STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GULF REAL PROPERTIES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 94-5628BID
	)	
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,	)	
	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Susan B. Kirkland, held a formal hearing in this case on January 12, 1995, in Fort Lauderdale, Florida, and on June 19, 1995, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether Respondent's determination to reject all bids for Lease No. 590:2490 was appropriate.

PRELIMINARY STATEMENT

Petitioner, Gulf Real Properties, Inc. (Gulf) responded to Respondent's, Department of Health and Rehabilitative Services, District 10 (HRS), Invitation to Bid for Lease No. 590:2490, to lease space to HRS for the Children's Medical Services facility.

HRS issued a notice of award letter to Gulf. A bid protest was filed by an unsuccessful bidder, who subsequently voluntarily withdrew the protest.

After the withdrawal of the protest, HRS issued a letter to Gulf stating that HRS was rejecting all bids. Gulf filed a petition for formal hearing.

The matter was referred to the Division of Administrative Hearings for assignment to a Hearing Officer.

At the final hearing, Gulf presented the testimony of Mary V. Goodman and James F. Antonucci. Petitioner's Exhibits 1-7 were admitted into evidence. HRS presented the testimony of Randall Baker, Christopher A. Edghill, and Dr. Joni Letterman.

At the final hearing the parties agreed to file their proposed recommended orders withing 21 days of the filing of the transcript. The transcript was filed on February 6, 1995. The parties requested that the date for filing proposed recommended orders be extended to March 13, 1995. Petitioner filed a Motion for Rehearing and/or in the Alternative Motion to File Newly Discovered Evidence. The motion was heard by telephonic conference. The motion was denied and the time for filing proposed recommended orders was extended to March 20, 1995. The parties timely filed their proposed recommended orders.

On April 12, 1995, the Hearing Officer entered an order requesting that the parties submit additional argument in reference to the applicability of Rule 60H-1.015, Florida Administrative Code. Both Gulf and HRS filed a response on April 21, 1995.

Subsequent to April 21, 1995, the Hearing Officer scheduled a conference call with the attorneys for Gulf and HRS. During the conference call, the Hearing Officer advised both parties that she had intended to request the parties to discuss in her April 12, 1995, Order, Rule 60H-1.017, not Rule 60H-1.015.

After consideration of the Motions and Responses filed by both HRS and Gulf, the Hearing Officer reopened the hearing in regard to past policies and practices in reference to the application of Rule 60H-1.017, and scheduled the hearing for June 5, 1995. The hearing was rescheduled to June 19, 1995.

At the hearing on June 19, 1995, Gulf presented the testimony of Jim Antonucci, Randall Baker, Mary Goodman, and Linda Treml, and introduced the deposition of George Smith. Gulf Exhibits A-F were admitted in evidence.

At the hearing on June 19, 1995, HRS did not call any witnesses. HRS Exhibits A, B-1, B-2, B-3, and C-Y were admitted in evidence.

HRS filed a supplement to its proposed recommended order on July 7, 1995, and Gulf filed a supplement to its proposed recommended order on July 10, 1995.

The parties' proposed findings of fact are addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Children's Medical Services (CMS) is a statewide program of the Department of Health and Rehabilitative Services which provides services for children who are suffering from medically debilitating or potentially medically debilitating conditions of a chronic nature. In Broward County, Respondent, District X of the Department of Health and Rehabilitative Services (District X), provides CMS services to approximately 4,000 children.

2. The CMS Broward County Clinic is currently located in a leased facility. The lease expires in August, 1995.

3. In the fall of 1994, District X determined that it would seek to lease a larger facility in the private sector to replace the existing leased facility. In November, 1993, Christopher Edghill, who was then the Facilities Manager for District X, prepared a Request for Prior Approval of Space (RNS), seeking approval from the Department of Management Services (DMS) for a new lease to house the CMS program in District X.

4. The RNS stated that District X desired to enter into a ten-year turnkey lease for 19,233 square feet. District X desired to acquire the facility in the private sector through a competitive bidding process. The RNS also included a Letter of Agency Staffing as justification for the space requested and a certification that the district had sufficient funds available to pay for the leased space.

5. Prior to submitting the RNS to DMS, Mr. Edghill did not inquire whether there was public space available in Broward County which would be suitable for housing the CMS program, and no evidence was presented to show that public space was available at that time.

6. After submission of the RNS, District X amended the RNS to include an option to renew.

7. The RNS was approved by DMS on December 3, 1993.

8. In January, 1994, District X issued the solicitation document for bids for lease for CMS facility. The lease number assigned was 590:2490.

9. A pre-bid conference was held on February 10, 1994.

10. James F. Antonucci, a representative for Petitioner, Gulf Properties, Inc. (Gulf), attended the pre-bid conference.

11. On April 4, 1994, Dr. Joni Letterman, who is the Medical Director of CMS for District X, was approached by Linda Bouffard and Rita Frantz concerning a needs assessment for a children's medical center in conjunction with North Broward Hospital District (NBHD). At that time the children's center was in its very early planning stages. The children's center was envisioned to be a combined maternal, obstetrical, pediatric, neonatal and full service children's hospital center with inpatient and outpatient services.

12. On April 6, 1994, Gulf entered into an option agreement to purchase land for space to be utilized for Lease No. 590:2490 should Gulf be awarded the contract.

13. Gulf and ANF Real Estate Group, Inc. (ANF) timely submitted responses to the solicitation by District X. The bids were opened on April 7, 1994. Gulf submitted one bid and ANF submitted two bids.

14. Gulf's bid offered a full service lease at $16.79 per square foot for the first year for 19,800 square feet, plus or minus three percent.

15. A bid evaluation committee of five (5) members was selected by District X. One of the evaluation committee members was Dr. Letterman. On April 20, 1994, the evaluation committee visited the sites proposed by the bidders.

16. By letter dated April 22, 1994, Dr. Letterman notified Ms. Frantz and Ms. Bouffard that CMS was in the process of selecting a bidder for a ten year lease and that relocation of CMS as part of the children's center would not be possible.

17. Sometime in late April or early May, 1994, Dr. Letterman was asked to join the Children's Initiative Committee, which was formed to expand on the concept of the children's center. Dr. Letterman attended her first committee meeting in early May, 1994. At that meeting the committee asked Dr. Letterman where CMS could fit into the children's center concept. Dr. Letterman explained that District X was in the midst of a competitive procurement process for a new CMS facility and did not know whether CMS could commit to relocating on the campus of Broward General Medical Center (BGMC). Mr. Will Trower, Chief Officer of BGMC, was present during the meeting but did not offer any space at that time relating to CMS for use while the children's center was being developed.

18. By memorandum dated May 27, 1994, the evaluation committee notified the acting district administrator that Gulf received the highest rating and recommended that the lease be awarded to Gulf.

19. By letter dated June 9, 1994, Dr. Letterman wrote to Mr. Trower, stating:

For CMS to move forward toward the Children's Center concept and reject bids already submitted, the Department requires a written letter of commitment assuring CMS space and related needs will be met as well as a provision for an interim CMS site as of September 1, 1995, the date our current lease expires. Due to constraints related to the bid process, I must have this written confirmation by the close of business, Thursday, July 16, 1994.

20. By letter dated June 13, 1994, Dr. Letterman advised Mr. Trower that the deadline for response was incorrect in her June 9, 1994 letter and should have read June 16, 1994.

21. Mr. Trower responded by letter dated June 16, 1994, wherein he advised:

> As it relates to interim space for CMS, I can at this time commit to offering to meet with you to have you consider space that will be available this spring in our medical

> office tower adjacent to the hospital. Based on our previous discussion, I believe this space will be adequate in size and capability for an interim location of the CMS services. A lease agreement could be established which would meet your needs for relocation and provide an interim location until such time as the Children's Center is completed.

22. BGMC offered a full service lease of 16,950 square feet for $14.50 per square foot.

23. By memorandum dated June 20, 1994, Mr. Edghill recommended that the best decision would be to award the lease to Gulf. This recommendation was based on Trower's letter which indicated that the Board of Commissioners would have to approve the initiative to develop the children's center, on the effect that a delay could have regarding the bidders' options on the proposed sites, and on the likelihood of a protest by the bidders.

24. By letter dated June 24, 1994, District X advised the bidders that authorization had been granted to award the lease to Gulf.

25. A letter of intent to protest the award was timely filed by ANF on June 27, 1994, followed by a timely filed formal protest on July 9, 1994.

26. On June 30, 1994, Gulf entered into an Agreement for Purchase and Sale of the property which was the subject of the April 6, 1994, option agreement.

27. By memorandum dated August 17, 1994, the District X administrator advised James Towey, the Secretary of HRS, of possible options for resolving the CMS lease problem. Option I was to proceed with the competitive bid process through resolution of the ANF protest and sign a contract with Gulf Real Properties. Option 2 was to terminate the competitive bid process, request proposals from the North and South Broward Hospital Districts and award CMS lease space according to revised criteria. Option 3 was to award the lease to Gulf but alter the occupancy plan by replacing clinic-specific space with general office space and relocating other District programs to the site. The District would then award the clinic-specific space to a hospital entity.

28. On August 26, 1994, ANF filed a Notice of Withdrawal of Formal Written Protest, advising District X that ANF was abandoning its requests for agency action regarding Lease No. 590:2490.

29. On August 26, 1994, Gulf entered into an addendum to the purchase and sale agreement, whereby it was acknowledged that a protest had been filed by ANF concerning the bid award for the lease of the facility which Gulf intended to construct on the property and it was agreed that Gulf had until September 30, 1994, to resolve the protest and that if the protest was not resolved in favor of Gulf that Gulf could cancel the contract.

30. By memorandum dated August 29, 1994, Secretary Towey advised the District X administrator to follow Option 2. His decision was based on his understanding that the District had incorrectly considered North Broward Hospital ("BGMC") not to be a governmental entity when it made its initial decision to award to Gulf and the move to North Broward Hospital would be in the best interests of their clients.

31. By letter dated August 31, 1994, District X advised Gulf that ANF had withdrawn its protest and that District X was rejecting all bids because suitable space had been made available by governmental entities. The letter advised Gulf that it could request an administrative hearing within 30 days of receipt of the letter.

32. The governmental entities referred to in the August 31, 1994 letter were North Broward Hospital and South Broward Hospital.

33. At the end of June, 1994, Dr. Letterman toured the BGMC office space. She determined that the space offered by BGMC was adequate to meet the needs of the District for the CMS clinic. A large number of CMS' clients are located near the hospital. Co-location of CMS at BGMC would allow the sharing of certain areas such as the employee lounge, the medical library, and medical record storage, thus reducing the space that would be required for the CMS program. Additionally, CMS employees, such as economic eligibility employees could be outposted at the hospital, thereby eliminating office space at CMS.

34. Currently BGMC provides services to the CMS clinic such as x-ray, laboratory, diagnostic, hearing testing, and sleep studies. Co-location of CMS and BGMC would eliminate the need to shuttle clients back and forth between the clinic and the hospital and thereby reduce the stress on the childrens' families and provide more efficient services. For example, co-location would eliminate the need for a child who was going to have outpatient surgery of having to go to the clinic for a pre-op exam, travel to another location for laboratory work, and then go to a different location for the surgery. Through co-location the services could be provided in one visit at one location.

35. Co-location of CMS with BGMC should result in more efficient use of the physicians' time. For example the doctors would not have to travel back and forth from the clinic to the hospital. Patient records would be more accessible for use by the physicians because the records could be maintained in one location.

36. In reviewing the proposals submitted by Gulf and ANF, Dr. Letterman had been concerned about the location of an emergency room near the proposed locations. The co-location of CMS and BGMC would result in an emergency room in a CMS approved hospital being in close proximity to the clinic.

37. On August 31, 1994, Gulf sent a termination letter to the seller of the property, advising that District X had rejected all bids. Gulf and the seller of the property thereafter executed another addendum to the purchase contract effective September 15, 1994, which allowed the withdrawal of the termination letter and provided that the closing should take place no later than May 31, 1995.

38. Gulf timely filed its Petition for Administrative Hearing on September 30, 1994.

39. In 1975, DMS, formerly the Department of General Services, promulgated what is now numbered as Rule 60H-1.017, Florida Administrative Code. This rule deals with turnkey leases. The rule was amended once in 1986.

40. Sometime during 1976 or 1977, management at DMS, relying on advice from legal counsel, determined that it did not have the authority to participate in the evaluation of proposals for turnkey leases of user agencies and decided to ignore Rule 60H-1.017, formerly Rule 13M-1.017. DMS did not repeal the rule

and amended the rule in 1986. The DMS real property leasing manual as revised in 1986 contained the procedures for the procurement of turnkey leases as set forth in Rule 60H-1.017.

41. In 1979, HRS promulgated Rule 10-8.007, Florida Administrative Code, dealing with turnkey leases. The rule has not been amended since its adoption.

42. In 1993 or 1994, the Division of Facilities Management of DMS, loaned a staff person to HRS to assist in the revision of HRS Manual, Facilities Acquisition and Management, Procuring Leased Space. This manual provides that for the procurement of turnkey lease construction the District should refer to Section 60H-1.017, Florida Administrative Code, and the Department of Management Services' Real Property Lease Manual and consult with the office of general services of HRS.

43. District X has not made a recommendation to DMS for the proposed award of the lease in issue. The Division of Facilities Management has not made an evaluation of the proposals. There has been no joint approval by the Department of Management Services and District X on the proposal submitted by Gulf Properties.

44. Although Rules 60H-1.017 and 10.8.007 are still in existence, HRS has been following the procedures set forth in Rule 60H-1.015 at least since 1983. Essentially, HRS determines whether there is existing space available and requests approval from DMS to seek a turnkey lease if there is no existing space available. If DMS approves HRS to seek a turnkey lease, HRS advertises for proposals, reviews the proposals submitted, gives notice of an intended award, and sends documentation to DMS in order that DMS may review and approve the lease. In turnkey lease procurements, DMS has followed a procedure similar to that set forth in Rule 60H-1.015. DMS reviews the initial request from HRS to go out for a turnkey lease. If approved HRS proceeds to solicit and award a lease. DMS will give technical assistance to HRS during the procurment process if HRS requests. After HRS notifies the bidders of the intended award, it sends documentation to DMS for review and approval. DMS reviews the following things: floor plans and specifications; price; compliance of design with the standards of the Americans with Disabilities Act; appropriateness of the completion date of the project; availability of public transportation; parking facilities; and dining facilities as they relate to the turnkey lease location. If any of the criteria reviewed by DMS is inappropriate or fails to comply with the specifications or DMS standards, DMS will not let HRS go forward with the project until the deficiency is corrected.

45. The bid solicitation document provides:

> Notification of bid award is final when either no protests are submitted or after all protests are resolved by an administrative hearing procedure. Subsequent protests at District Court level will not be grounds for delaying bid award.

46. The solicitation document also states that HRS has the right to reject any and all bids.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

48. The rules for the procurement and acceptance of proposals for leases for existing space and for leases for turnkey construction differ. In the procurement of leases for existing space, the user agency, in this case District X, evaluates the proposals and makes the selection of the lowest and best bid. Rule 60H-1.015 (5), Florida Administrative Code provides:

> (5) Evaluation
> (a) The user agency alone shall reserve the right to accept or reject any or all bids submitted and if necessary reinitiate procedures for soliciting competitive proposals.
> (b) The user agency, in conjunction with preparing specifications, shall develop weighted evaluation criteria. The criteria items most significant to the user agency's needs should bear the highest weight. Rental, using total present value methodology for basic term of lease applying the present value discount rate pursuant to Rule 60H-1.029; the cost of relocation, if any; consolidation of activities, if desireable; and any other factor deemed necessary should be weighted.
> (c) The evaluation shall be made by the user agency.
> (d) Selection (deemed to be the lowest and best bid) shall be made by the user agency.
> * * *
> (f) Selection shall be publicly announced by the user agency at the time and place designated at the bid opening. A copy of the announcement shall be filed with the Bureau.

49. Rule 60H-1.017, Florida Administrative Code provides the criteria for the solicitation of proposals for a turnkey lease. An agency may procure proposals for a turnkey lease when it is determined that no existing space, either State or private is available. Rule 60H-1.017(3) provides that "[t]he State User Agency will perform the [turnkey lease construction] program to the point of acceptance of proposals, as solicited, in accordance with the Department of Management Services' guidelines, as presented herein." The rule further outlines the responsibilities of the user agency through the evaluation of the proposals.

50. Rule 60H-1.017(3)(f)8, Florida Administrative Code provides:

> . . . Evaluation of proposals will be made jointly by the Division of Facilities Management and the User Agency on the basis of price, design, characteristics of construction, completion date, location (including environmental or characteristics of surrounding neighborhood), public transportation availa-

bility, availability of parking facilities, and availability of satisfactory dining facilities, and conformance to the User Agency program, performance specifications, and floor layout plan.

The User Agency then presents the entire "project review package" (including the User Agency's specific recommendation, justification in support of the recommendation, and the proposed lease contract) to the Division of Facilities Management.

The project review package shall contain:

a. A letter of transmittal setting forth:

(i) the fact that "this is a lease-build proposal," and

(ii) functional and staff justification as to the facility's necessity.

b. Proof of Advertisement. Said advertisement to set forth the particulars of the pre-proposal conference (where, when time, attendees, etc).

c. A list of the responses to the advertisements.

d. Set of the User Agency's program, any unique planning information, performance specifications (building and site). Site description and or delineated area, floor layout plan, and property appraisal.

e. All proposals submitted to the User Agency must be in accordance to guidelines developed.

f. User Agency's recommendation with justification.

The Division of Facilities Management will review the project, if it concurs with the User Agency recommendation, it will give approval and return to the User Agency for execution. The User Agency and the Department of Management Services must be in joint agreement on the proposal before approval is granted. . . .

51. Rule 10-8.007, Florida Administrative Code, promulgated in 1979, deals with HRS turnkey leases and provides:

(1) Purpose. The purpose of this program is to provide the means of meeting State space requirements, in a competitive area, where it has been determined that existing space, either State or privately owned is not available.

(2) The Department shall provide technical assistance in the details of the endeavor.

(3) The Department and the Department of General Services [now the Department of Management Services] must be in joint agreement before turnkey approval is granted.

A physical inspection of completed building and sites will be made by the Department who will,

> in turn, supply the Division of Building Construction and Property Management with a Certification of Acceptance, and a Certificate Citing the Date of Occupancy. . . .

52. Section 255.25(3)(a), Florida Statutes, provides:

> Except as provided in subsection (10), no state agency shall enter into a lease as lessee for the use of 3,000 square feet or more of space in a privately owned building except upon advertisement for and receipt of competitive bids and award to the lowest and best bidder. The Division of Facilities Management [of the Department of Management Services] shall have the authority to approve a lease for 3,000 square feet or more of space that covers more than 1 fiscal year subject to the provision of ss. 216.311, 255.2501, 255.2502, and 255.2503, if such lease is in the judgement of the division, in the best interests of the state. This paragraph does not apply to buildings or facilities of any size leased for the purpose of providing care and living space for persons.

53. It is apparent that District X was proceeding under the assumption that Rule 60H-1.015 governed the procurement of the lease rather than 60H-1.017. The procurement of space for the CMS facility is for turnkey construction. Thus, the applicable administrative rule is Rule 60H-1.017 rather than Rule 60H-1.015. However, the evidence established that both DMS and HRS have not been following Rule 60H-1.017, which has been in existence since 1975. Although DMS management determined they would not follow DMS' own rule around 1976, DMS chose not to repeal the rule and continued to refer to the procedures set forth in the rule in its leasing manual. DMS even amended the rule in 1986. DMS loaned a staff person to assist HRS in revising the HRS leasing manual in 1993-94. The HRS manual referred the districts to Rule 60H-1.017 and DMS' Real Property Lease Manual for the procurement of turnkey leases.

54. HRS has not been following Rule 10-8.007, to the extent that the rule is interpreted to mean that both DMS and HRS must be in joint agreement for the award of a turnkey lease. This interpretation is the interpretation which is set forth in HRS's current leasing manual when it refers the districts to Rule 60H-1.017 and to DMS's leasing manual, which sets forth the same procedures as outlined in Rule 60H-1.017, for the procedures to be used in procuring turnkey leases.

55. Valid rules of an administrative agency have the force and effect of law. Florida Livestock Board v. Gladden, 76 So.2d 291 (Fla. 1954). The validity of a rule is to be assumed by the public official who is to carry out the rule. Graham v. Swift, 480 So.2d 124 (Fla. 3rd DCA 1985). Thus, HRS is bound by Rule 60H-1.017 just as it would be bound by a statute. Rule 60H-1.017 has not been declared invalid by the courts or through a rule challenge. HRS is also bound to follow its own Rule 10-8.007 which requires joint agreement by DMS and HRS for approval of a turnkey lease.

56. Pursuant to Rule 60H-1.017, the acceptance of a turnkey lease proposal required that there be joint evaluation and approval by District X and the Department of Management Services. Rule 10-8.007, requires joint agreement

between HRS and DMS before turnkey approval is granted. There has been no joint evaluation and approval of the proposals by District X and the Department of Management Services, thus District X had no authority to award a lease to Gulf when it advised Gulf of its intent to award on June 24, 1994.

57. Gulf's argument that the competitive bidding process was completed and the award became final when ANF withdrew its protest is without merit based on Rule 60H-1.017. Because there had been no recommendation to the Department of Management Services by District X, no evaluation of the proposals by the Department of Management Services and no joint approval of the proposal by District X and DMS, the competitive solicitation process has not ended.

58. In Department of Transportation v. Groves-Watkins, 530 So. 2d 912 (Fla. 1988), the Florida Supreme Court set forth the role of a hearing officer in the review of an agency's decision to award or reject all bids.

> Thus, although the APA provides the procedural mechanism for challenging an agency's decision to award or reject all bids, the scope of the inquiry is limited to whether the purpose of the competitive bidding has been subverted. In short, the hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.

Id. at 914.

59. In Liberty County v. Baxter's Asphalt and Concrete, 421 So. 2d 505, 507 (Fla. 1982), the court noted the strong judicial deference accorded an agency's decision in competitive bidding situations:

> [A] public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.

60. Petitioner has failed to demonstrate that HRS acted fraudulently, arbitrarily, illegally, or dishonestly when it advised Gulf that it was rejecting all bids.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered dismissing Gulf's bid protest and rejecting all bids for lease number 580:2490.

DONE AND ENTERED this 15th day of August, 1995, in Tallahassee, Leon County, Florida.

SUSAN B. KIRKLAND
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of August, 1995.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 94-5628BID

To comply with the requirements of Section 120.59(2), Florida Statutes (1993), the following rulings are made on the parties' proposed findings of fact:

Petitioner's Proposed Findings of Fact.

1. Paragraph 1: Accepted in substance.
2. Paragraphs 2-5: Rejected as unnecessary detail.
3. Paragraph 6: Accepted in substance.
4. Paragraph 7: Rejected as unnecessary detail.
5. Paragraph 8: Accepted in substance.
6. Paragraph 9: Rejected as unnecessary detail.
7. Paragraphs 10-15: Accepted in substance.
8. Paragraphs 16-17: Rejected as unnecessary detail.
9. Paragraph 18: Accepted in substance.
10. Paragraph 19: The portion of the paragraph stating that Gulf has maintained control of the subject property since the time of initial option is rejected as not supported by the greater weight of the evidence. The remainder of the paragraph is accepted in substance.
11. Paragraphs 20-21: Accepted in substance.
12. Paragraph 22: The first sentence is rejected as unnecessary detail. The second sentence is accepted in substance.
13. Paragraphs 23-25: Accepted in substance.
14. Paragraph 26: The portion of the sentence which states the ITB required that the award letter be issued within 30 days is rejected as not supported by the greater weight of the evidence. The remainder is accepted in substance.
15. Paragraph 27: Rejected as immaterial.
16. Paragraph 28: Accepted in substance.
17. Paragraph 29: Rejected as immaterial.
18. Paragraphs 30-31: Accepted in substance.
19. Paragraphs 32-33: Rejected as immaterial.
20. Paragraph 34: The portion that states the notice of

withdrawal was filed on August 26 is accepted. The remainder is rejected as unnecessary detail.

21. Paragraph 35: Accepted in substance.
22. Paragraph 36: Accepted in substance to the extent that the manual refers to Rule 60H-1.017 F.A.C. for the procedures for turnkey leases.
23. Paragraph 37: Rejected as immaterial.
24. Paragraph 38: Accepted in substance to the extent that he did follow the manual but not to the extent that the manual set forth the procedures for procuring a turnkey lease.
25. Paragraph 39: Rejected as not supported by the greater weight of the evidence and as contrary to law.
26. Paragraphs 40-41: Rejected as unnecessary.
27 Paragraph 42: Accepted in substance.
28. Paragraphs 43-44: Rejected as unnecessary.
25. Paragraph 45: Accepted in substance.
26. Paragraphs 46-47: Rejected as unnecessary detail.
27. Paragraph 48: Accepted in substance.
28. Paragraph 49: Rejected to the extent that the only government entity interested in providing space was Broward General.
29. Paragraphs 50-51: Rejected as unnecessary.
30. Paragraphs 52: Rejected as subordinate to the facts found.
31. Paragraphs 53-59: Accepted in substance.
32. Paragraphs 60-68: Rejected as irrelevant.
33. Paragraph 69: Rejected as not supported by the greater weight of the evidence.
34. Paragraphs 70-71: Accepted in substance.
35. Paragraphs 72: Rejected as irrelevant as to whether she was qualified as an expert.
36. Paragraph 73: Rejected as unnecessary detail.
37. Paragraph 74: Accepted in substance.
38. Paragraphs 75-81: Rejected as subordinate to the facts found.
39. Paragraph 82: The first half of the sentence is rejected as unnecessary detail. The remainder of the sentence is accepted in substance.
40. Paragraphs 83-90: Rejected as subordinate to the facts found.
41. Paragraph 91: Rejected as constituting argument.
42. Paragraphs 92-96: Rejected as subordinate to the facts found.
43. Paragraph 97: Accepted as that has been the practice of HRS but rejected to the extent that it reflects what is required by Rule 60H-1.017.
44. Paragraph 98: Rejected as not supported by the greater weight of the evidence and by the law.
45. Paragraph 99: Rejected to the extent that it implies that DMS approval only means that the lease is effective for payment. Approval by DMS is required for a turnkey lease before the lease can be executed by the parties.
46. Paragraph 100: Accepted to the extent that it means that DMS has not evaluated and given approval of the award.

Supplement to Proposed Recommended Order

1. Paragraphs 1-2: Rejected as unnecessary.
2. Paragraph 3: Accepted in substance.
3. Paragraph 4: Accepted in substance to the extent that HRS had the authority if it followed the procedures under 60H-1.017, and to the extent that the leases were eventually approved by DMS, HRS's premature notices of award were ratified.
4. Paragraph 5: Accepted to the extent that it applies to the time periods before HRS issued a notice of award.
5. Paragraph 6: Accepted in substance.
6. Paragraphs 7-8: Rejected as unnecessary.
7. Paragraph 9: The first sentence is accepted in substance as it pertains prior to HRS issuing a notice of award. It is clear that DMS did do some evaluation of the proposed awardee's proposal prior to DMS approving the lease. The second sentence is accepted in substance as to what actually happened but rejected as to what was stated in Rule 10-8.007 and HRS's interpretation as set forth in its leasing manual.
8. Paragraphs 10-12: Accepted in substance.
9. Paragraph 13: Accepted in substance to the extent that it refers to the time prior to an agency issuing a notice of intended award.
10. Paragraphs 14-15: Accepted in substance.
11. Paragraph 16: Accepted in substance to the extent that the procedures were consistent but that the procedures repudiated the procedures set forth in DMS's duly promulgated Rule 60H-1.017.
12. Paragraph 17: Accepted in substance.
13. Paragraph 18: Rejected as constituting a conclusion of law.
14. Paragraph 19: Rejected as not supported by the greater weight of the evidence.
15. Paragraph 20: Rejected as constituting a conclusion of law.
16. Paragraph 21: Accepted to the extent that the District Administrator has authority to award when the appropriate rules have been followed.
17. Paragraphs 22-23: Accepted in substance.
18. Paragraph 24: Irrelevant since her current duties do not include procurement of turnkey leases and in the past she did not participate in the procurement of a turnkey lease.
19. Paragraph 25: Accepted in substance.

Respondent's Proposed Findings of Fact.

1. Paragraphs 1-4: Accepted in substance.
2. Paragraph 5: The first sentence is accepted in substance. The remainder is rejected as unnecessary detail.
3. Paragraphs 6-9: Accepted in substance.
4. Paragraphs 10-11: Rejected as subordinate to the facts found.
5. Paragraph 12: The paragraph is accepted in substance as it relates to state-owned facilities but not as it relates to other governmental facilities.

6. Paragraphs 13-14: Accepted in substance.
7. Paragraph 15: Rejected as unnecessary detail.
8. Paragraphs 16-17: Rejected as immaterial to the facts actually found.
9. Paragraphs 18-19: Rejected as unnecessary detail.
10. Paragraphs 20-51: Accepted in substance.
12. Paragraph 52: Rejected to the extent that it implies that for this particular case it was the sole responsibility of District X to evaluate the proposals.
13. Paragraphs 53: Rejected as unnecessary detail.
14. Paragraphs 54-55: Accepted in substance.
15. Paragraph 56: Rejected as immaterial.
16. Paragraph 57: Accepted in substance.
17. Paragraphs 58-59: Rejected as immaterial.
18. Paragraph 60: Accepted in substance.
19. Paragraph 61: Accepted in substance except as to the statement the pressure was passed on, which is rejected as not supported by competent substantial evidence.
20. Paragraphs 62-66: Accepted in substance.
21. Paragraph 67: Accepted in substance except as to the date. The notice was faxed to the District on August 26 and a hard copy was submitted on August 29.
22. Paragraph 68: Rejected as not supported by the evidence.
23 Paragraph 69: Accepted in substance.
24. Paragraph 70: Rejected as unnecessary.
25. Paragraph 71: Accepted in substance.
26. Paragraph 72: Rejected as constituting a conclusion of law.
27. Paragraph 73: Rejected as unnecessary.

Supplemental Proposed Findings of Fact

1. Paragraphs 1-2: Accepted in substance.
2. Paragraph 3: Accepted in substance to the extent that the evaluation by DMS and the user agency is not done simultaneously.
3. Paragraphs 4-9: Accepted in substance.
4. Paragraph 10: Accepted to the extent that in actual practice DMS assists when requested by the user agency prior to the issuance of the notice of award.
5. Paragraphs 11-19: Accepted in substance.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

GULF REAL PROPERTIES, INC.,

Petitioner,

vs. CASE NO. 94-5628BID
RENDITION NO. 96-017-FOF-BID

DEPARTMENT OF HEALTH
AND REHABILITATIVE SERVICES

Respondent.
_____/

FINAL ORDER

This cause came on before me for the purpose of issuing a final agency order. The hearing officer assigned by the Division of Administrative Hearings (DOAH) in the above- styled case submitted a Recommended Order to the Department of Health and Rehabilitative Services (HRS). A copy of the Recommended Order of Hearing Officer Susan B. Kirkland, dated August 15, 1995, is attached hereto and incorporated.

RULINGS ON EXCEPTION

Petitioner Gulf Real Properties' (hereinafter "Gulf" or "Petitioner") first exception is that finding of fact 33 should have found that a larger number of Children's Medical Service's ("CMS") patients were located closer to the Gulf location than to the Broward General Medical Center ("BGMC") location. The exception is denied. Finding 33 that "[a] larger number of CMS' clients are located near the hospital" is a permissible finding based on the evidence. Dr. Letterman's testimony is consistent with the hearing officer's finding.

Petitioner also takes exception to the finding in paragraph 33 of the Recommended Order that co-location would allow the sharing of certain areas, thus reducing the space required for the CMS program. Petitioner characterizes Dr. Letterman's testimony as "merely speculative" and as "absolute speculation". However, the transcript of the hearing shows specific testimony by Dr. Letterman regarding the numerous benefits of the proposed co-location. Finding 33 is permissible, based upon competent substantial evidence in the record. The exception is denied.

Petitioner's second exception is to the finding in paragraph 35 of the Recommended Order that co-location would result in record sharing in the CMS program. Petitioner asserts that this finding is mere speculation and, as such, is not competent substantial evidence. The transcript of the hearing shows that Dr. Letterman testified that location of the CMS program at Broward General would simplify records. There is competent substantial evidence in the record to support the hearing officer's finding. The exception is denied.

For its third exception, Petitioner asserts that as finding 36 states, Dr. Letterman did testify that she was concerned about the lack of an emergency room near the Petitioner's location. However, Petitioner adds that the hearing officer should also have found that Dr. Letterman, as an evaluator, rated the Petitioner's location a 9 out of a possible 10 points for location and that Petitioner received the highest rating in the evaluation process. The weighing of the evidence is reserved exclusively for the trier of fact. The exception is denied.

Petitioner's fourth exception is that finding of fact 42 is not supported by the evidence. The Hearing Officer found that the HRS Manual, Facilities Acquisition and Management, Procuring Leased Space provides that in the procurement of turnkey leases, the District should refer to Rule 60H-1.017, F.A.C., and the Department of Management Services' (DMS) Real Property Lease Manual, and should consult with Respondent's Office of General Services. Specifically, Petitioner argues that the HRS Manual has not been promulgated as a rule and that the District is only "directed" to refer to Rule 60H-1.01, F.A.C., "for preliminary informational purposes only". In citing Appendix G of the HRS Manual in support of its argument, Petitioner refers to the statement "Preliminary information can be found in Section 60H-1.01, F.A.C., and in the Department of Management Services' Real Property Lease Manual". Petitioner

failed to provide any legal authority to support its argument that this statement in any way limits or restricts Respondent to referring to Section 60H-1.01, F.A.C., for the sole purpose of obtaining preliminary information. On the contrary, there is competent substantial evidence to support the hearing officer's findings of fact that in the procurement of turnkey leases, the District must comply with all the requirements of Rule 60H-1.01, F.A.C., and DMS' Real Property Lease Manual. The exception is denied.

Petitioner's fifth exception is to finding of fact 44 in the Recommended Order. In finding 44, the Recommended Order provides, "Although Rules 60H-1.01 and 10.8.00 [sic] are still in existence, HRS has been following the procedures set forth in Rule 60H-1.1015 at least since 1983". Petitioner argues that, regardless of the requirements of Rules 60H-1.01 and 10-8.00, F.A.C., Respondent's past practice has been to first issue a Notice of Award and to then seek "joint approval" between HRS and DMS for a turnkey lease. Petitioner argues that, contrary to the hearing officer's reference to the above-listed rules, the evidence shows that "joint approval" by HRS and DMS occurs in the initial stages when HRS requests and DMS approves the decision to seek competitive bids for a turnkey lease and that this initial "joint approval" is the only joint approval required by statute or rule. Such an argument is contradictory to the clear language of Rule 60H- 1.01, F.A.C., which provides that the agency must submit a project review package to DMS and the review package must contain specific documents, including proof of advertisement, a list of the responses to the advertisement, and the User Agency's recommendation with justification. These documents would not be available for inclusion in the package in the initial stage suggested by Petitioner. In regard to the project review package, Rule 6OH-1.017, F.A.C., provides:

> The Division of Facilities Management will review the project, if it concurs with the User Agency's recommendation it will give approval and return to the User Agency for execution. The User Agency and the Department of Management Services must be in joint [agreement] on the proposal [before approval is granted]. [emphasis added]

Petitioner also argues in regard to finding of fact number 44 that the record evidence does not support the hearing officer's determination that HRS interprets the procedures set forth in Rule 10-8.007, F.A.C., to be identical to the procedures set forth in DMS's Rule 60H-1.017, F.A.C., or as requiring "joint approval" between HRS and DMS of an award of a bid for a turnkey lease, and Petitioner states it "demonstrates that the agency's interpretation, based on its past practices, is that joint approval of the award of a bid is not required". Any interpretation of Rule 10-8.007, F.A.C., which would directly conflict with the provisions of Rule 60H-1.017, F.A.C., would be erroneous. In addition, Respondent is statutorily prohibited from promulgating a rule which would be contrary to the clear requirements of Rule 60H-1.017, F.A.C. Respondent's authority to promulgate a rule (Rule 10-8.007, F.A.C.) is provided in s. 255.25(2)(c), F. S., which clearly states:

> Each state agency shall develop procedures and adopt rules to ensure that the leasing practices of the agency are in [substantial compliance] with the rules adopted pursuant to this section as ss. 255.249, 255.2502, and 255.2503. [emphasis added]

There is substantial competent evidence in the record to support the hearing officer's findings of fact, and the exception is denied.

Exception number six filed by Petitioner is that the hearing officer failed to find as a fact that Respondent did not obtain DMS approval to reject all bids in order to negotiate with BGMC. The weighing of the evidence is the sole responsibility of the hearing officer. The agency head may not make findings of fact in the Final Order. The exception stating that certain facts were not found is denied. Petitioner also did not provide to the undersigned, along with its exceptions, a copy of proposed findings of fact to be reviewed prior to the entry of this Final Order to assure that explicit rulings have been made by the hearing officer on proposed findings of fact where required. Presumably, Petitioner is not alleging the lack of explicit rulings on its proposed findings of fact.

In its seventh exception, Petitioner argues that the hearing officer failed to consider and completely ignored Petitioner's argument that upon the Notice of Award of the bid by Respondent, there existed a binding contract. In support of his argument, Petitioner cites to the holding in Carl M. Napolitano v. Department of Health and Rehabilitative Services, 12 FALR 409 (1990). This case is distinguishable from Napolitano, however, because in the latter case the requirements of the applicable statutes and rules, which mandate that certain procedures occur prior to the issuance of a Notice of Award, were properly followed and, therefore, it was determined that a contract existed. In the instant case, however, the requirement of Rule 60H-1.017, F.A.C., which mandates joint agreement between DMS and HRS before approval is granted and only after DMS reviews the project review package which must be submitted by HRS, had not yet been met. As Respondent rejected all bids on August 31, 1994, this case never reached the point of the mandatory DMS review. Therefore, the Notice of Award which was issued in this case was not issued pursuant to the requirements of Rule 60H-1.017, F.A.C., and is clearly distinguishable from Napolitano.

In its eighth and final exception, Petitioner alleges that finding of fact number 46 overlooks and fails to consider that Respondent's right to reject all bids is limited by the Invitation to Bid which Petitioner states was relied on by Respondent in its August 31, 1994, letter and that no authority exists to "reject" a Notice of Award, which became final before the purported rejection of all bids. The evidence does not support Petitioner's argument that Respondent relied solely on the Invitation to Bid in rejecting all bids. On the contrary, the August 31, 1994, letter clearly states that Respondent rejected all bids "pursuant to Section 255.25, Florida Statutes; Chapter 10-13, F.A.C., and the provisions of the Invitation to Bid, Lease No. 590:2490". In addition, the provisions of s. 255.25, F. S., Rule 60H-1.017, F.A.C., and Rule 10-8.007. F.A.C., do not support Petitioner's argument that the Notice of Award became "final". The exception is denied.

FINDINGS OF FACT

The Department hereby adopts and incorporates by reference the findings of fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

The Department hereby adopts and incorporates by reference the conclusions of law set forth in the Recommended Order.

Based upon the foregoing, it is

ADJUDGED, that the bid protest of Petitioner Gulf Properties, Inc., be and the same is hereby DISMISSED.

DONE and ORDERED this 26th day of January,1996 at Tallahassee, Leon County, Florida.

EDWARD A. FEAVER, Secretary
Department of Health and
Rehabilitative Services

By:_____
Lowell Clary
Assistant Secretary for
Administration

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF HRS, AND A SECOND COPY ALONG WITH FILING FEE AS PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

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DISTRICT COURT OPINION
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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

GULF REAL PROPERTIES, INC.,

Appellant,

vs.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, an agency of the State of Florida,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 96-471
DOAH CASE NO. 94-5628BID

Opinion filed February 4, 1997.

An appeal from an order of the Department of Health and Rehabilitative Services.

Wilbur E. Brewton and Kelly Brewton Plante of Gray, Harris & Robinson, P.A., Tallahassee, for Appellant.

William A. Frieder, Assistant General Counsel for the Department of Health and Rehabilitative Services, Tallahassee, for Appellee.

BENTON, J.

Gulf Real Properties, Inc. (Gulf) asks us to overturn a final order entered by the former Department of Health and Rehabilitative Services (HRS) which had the effect of rejecting all bids HRS received in response to an invitation to bid. We affirm.

HRS needed space to house a clinic run by Children's Medical Services, then an HRS program. In response to an invitation for bids to furnish a "turnkey" facility in Broward County that HRS could lease with an option to purchase, Gulf submitted one and ANF Real Estate Group, Inc. (ANF) submitted two bids. The invitation to bid stated: "The department reserves the right to reject any and all bids when such rejection is in the interest of the State of Florida." (Underlined in the original.)

On June 24, 1994, HRS notified both Gulf and ANF that "authorization ha[d] been granted to award subject lease to" Gulf. Treating this letter as notice of the agency's intended decision, ANF filed first a timely notice of protest, then a timely formal written protest, alleging that Gulf's bid was not responsive. While the protest was pending, agency personnel reconsidered the merits of

locating the clinic on the campus of Broward General Hospital, particularly in light of section 255.25(4)(b), Florida Statutes (1995), which provides: "State agencies shall cooperate with local governmental units by using suitable, existing publicly owned facilities . . . ." The North Broward Hospital District, which owns and operates Broward General Hospital, is a local governmental unit.

On August 26, 1994, ANF filed a notice of withdrawal of formal written protest which requested "[t]hat this proceeding be closed." On August 31, 1994, HRS wrote Gulf "the Agency is exercising its right to reject all bids . . . [because] suitable space has been made available by governmental entities with which HRS is obligated by statute to cooperate." The letter also advised Gulf that it could request an administrative hearing.

Gulf did request a hearing, and the matter was referred to the Division of Administrative Hearings. On the basis of an administrative rule promulgated by the Department of Management Services (and since amended), the recommended order concluded that "District X had no authority to award a lease to Gulf when it advised Gulf of its intent to award," and recommended--on that and other grounds--entry of an order "dismissing Gulf's bid protest" and rejecting all bids. HRS's final order, which we now review, overruled exceptions taken by Gulf, and followed the recommendation to dismiss Gulf's "bid protest" or petition for administrative hearing.

Acceptance of a bid solicited under the Administrative Procedure Act differs from acceptance by local governmental bodies. Gulf's reliance on cases like City of Homestead v. Raney Construction, Inc., 357 So.2d 749 (Fla. 3d DCA 1978), Berry v. Okaloosa County, 334 So.2d 349 (Fla. 1st DCA 1976), and Dedmond v. Escambia County, 244 So.2d 758 (Fla. 1st DCA 1971) is therefore misplaced. The invitation to bid provided that "5120.53(5), Florida Statutes" would govern protest procedures. Like section 120.57(3), Florida Statutes (Supp. 1996), which has now replaced it, section 120.53(5)(c), Florida Statutes (1995), provided:

> Upon receipt of the formal written protest which has been timely filed the agency shall stop the bid solicitation process or the 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 bid solicitation process or the contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.

s 120.53(5)(c), Fla. Stat. (1995) [emphasis supplied]. Once ANF filed its formal protest, the bid solicitation and contract award process stopped. Cianbro Corp. v. Jacksonville Trans. Auth., 473 So.2d 209 (Fla. 1st DCA 1985). Even though ANF subsequently withdrew its protest the requisite final agency action only occurred when HRS entered the final order, in the wake of the formal administrative hearing Gulf requested. No contract between HRS and Gulf ever came into existence.

Our decision does not turn on a construction of the administrative rule the Department of Management Services has now amended. We affirm because 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." Department of Transp. v. Groves-Watkins Constructors, 530 So.2d 912, 913 (Fla. 1988). A disappointed bidder seeking to overturn an agency's decision to reject all bids must show that "the agency acted fraudulently, arbitrarily, illegally, or dishonestly." Id. at 914. Appellant did not meet this burden here.

Affirmed.

ERVIN and KAHN, JJ., CONCUR.