rules of evidence.³

A reviewing agency may not reweigh the evidence presented at the Division of Administrative Hearings ("DOAH") final hearing, reject an ALJ's findings of fact if supported by the record or judge the credibility of the witnesses.⁴ If the record shows competent substantial evidence to support an ALJ's factual findings, then "it is irrelevant

¹ *Stokes v. Bd. of Prof'l Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007); see also *Padron v. Dep't of Env'tl. Prot.*, 143 So. 3d 1037, 1041 (Fla. 3d DCA 2014).

² See *Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n. 3 (Fla. 5th DCA 1996).

³ *Id.*

⁴ See, e.g., *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005) (citing, *Aldrete v. Dep't of Health, Bd. of Med.*, 879 So. 2d 1244, 1246 (Fla. 1st DCA 2004); *Pillsbury v. Dep't of Health and Rehab. Svcs.*, 744 So. 2d 1040, 1041 (Fla. 2d DCA 1999)).

that there is also competent substantial evidence to support a contrary finding."⁵ As the "fact-finder," these evidentiary-related matters are within the ALJ's province.⁶

II. CONCLUSIONS OF LAW

Section 120.57(1)(l), Florida Statutes, provides that an agency may reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" whenever the agency's interpretation is "as or more reasonable" than the interpretation made by the ALJ.⁷ Florida Courts have consistently applied this section's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the ALJ's application of legal concepts such as collateral estoppel, res judicata, and hearsay, but not from reviewing conclusions of law that are based upon the ALJ's application of an agency's administrative rules or procedures.⁸ An agency is prohibited from rejecting or modifying a conclusion of law to form the basis for rejecting or modifying a finding of fact.⁹

III. BID PROTESTS

The standard of review in a proceeding where an agency procurement decision is contested is governed by Section 120.57(3), Florida Statutes, and established Florida case law. "In the context of bid protests, a public body has wide discretion in the bidding process, and its decision, when based on an honest exercise of the discretion, should not be overturned even if reasonable persons might disagree."¹⁰

⁵ See, e.g., *Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991) (citing, *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986)).

⁶ See, e.g., *Tedder v. Fla. Parole Comm'n*, 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz*, 475 So. 2d at 1281.

⁷ See *Deep Lagoon Boat Club Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001).

⁸ *Id.*

⁹ § 120.57(1)(l), Fla. Stat.

¹⁰ *AT&T Corp. v. State, Dep't of Mgmt. Servs.*, 201 So. 3d 852, 854 (Fla. 1st DCA 2016).

If there are disputed issues of material fact, the *de novo* hearing under Section 120.57(3)(f), Florida Statutes, is subject to the same procedural requirements as other formal hearings held pursuant to Section 120.57(1).¹¹ It is the responsibility of the ALJ under Section 120.57(3)(f), Florida Statutes, to "determine whether the agency's proposed [procurement] action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications." The burden of proof is on "the party protesting the proposed agency action."

The *Syslogic Technology Services* and *R.N. Expertise* Final Orders adopt a detailed analysis of the "standard of review" issue under Section 120.57(3)(f), Florida Statutes.¹² Although designated as a "standard of proof" in Section 120.57(3)(f), Florida Statutes, the terms "clearly erroneous," "arbitrary," or "capricious" are recognized review standards, rather than standards of proof normally applicable in evidentiary hearings.¹³ This "standard of review" interpretation of Section 120.57(3)(f), Florida Statutes, was adopted without any modifications by the South Florida Water Management District in its Final Order.¹⁴ This interpretation of Section 120.57(3)(f), Florida Statutes, in the *Syslogic Technology Services* case and the *R.N. Expertise* case is reasonable and persuasive. Accordingly, in preparing this Final Order, the standard of review applied in determining the propriety of the Department's proposed award was whether this action was "clearly erroneous, contrary to competition, arbitrary, or capricious."

¹¹ See § 120.57(3)(d)(3), Fla. Stat.

¹² *Syslogic Technology Services v. South Florida Water Management District*, 26 FALR 1368, 1382 (Fla. SFWMD 2002), appeal dismissed without a published opinion, 819 So. 2d 771 (Fla. 2d DCA 2002); and *R.N. Expertise, Inc. v. Miami-Dade Cty. Sch. Bd.*, DOAH Case No. 01-2663BID, 2002 Fla. Div. Adm. Hear. LEXIS 163, adopted in toto March 14, 2002, affirmed without a published opinion, 875 So. 2d 1251 (Fla. 5th DCA 2004).

¹³ *Syslogic Technology Services*, 26 FALR at 1380.

¹⁴ *Id.* at 1368.

RULING ON EXCEPTIONS

I. GENERALLY

Parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the ALJ's findings of fact and conclusions of law by filing exceptions to the ALJ's Recommended Order.¹⁵ If a party does not file exceptions, the party "has thereby expressed its agreement with, or at least waived any objection to, those findings. . ." ¹⁶

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception."¹⁷ The 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."¹⁸

II. RULING ON DISTRICT STAFF'S EXCEPTIONS TO THE RECOMMENDED ORDER

District Staff timely filed its notice of taking exception to three Conclusions of Law in the ALJ's Recommended Order. The ruling on each of the three exceptions is as follows:

Exception 1 (Conclusion of Law 80)

In its first exception, District Staff urges rejection of the ALJ's Conclusion of Law in paragraph 80 of the Recommended Order because the ALJ cites to Section 287.057(23)

¹⁵ See, e.g., *Comm'n on Ethics v. Barker*, 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing*, 954 So. 2d 77, 81 (Fla. 5th DCA 2007).

¹⁶ *Env'tl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); see also *Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003).

¹⁷ § 120.57(1)(k), Fla. Stat.

¹⁸ *Id.*

of the Florida Statutes, which the District contends does not apply to its competitive procurement process because the District is not an executive or legislative State agency. District Staff is correct that Section 287.057(23) of the Florida Statutes is not applicable to the District or its competitive procurement process. However, District Staff admits it is unsure of the purpose for which the ALJ chose to use this citation. The greater context of the Recommended Order, particularly when reading paragraphs 80 and 95 together, makes clear that the ALJ drew a comparison between the intent of Section 287.057(23) to create a "cone of silence" and the intent behind section 1.7 of the District's Request for Bids ("RFB") to do the same. The ALJ does not appear to apply Section 287.057(23) as governing law, which would be erroneous, but rather as a tool to explain the conclusion of law in paragraph 95. Therefore, District Staff's first exception is denied.

**Exception 2
(Conclusion of Law 81)**

In its second exception, District Staff contends that the ALJ's Conclusion of Law in Paragraph 81 should be rejected because it erroneously interprets the intent of section 1.7 of the District's RFB. Specifically, the ALJ interprets Section 1.7 to create a "cone of silence" that prohibits communication between a District employee, except for the assigned Contract Specialist, and a bidder, regardless of who initiates the contact. The District points to the testimony of its Procurement Director, Johanna Labrada, to show that the competent substantial evidence supports a different interpretation—mainly that the "cone of silence" is a one way street where any District employee can contact a bidder, but a bidder is forbidden from contacting anyone other than the assigned Contract Specialist during the specified time period. While an agency has discretion in interpreting

its own RFB¹⁹—the interpretation of section 1.7 is a moot point. The ALJ found that Ferrate Solutions Corp., is not a responsible bidder because it lacked the requisite experience required under the RFB. No party took exception to this finding or to the ALJ's resulting conclusion that the contract should be awarded to Phosphorus Free. Accordingly, whether or not communications between a District employee and a bidder are prohibited under section 1.7 has no bearing on the outcome of this matter. Therefore, District Staff's second exception is denied.

**Exception 3
(Conclusion of Law 95)**

In its third and final exception, District Staff requests rejection of the ALJ's Conclusion of Law in paragraph 95 of the Recommended Order. District Staff cites to the ALJ's interpretation of section 1.7, as discussed in the ruling on its second exception, and to the reliance by the ALJ on Section 287.057(23) of the Florida Statutes, as discussed in the ruling on its first exception. Once again, while District Staff is correct that Section 287.057(23) is not applicable to the District's competitive procurement process, the ALJ does not rely on it for any other purpose than to draw a comparison between its intent and the intent of section 1.7 of the RFB. And, again, the intent and interpretation of section 1.7 is irrelevant to the outcome of this proceeding. Therefore, District Staff's third exception is denied.

III. RULING ON FERRATE SOLUTION CORP.'S EXCEPTIONS TO THE RECOMMENDED ORDER

Ferrate Solutions Corp., timely filed a Notice of Joining in the Exceptions of the South Florida Water Management District. Accordingly, Ferrate Solutions Corp.'s exceptions are denied for the reasons set forth in the rulings on District Staff's exceptions.

¹⁹ See *Deep Lagoon Boat Club Ltd.*

ORDER

Having reviewed the Recommended Order, the exceptions, and the record of the proceeding before DOAH, and having considered the applicable law, and being otherwise fully advised in the premises, it is ORDERED that:

1. The South Florida Water Management District Staff's exceptions are denied for the reasons set forth above;
2. The Recommended Order, attached as "Exhibit A," is hereby adopted.
3. Contract No. 6000001188 is awarded to Phosphorus Free Water Solutions, LLC.

Attached as "Exhibit B" is a Notice of Rights. Under Section 101-22(b), South Florida Water Management District Policies and Procedures, the Governing Board delegated to the Executive Director authority to execute final orders following Governing Board action.

DONE AND ORDERED, this _____ day of September 2021, West Palm Beach, Florida 33406.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT

Drew Bartlett, Executive Director

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was furnished by electronic mail on this ____ day of September 9, 2021, to all counsel of record as listed below.

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