

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

ASSESSMENT SYSTEMS, INC.,
AGENCY CLERK

Petitioner,

vs.

DOAH Case No.: 98-1867BID

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,

Respondent,

and

PSYCHOLOGICAL SERVICES, INC.,

Intervenor.

FINAL ORDER

THIS MATTER has come before me for the purpose of issuing a final agency order. On July 14, 1998, an Administrative Law Judge (hereinafter "ALJ") from the Division of Administrative Hearings submitted his Recommended Order, a copy of which is attached hereto as Exhibit "A" and, by reference, incorporated as part of this Order. On July 24, 1998, Respondent, Department of Business and Professional Regulation (hereinafter "Department" or "Respondent"), timely filed its exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit "B." On July 24, 1998, Intervenor, Psychological Systems Inc. (hereinafter "PSI" or "Intervenor"), timely filed its exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit "C." On August 3, 1998, Petitioner, Assessment Systems Inc. (hereinafter "ASI" or "Petitioner"), filed its response in opposition to Respondent's and Intervenor's exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit "D." While Petitioner's response in opposition was received more than ten days after the entry of the Recommended Order, said response was accepted and considered in the rendering of this Final Order. At the request of the Department, all parties waived the thirty-day deadline

for the rendering of this Final Order until August 17, 1998, a four-day extension.

APPEARANCES

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STATEMENT OF THE ISSUE

At issue in this matter is whether the decision of the Department to award the subject contract to PSI comported with essential requirements of law.

BACKGROUND

This matter arose on Petitioner's timely protest of the Department's intent to award the contract for RFP No. 97/98-002 to Intervenor. Petitioner charged, inter alia, that the Department improperly imposed a format penalty against its proposal. The matter was referred to the Division of Administrative Hearings for the assignment of an ALJ to conduct a formal hearing pursuant to section 120.57(3), Florida Statutes. Intervenor petitioned to intervene and that petition was granted by order of April 27, 1998. Pursuant to notice, a formal hearing was held on this matter on May 20 and 21, in Tallahassee, Florida, before the Honorable William J. Kendrick, a duly designated Administrative Law Judge of the Division of Administrative Hearings. The Recommended Order issued by the Administrative Law Judge recommends that the Department issue a final order which awards the subject contract to ASI. As noted above, the Department and PSI filed exceptions to the Recommended Order and ASI filed a response in objection to those

exceptions. The complete record in this matter has been reviewed.

RULINGS ON THE EXCEPTIONS FILED BY THE RESPONDENT

Exception No. 1: Respondent's first item in its exceptions, in the paragraph numbered 1, is a statement of law regarding the proper review standard for this agency to consider the findings of fact in the Recommended Order. While not drafted as an exception, this statement is adopted.

Exception No. 2: Exception two is to paragraph 10 of the Recommended Order in which the ALJ found that the final step in the evaluation process was to resolve whether CMBE preference points should be awarded to the vendors and that ASI was the only vendor to submit a CMBE subcontract plan as part of its proposal. Respondent contends that this finding is not based on competent substantial evidence.

Exception two is granted as far as it contends that there is no competent substantial evidence in the record to sustain a finding that the final step in the evaluation process was to resolve whether CMBE preference points should be awarded to any of the vendors. This portion of the ALJ's finding of fact in paragraph 10 of the Recommended Order is actually a conclusion of law. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this determination as a factual finding. Rather, it is merely an interpretation of a document, one which the Department is as qualified to make as is the ALJ, and one which the Department has a special responsibility to make regarding its own RFP. The Department's interpretation is a reasonable one and, therefore, it is concluded that as a matter of law, the Department's interpretation comports with the provisions of the RFP and essential requirements of law.

Exception No. 3: Exception three is to that part of paragraph 13 of the Recommended Order in which the ALJ found as a fact that, "[h]ad that step been taken, ASI, with 43.23 CMBE preference points, would have been ranked first with 476.205 total points; however, on March 25, 1998, Fae Hartsfield inexplicitly urged the imposition of a 'formal penalty' under the provisions of Section I.F. Of the RFP." Respondent contends that this finding is not based on competent substantial evidence.

Exception three is granted for the reasons stated in the exception. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this determination. There is no evidence that Fae Hartsfield "urged" the imposition of a format penalty.

Further, the ALJ's interpretation in paragraph 13 that the RFP required a certain action by the lead evaluator at a certain point in the process is a conclusion of law because it is merely an interpretation of a document, one which the Department is as qualified to make as is the ALJ, and one which the Department has a special responsibility to make regarding its own RFP. The Department's interpretation is a reasonable one and, therefore,

it is concluded that as a matter of law, the Department's interpretation comports with the provisions of the RFP and essential requirements of law.

Exception No. 4: Exception four is to that part of paragraph 14 of the Recommended Order in which the ALJ found as a fact that, "[n]otably, by the time Fae Hartsfield urged the imposition of the format penalty, the award process (which included evaluation of the proposals, evaluation of proposer references, opening of the cost proposals, and award of CMBE preference points) was complete . . ." Respondent contends that this finding is not based on competent substantial evidence.

Exception four is granted for the reasons stated in the exception. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this portion of the ALJ's determination. There is no evidence in the record that Fae Hartsfield "urged" the imposition of a format penalty.

Further, the ALJ's interpretation in paragraph 14 that the RFP award process was complete at this time is a conclusion of law because it is merely an interpretation of a document, one which the Department is as qualified to make as is the ALJ, and one which the Department has a special responsibility to make regarding its own RFP. The Department's interpretation is a reasonable one and, therefore, it is concluded that as a matter of law, the Department's interpretation comports with the provisions of the RFP and essential requirements of law.

Exception No. 5: Exception five is to that part of paragraph 15 of the Recommended Order in which the ALJ found as a fact that, "[n]otably, at this time Fae Hartsfield knew she had not penalized the vendors, and knew or suspected that it was unlikely the other evaluators had penalized the vendors since the evaluation guide did not include a provision for the imposition of such a penalty." Respondent contends that this finding is not based on competent substantial evidence.

Exception five is granted for the reasons stated in the exception. After a review of the complete record, it is concluded that there is no evidence whatsoever, to support this portion of the ALJ's determination. There is no evidence in the record that Fae Hartsfield knew or suspected that it was unlikely the other evaluators had penalized the vendors.

Exception No. 6: Exception six is to that part of paragraph 16 of the Recommended Order in which the ALJ found as a fact that, "[b]ased on such information, and the timing of Fae Hartsfield's survey, it is reasonable to presume most, if not all, evaluators knew or suspected that imposing a format penalty on ASI could affect the bid award." Respondent contends that this finding is not based on competent substantial evidence and, additionally, is a conclusion of law.

Exception six is granted for the reasons stated in the exception, except it is not granted as to this finding being a conclusion of law. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this portion of the ALJ's determination as a finding of fact. This determination is merely a presumption, as admitted to by the ALJ. There is no competent substantial evidence in the record that "most, if not all, evaluators knew or suspected that imposing a format penalty on ASI could affect the bid award." i

Exception No. 7: Exception seven is to the entire paragraph 21 of the Recommended Order. Respondent contends that this finding is not based on competent substantial evidence and, additionally, is a conclusion of law.

Exception seven is granted for the reasons stated in the exception. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this as a factual finding. The ALJ's finding in paragraph 21 of the Recommended Order is actually a conclusion of law. It is merely an interpretation of a document, one which the Department is as qualified to make as is the ALJ, and one which the Department has a special responsibility to make regarding its own RFP. The Department's interpretation is a reasonable one and, therefore, it is concluded that as a matter of law, the Department's interpretation comports with the provisions of the RFP and essential requirements of law. An agency should be granted great latitude in determining when its bid evaluation process is complete and when an award should be made.

Exception No. 8: Exception eight is to that part of paragraph 22 of the Recommended Order in which the ALJ found as a fact that, "[c]learly, under the procedure established, the role of the evaluators was complete when the results of their evaluation were submitted to the lead evaluator, and consideration of or assessment of a penalty, particularly at the

junction of the award process it was imposed, offends the evaluation procedure established by the RFP, which includes inherent safeguards to discourage manipulation of the award process." Respondent contends that this finding is not based on competent substantial evidence. (Respondent's exceptions list this finding as being contained in paragraph 23 of the Recommended Order, but the language quoted by the Respondent is actually in paragraph 22.)

Exception eight is granted for the reasons stated in the exceptions and because this portion of the ALJ's finding of fact in paragraph 22 of the Recommended Order is actually a conclusion of law. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this determination as a factual finding. Rather, it is merely an interpretation of a document, one which the Department is as qualified to make as is the ALJ, and one which the Department has a special responsibility to make regarding its own RFP. The Department's interpretation is a reasonable one and, therefore, it is concluded that as a matter of law, the Department's interpretation comports with the provisions of the RFP and essential requirements of law.

Exception No. 9: Exception nine is to two portions of paragraph 22 of the Recommended Order. Respondent contends that these portions of the finding are not based on competent substantial evidence.

Exception nine is granted for the reasons stated in the exception and as discussed above under the rulings to Respondent's exceptions No. 2 and 8.

Exception No. 10: Exception ten is to that part of paragraph 25 of the Recommended Order in which the ALJ found as a fact that, "[h]ere, imposition of a penalty, at the juncture it was imposed, was a transparent manipulation of the competitive bidding process, and was contrary to the fundamental requirements of law." Respondent contends that this finding is not based on competent substantial evidence and, additionally, is a conclusion of law.

Exception ten is granted for the reasons stated in the exception. After a review of the complete record, it is concluded that there is no competent substantial evidence to support the factual portion of this finding. A finding of "manipulation" would be a factual finding but nothing in the

record supports any finding that there was "a transparent manipulation of the competitive bidding process."

The remainder of the excepted to portion of paragraph 25 of the Recommended Order is actually a conclusion of law because it is an opinion drawn from a reading of the RFP on what is permissible under the language of the document. It is merely an interpretation of a document, one which the Department is as qualified to make as is the ALJ, and one which the Department has a special responsibility to make regarding its own RFP. The Department's interpretation is a reasonable one and, therefore, it is concluded that as a matter of law, the Department's interpretation comports with the provisions of the RFP and essential requirements of law. An agency should be granted great latitude in determining when its bid evaluation process is complete and when an award should be made.

Exception No. 11: Exception eleven is to the entire paragraph 26 of the Recommended Order. Respondent contends that this finding is not based on competent substantial evidence.

Exception eleven is granted for the reasons stated in the exception. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this as a factual finding. The ALJ's finding in paragraph 26 of the Recommended Order is actually a conclusion of law. It is merely an interpretation of a document, one which the Department is as qualified to make as is the ALJ, and one which the Department has a special responsibility to make regarding its own RFP. The Department's interpretation is a reasonable one and, therefore, it is concluded that as a matter of law, the Department's interpretation comports with the provisions of the RFP and essential requirements of law. An agency should be granted great latitude in determining the terms of its RFP. i

Exception No. 12: Exception twelve is to the entire paragraph 48 of the Recommended Order. Respondent contends that this conclusion of law is erroneous.

Exception twelve is granted for the reasons stated in the exception. The ALJ's conclusion places his interpretation of the provisions of the RFP over that of the Department's. There is no competent substantial evidence in the record to show with certainty that the Department's interpretation of its own document was contrary to the terms of the document. The Department's interpretation was a reasonable one and, therefore,

not an abuse of discretion. Stated differently, it was not clearly erroneous, contrary to competition, arbitrary, or capricious.

RULINGS ON THE EXCEPTIONS FILED BY THE INTERVENOR

Exceptions No. 1 and No. 2: The first two items in Intervenor's exceptions, in the paragraphs numbered 1 and 2, are statements of law regarding the proper review standard for this agency to consider the findings of fact in the Recommended Order. While not drafted as exceptions, these statements are adopted.

Exception No. 3: Exception three is to that part of paragraph 4 of the Recommended Order in which the ALJ found as a fact that, "[t]he only part of the RFP the evaluators had to be concerned with was the evaluation criteria in Appendix 6 beginning on Page 67 of the coded RFP they were given." Intervenor contends that this finding is not supported by competent substantial evidence.

Exception three is granted for the reasons stated in the exception. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this determination.

Exception No. 4: Exception four is to that part of paragraph 4 of the Recommended Order in which the ALJ found as a fact that, "Fee Hartsfield's duty as lead evaluator was only to make uniform mail or fax transmission to evaluators to answer questions on technical issues so they would each get identical communications. Evaluators were not supposed to speak with Fae Hartsfield directly." Intervenor contends that this finding is not supported by competent substantial evidence.

Exception four is granted for the reasons stated in the exception. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this determination.

Exception No. 5: Exception five is to that part of paragraph 8 of the Recommended Order in which the ALJ found as a fact that it was not Fae Hartsfield's function to assist in the calculation of cost scores. Intervenor contends that this finding is not supported by competent substantial evidence.

Exception five is granted for the reasons stated in the exception. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this determination.

Exception No. 6: Exception six is to those parts of paragraphs 13 and 14 and footnote 2 of the Recommended Order in which the ALJ found as a fact that Fae Hartsfield advocated or "urged" for the imposition of a penalty. Intervenor contends that this finding is not supported by competent substantial evidence.

Exception six is granted for the reasons stated in the exception and for the reasons discussed above in the rulings on Respondent's exceptions No. 3 and 4. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this determination.

Exception No. 7: Exception seven is to that part of footnote 2 of the Recommended Order in which the ALJ speculated as to Fae Hartsfield's possible motivation for "to manipulate the bid award." Intervenor contends that this finding is not supported by competent substantial evidence.

Exception seven is granted for the reasons stated in the exception. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this 11 finding, if it is a finding at all. As admitted by the ALJ, her motivation "cannot be distilled from the record in this case." Further, while not excepted to by the Intervenor, there is no competent substantial evidence in the record to support a finding that "Fee Hartsfield's motive was to manipulate the bid award." There is no evidence of manipulation in this case. Indeed, either ASI's or PSI's proposals are acceptable alternatives to the Department.

Exception No. 8: Exception eight is to that part of paragraph 14 of the Recommended Order in which the ALJ found as a fact that Fae Hartsfield "knew the format penalty would reduce ASI to second place." Intervenor contends that this finding is not based on competent substantial evidence.

Exception eight is rejected as to concluding that there is not competent substantial evidence to support a finding that Fae Hartsfield knew that if the maximum amount of allowed penalty points were taken from ASI, then ASI would be reduced to second place. However, the exception is granted as concluding that

there is no competent substantial evidence in the record to support any finding in this paragraph which concludes that Fae Hartsfield knew, prior to contacting the other evaluators, what the decision of the other evaluators would be and what amount of penalty, if any, would be assessed.

Exception No. 9: Exception nine is to that part of paragraph 15 of the Recommended Order in which the ALJ found as a fact that, Fae Hartsfield "knew or suspected that it was unlikely the other evaluators had penalized the vendors since the evaluation guide did not include a provision for the imposition of such a penalty." Intervenor contends that this finding is not supported by competent substantial evidence.

Exception nine is granted for the reasons stated in the exception and for the reasons discussed above in the ruling on Respondent's exception No. 5. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this determination.

Exception No. 10: Exception ten is to that part of paragraph 16 of the Recommended Order in which the ALJ found as a fact that "it is reasonable to presume most, if not all, evaluators knew or suspected that imposing a format penalty on ASI could affect the bid award." Intervenor contends that this finding is not supported by competent substantial evidence.

Exception ten is granted for the reasons stated in the exception and for the reasons discussed above in the ruling on Respondent's exception No. 6. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this determination.

Exception No. 11: Exception eleven is drafted as a conclusion of law, and is not excepting to a particular conclusion of law in the Recommended Order, but rather to the application of the burden of proof in the findings of fact by the ALJ.

Exception eleven is granted for the reasons stated in the exception. Intervenor has stated the proper application of burden of proof to be used in this matter.

Exception No. 12: Exception twelve is to that part of paragraph 25 and footnote 2 of the Recommended Order in which the ALJ found as a fact that imposition of the penalty "was a transparent manipulation of the competitive bidding process" and

that Fae Hartsfield's motive was to manipulate the bid award process. Intervenor contends that this finding is not supported by competent substantial evidence.

Exception twelve is granted for the reasons stated in the exception and for the reasons discussed above in the ruling on Respondent's exception No. 10 and on the rulings to Intervenor's exceptions No. 6 and 7. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this determination.

Exception No. 13: Exception thirteen is to the portion of footnote 2 of the Recommended Order relating to the ALJ's finding regarding the effect of application of other penalty provisions in the RFP. Intervenor contends that this finding is not supported by competent substantial evidence.

Exception thirteen is granted for the reasons stated in the exception. After a review of the complete record, it is concluded that there is no competent substantial evidence to support this determination.

Exception No. 14: Exception fourteen takes issue with the ALJ's conclusion in paragraph 41 of the Recommended Order that there "was no showing that ASI's response to the request for clarification materially altered its proposal." Intervenor contends that there was competent substantial evidence to support such a finding.

Exception fourteen is rejected. After a review of the complete record, it is concluded that there is competent substantial evidence to support the ALJ's finding.

Exception No. 15: Exception fifteen is drafted as a conclusion of law, and is not excepting to a particular conclusion of law in the Recommended Order, but rather to the characterization of what the Intervenor considers conclusions of law which as findings of fact by the ALJ.

Exception fifteen is granted for the reasons stated in the exception. Intervenor has stated the proper conclusion of law to be applied in this area.

Exception No. 16: Exception sixteen is drafted as a conclusion of law, and is not excepting to a particular conclusion of law in the Recommended Order.

Exception sixteen is granted for the reasons stated in the exception. Intervenor has stated the proper conclusion of law to be applied in this area.

Exception No. 17: Exception seventeen is to paragraphs 21 and 25 of the Recommended Order as findings of fact. Intervenor contends that these paragraphs are actually conclusions of law.

Exception seventeen is granted for the reasons stated in the exception and for the reasons discussed above in the rulings on Respondent's exceptions No. 7 and 10.

Exception No. 18: Exception eighteen is drafted as a conclusion of law, and is not excepting to a particular conclusion of law in the Recommended Order.

Exception eighteen is granted for the reasons stated in the exception. Intervenor has stated the proper conclusion of law to be applied in this area.

Exception No. 19: Exception nineteen is drafted as a conclusion of law, and is not excepting to a particular conclusion of law in the Recommended Order.

Exception nineteen is granted for the reasons stated in the exception. Intervenor has stated the proper conclusion of law to be applied in this area.

Exception No. 20: Exception twenty is drafted as a conclusion of law, and is not excepting to a particular conclusion of law in the Recommended Order.

Exception twenty is granted for the reasons stated in the exception. Intervenor has stated the proper conclusion of law to be applied in this area. ;

Exception No. 21: Exception twenty-one is to paragraph 22 of the Recommended Order as a finding of fact. Intervenor contends that this paragraph is merely a legal interpretation.

Exception twenty-one is granted for the reasons stated in the exception and for the reasons discussed above in the ruling on Respondent's exception No. 8.

Exception No. 22: Exception twenty-two is to paragraph 23 of the Recommended Order as a finding of fact. Intervenor

contends that this paragraph is merely a legal construction of the RFP.

Exception twenty-two is granted for the reasons stated in the exception.

Exception No. 23: Exception twenty-three is to paragraph 24 of the Recommended Order as a finding of fact. Intervenor objects to this conclusion.

Exception twenty-three is granted for the reasons stated in the exception and for the reasons stated in Intervenor's exception No. 37.

Exception No. 24: Exception-twenty-four is to paragraphs 27 through 32 and footnotes 2 and 5 of the Recommended Order. Intervenor objects to the conclusions found in these portions of the Recommended Order.

Exception twenty-four is granted for the reasons stated in the exception and for the reasons stated in Intervenor's exceptions No. 42 and 43.

Exception No. 25: Exception twenty-five is to footnotes 4 and 5 of the Recommended Order. Intervenor objects to the conclusions found in these portions of the Recommended Order.

Exception twenty-five is granted for the reasons stated in the exception and for the reasons stated in Intervenor's exceptions No. 39 through 41.

Exception No. 26: Exception twenty-six is to paragraph 41 of the Recommended Order. Intervenor objects to the conclusions found in this paragraph of the Recommended Order.

Exception twenty-six is rejected. As found by the ALJ, there is competent substantial evidence to conclude that ASI's CMBE subcontract plan was responsive. Any variance in the future from the plan, should ASI be awarded the contract, is a compliance issue which would be addressed at such time by the Department pursuant to terms of the contract.

Exception No. 27: Exception twenty-seven is to footnote 6 of the Recommended Order. Intervenor objects to the conclusions found in this footnote of the Recommended Order.

Exception twenty-seven is rejected. While this conclusion is actually a legal interpretation of the RFP and not a finding of fact, the ALJ's interpretation is consistent with that of the Department during the evaluation of the proposal. The Department's interpretation is entitled to great weight as found throughout this Final Order and as argued by the Intervenor throughout its exceptions.

Exception No. 28: Exception twenty-eight is to footnote 7 of the Recommended Order. Intervenor objects to the conclusions found in this footnote of the Recommended Order.

Exception twenty-eight is rejected. While this conclusion is actually a legal interpretation of the RFP and not a finding of fact, the ALJ's interpretation is consistent with that of the Department during the evaluation of the proposal. The Department's interpretation is entitled to great weight as found throughout this Final Order and as argued by the Intervenor throughout its exceptions.

Exception No. 29: Exception twenty-nine is to a portion of footnote 6 of the Recommended Order. Intervenor objects to the conclusions found in this footnote of the Recommended Order and asserts the finding is actually a conclusion of law.

Exception twenty-nine is granted for the reasons stated in the exception.

Exception No. 30: Exception thirty is drafted as a conclusion of law, and is not excepting to a particular conclusion of law in the Recommended Order.

Exception thirty is granted for the reasons stated in the exception. Intervenor has stated the proper conclusion of law to be applied in this area.

Exception No. 31: Exception thirty-one is drafted as a conclusion of law, and is not excepting to a particular conclusion of law in the Recommended Order.

Exception thirty-one is granted for the reasons stated in the exception. Intervenor has stated the proper conclusion of law to be applied in this area.

Exception No. 32: Exception thirty-two is to paragraphs 21, 25, 47, and 50 of the Recommended Order. Intervenor objects to

the standard of review which is applied in these paragraphs of the Recommended Order.

Exception thirty-two is granted for the reasons stated in the exception.

Exception No. 33: Exception thirty-three is to the application of contract law by the ALJ in construing the terms of the contract against the drafter (the Department in this case).

Exception thirty-three is granted for the reasons stated in the exception.

Exception No. 34: Exception thirty-four is to the application of contract law by the ALJ in construing the terms of the contract against the drafter (the Department in this case).

Exception thirty-four is granted for the reasons stated in the exception.

Exception No. 35: Exception thirty-five is drafted as a conclusion of law, and is not excepting to a particular conclusion of law in the Recommended Order.

Exception thirty-five is granted for the reasons stated in the exception. Intervenor has stated the proper conclusion of law to be applied in this area.

Exception No. 36: Exception thirty-six is drafted as a conclusion of law, and is not excepting to a particular conclusion of law in the Recommended Order.

Exception thirty-six is granted for the reasons stated in the exception. Intervenor has stated the proper conclusion of law to be applied in this area.

Exception No. 37: Exception thirty-seven is to the ALJ's legal construction of the RFP which renders the format penalty provision a nullity. Intervenor objects to this conclusion as error.

Exception thirty-seven is granted for the reasons stated in the exception. Intervenor has stated the proper conclusion of law to be applied in this area.

Exception No. 38: Exception thirty-eight is to the ALJ's legal construction of the RFP which renders the format penalty provision a nullity. Intervenor objects to this conclusion as error.

Exception thirty-eight is granted for the reasons stated in the exception.

Exception No. 39: Exception thirty-nine is to the ALJ's legal construction of the RFP which renders the format penalty provision a nullity. Intervenor objects to this conclusion as error.

Exception thirty-nine is granted for the reasons stated in the exception.

Exception No. 40: Exception forty is to the ALJ's legal construction of the RFP which renders the format penalty provision a nullity. Intervenor objects to this conclusion as error.

Exception forty is granted for the reasons stated in the exception.

Exception No. 41: Exception forty-one is to the ALJ's legal construction of the RFP which renders the format penalty provision a nullity. Intervenor objects to this conclusion as error.

Exception forty-one is granted for the reasons stated in the exception.

Exception No. 42: Exception forty-two is to the ALJ's legal construction of the RFP which interprets the provisions of the RFP relating to the calculation of penalty points. Intervenor objects to this conclusion as error.

Exception forty-two is granted for the reasons stated in the exception.

Exception No. 43: Exception forty-three is to the ALJ's legal construction of the RFP which interprets the provisions of the RFP relating to the calculation of penalty points. Intervenor objects to this conclusion as error.

Exception forty-three is granted for the reasons stated in the exception.

Exception No. 44: Exception forty-four is to the ALJ's legal construction of section 120.57(3)(f), Florida Statutes. Intervenor objects to this construction as error.

Exception forty-four is rejected. The ALJ's construction of section 120.57(3)(f), Florida Statutes, is not in error. The ALJ correctly applies this provision and finds that the clarification requested and received by the Department in evaluating ASI's CMBE subcontract plan was not violative of this statutory provision.

Exception No. 45: Exception forty-five is to the ALJ's legal construction of section 120.57(3)(f), Florida Statutes. Intervenor objects to this construction as error.

Exception forty-five is rejected. The ALJ's construction of section 120.57(3)(f), Florida Statutes, is not in error. The ALJ correctly applies this provision and finds that the clarification requested and received by the Department in evaluating ASI's CMBE subcontract plan was not violative of this statutory provision.

Exception No. 46: Exception forty-six is to the ALJ's interpretation of the RFP's provisions relating to the award of CMBE bonus points. Intervenor objects to this interpretation as error. i

Exception forty-six is rejected because the ALJ's interpretation of the RFP is consistent with that of the Department during the evaluation of the proposal.

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Exception No. 47: Exception forty-seven is to the ALJ's interpretation of the RFP's provisions relating to the award of CMBE bonus points. Intervenor objects to this interpretation as error.

Exception forty-seven is rejected because the ALJ's interpretation of the RFP is consistent with that of the Department during the evaluation of the proposal.

Exception No. 48: Exception forty-eight is to the ALJ's interpretation of ASI's proposal relating to its CMBE subcontract plan. Intervenor objects to this interpretation as error.

Exception forty-eight is rejected. As found by the ALJ, there is competent substantial evidence to conclude that ASI's CMBE subcontract plan was responsive. Any variance in the future from the plan, should ASI be awarded the contract, is a compliance issue which would be addressed at such time by the Department pursuant to terms of the contract.

Exception No. 49: Exception forty-nine is to the ALJ's conclusions of law in paragraphs 21 and 48 of the Recommended Order. Intervenor objects to these conclusions as error.

Exception forty-nine is partially granted. The Intervenor is correct that the Department's own construction of its RFP should be applied. The Intervenor is correct that there is no basis to conclude that the Department's proposed decision to award the contract to PSI was contrary to the RFP's specifications, clearly erroneous, arbitrary, or capricious. However, there is a basis to conclude that the Department's actions were contrary to competition.

Exception No. 50: Exception fifty asserts that the only action taken by the Department which was violative of section 120.57(3)(f), Florida Statutes, was the Department's consideration of ASI's CMBE subcontract plan and the clarification of said plan requested and received by the Department.

Exception fifty is rejected. As found by the ALJ, there is competent substantial evidence to conclude that ASI's CMBE subcontract plan was responsive. Further, there is evidence in the record of other action taken by the Department which is violative of section 120.57(3)(f), Florida Statutes.

Exception No. 51: Exception fifty-one asserts that the Department should reject the ALJ's ultimate conclusion of law, dismiss ASI's protest, and award the contract to PSI.

Exception fifty-one is partially granted. The Intervenor is correct that the Department's own construction of its RFP should be applied and the ALJ's conclusions to the contrary should be rejected. The Intervenor is correct that there is no basis to conclude that the Department's proposed decision to award the contract to PSI was contrary to the RFP's specifications, clearly erroneous, arbitrary, or capricious. However, there is a basis to conclude that the Department's actions were contrary to competition. There is other action in

the record taken by the Department which is violative of section 120.57(3)(f), Florida Statutes, which requires that ASI's bid protest be sustained.

FINDINGS OF FACT

1. The ALJ's Findings of Fact 1, 2, 3, 5, 6, 7, 9, 11, 12, 17, 18, 19, 20, 30, and 33 through 41 as set forth in the Recommended Order are adopted and incorporated herein by reference.

2. The remainder of the ALJ's Findings of Fact are rejected or modified as discussed above in the rulings on exceptions filed by the Respondent and the Intervenor.

3. There is competent substantial evidence to support the findings of fact as modified.

CONCLUSIONS OF LAW

4. The ALJ's Conclusions of Law 42 through 47 are adopted and incorporated herein by reference.

5. The ALJ's Conclusion of Law 48 is rejected. There is no demonstration in the record that the Department's imposition of a format penalty was contrary to the RFP's terms or specifications or that its decision was an abuse of discretion. Further, there was no demonstration that the Department's decision or its interpretation of the RFP were clearly erroneous, contrary to competition, arbitrary, or capricious. The ALJ has substituted his interpretation of the RFP for that of the Department's. "Although it must be admitted that the meaning of language is a factual question, the general rule is that interpretation of a document is a question of law rather than fact." Peacock Const. Co., Inc. v. Modern Air Conditioning, Inc., 353 So. 2d 840, 842 (Fla. 1977).

6. The Department has the ability to interpret its own RFP, therefore, the format penalty provision is not a nullity. The Department's interpretation of when the evaluation process was complete, of when the format penalty could be assessed, of the role of the lead evaluator, of the scope of the evaluators in reviewing the proposal, and of what "total" meant in determining the format penalty are reasonable and are found to comport with essential requirements of law.

7. As stated in the ALJ's Conclusion of Law 43, section 120.57(3)(f), Florida Statutes, provides in pertinent part:

". . . . 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, 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 bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. . . ."

8. "In this context, the phrase 'de novo hearing' is used to describe a form of intra-agency review. The [administrative law] judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." State Contracting and Engineering Corp. v. Department of Transportation, Fla. L. Weekly D942, (Fla. 1st DCA 1998). Here, the ALJ exceeded his scope of authority.

9. The Department's actions in this matter were not contrary to its governing statutes, rules or policies, or the proposal specifications, except as found in the conclusion of this Final Order.

10. The ALJ's Conclusion of Law 49 is rejected. The Department's interpretation of the RFP's specifications is reasonable and comports with essential requirements of law.

11. The ALJ's Conclusion of Law 50 is adopted and incorporated herein by reference.

12. ASI did not receive any unfair or substantial competitive advantage over other bidders by reason of its submission in response to the RFP being in the incorrect format.

13. While the ultimate conclusions of the ALJ are rejected, it is found that based on the ALJ's findings of fact, the method used by the Department in discussing the format penalty with the technical evaluators is flawed. There is no way to know whether the evaluators would have arrived at the same determination of penalty points if the inquiry had been communicated in writing

rather than communicated verbally. The evaluators should have been left free to make their own determinations without knowing what any other evaluator was thinking or had already concluded. Therefore, it is found that the Department's method in determining the format penalty was contrary to competition and, therefore, in violation of section 120.57(3)(f), Florida Statutes. As a result, the format penalty points may not be assessed to reduce the score of ASI's proposal.

14. ASI's proposal, without the assessment of penalty points, should have been ranked first with a score of 476.205 total points. PSI's proposal should have been ranked second with its score of 463.51 total points.

ORDER

Based upon a review of the complete record, the findings of fact, and conclusions of law in this matter, it is hereby ORDERED that Petitioner's bid protest be sustained and the subject contract be awarded to Assessment Systems, Inc. This Order shall be effective on the date of filing with the Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this 17th day of August, 1998, in Tallahassee, Leon County, Florida.

Henry P. Osborne, Secretary
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0750

NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

Any party who is substantially affected is hereby notified pursuant to section 120.569(1), Florida Statutes, that an appeal of this Final Order may be taken pursuant to section 120.68, Florida Statutes, unless this right is waived, by filing one copy of a Notice to Appeal with the Clerk of the Department of Business and Professional Regulation and one copy of a Notice to Appeal with the required filing fee with the District Court of Appeal within thirty (30) days of the date this Order is filed with the Clerk of the Department of Business and Professional Regulation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Paul R. Ezatoff, Esquire, Katz, Kutter, Haigler, Alderman, Bryant & Yon, P.A., Highpoint Center, Suite 1200, 106 East College Avenue, Tallahassee, Florida, 32301, Attorney for the Petitioner; and by hand to Martha Harrell Chumbler, Esquire, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., 215 South Monroe Street, Suite 500, Tallahassee, Florida, 32302, Attorney for Intervenor; on this 17th day of August, 1998.

Thomas G. Thomas
Assistant General Counsel

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