

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

METCALF & EDDY, INC., )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 00-0494BID  
 )  
 STATE OF FLORIDA, )  
 DEPARTMENT OF TRANSPORTATION, )  
 )  
 Respondent, )  
 )  
 and )  
 )  
 WRS INFRASTRUCTURE AND )  
 ENVIRONMENT, INC., )  
 )  
 Intervenor. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 5 through 8, 2001, in Miami, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the Department of Transportation's proposed action, the award of the contract in question to WRS Infrastructure and Environment, Inc., is contrary to its governing statutes, its rules or policies, or the proposal specifications.

PRELIMINARY STATEMENT

The subject of this bid protest is the Department of Transportation's ("Department") District VI Contamination Assessment and Remediation Contract for Project and Bid Number RFP-DOT-99/2000-6026DS, FIN Number 249943 ("District VI contract"). On October 20, 1999, the Department posted its Notice of Intent to Award (Revised), in which it stated its intention to award the District VI contract to WRS Infrastructure and Environment, Inc., ("WRS"), as the highest-ranked proposer. On November 4, 1999, Metcalf & Eddy, Inc., ("Metcalf & Eddy"), which was the third-highest ranked proposer, filed the Formal Protest of Metcalf & Eddy, Inc. WRS was

permitted to intervene by the Department, and the Department transmitted Metcalf & Eddy's formal protest to the Division of Administrative Hearings on January 28, 2000, for assignment of an administrative law judge. In an order entered February 18, 2000, the Metcalf & Eddy protest was consolidated with the protest filed by OHM Remediation Services Corp. ("OHM"), DOAH Case No. 00-0495BID.<sup>1</sup>

In its formal protest, Metcalf & Eddy raised four points:

Point One: Neither WRS nor OHM complied with the requirements of the subject request for proposal with respect to registration and SPURS numbers.

Point Two: As was done with the WRS and OHM proposals, Metcalf & Eddy's proposal should be re-evaluated and Metcalf & Eddy's scores raised.

Point Three: One of the bases of the protest by WRS which led to the aforesaid re-evaluation was improper and should not have been considered.

Point Four: Proposal respondents have been rejected for matters of considerably less significance than the infractions which Metcalf & Eddy has currently itemized against WRS and OHM.

At the hearing and in its proposed findings of fact and conclusions of law, Metcalf & Eddy has focused on Point One and Point Four and has apparently abandoned Point Two and Point Three.

The hearing in these cases was originally scheduled for May 8 through 12, 2000. A series of discovery disputes arose between the Department and OHM, and OHM appealed a discovery order to the First District Court of Appeal. On April 24, 2000, the Department filed a Motion for Stay Pending Review of Agency Action, which was granted in an order entered April 27, 2000. The final hearing was continued, and the cases was placed in abeyance pending issuance of the mandate of the First District Court of Appeal. The mandate was issued on December 28, 2000, and the final hearing was rescheduled for March 5 through 8, 2001.

At the hearing, Metcalf & Eddy presented the testimony of the following witnesses: Jon Berry, an employee of WRS; Mauricio Gomez, a contamination impact coordinator and environmental manager employed by the Department in District VI; Nancy Lyons, a Contracts Administrator employed by the Department in District VI; Lillian Costa, an environmental scientist employed by the Department in District VI; Javier Rodriguez, a project development engineer employed by the Department in District VI; Mark S. Blanchard, Metcalf & Eddy's Vice President for Operations in Florida; Paul Lampley, a contamination impact coordinator employed by the Department in District IV; Gustavo Pego, the Department's Director of Operations in District VI; and John Martinez, the Department's

Director of Production in District VI. Metcalf & Eddy also elicited testimony during cross examination from two witnesses presented by OHM, Thomas McSweeney, a vice-president of OHM, and Curtis Lee, a project manager for OHM. Metcalf & Eddy Exhibits 65 through 67 and 69 were offered and received into evidence.<sup>2</sup> Neither the Department nor WRS presented the testimony of any witnesses or offered any exhibits into evidence with respect to the issues raised by Metcalf & Eddy. The Department's Motion for Official Recognition, which was filed on February 26, 2001, was granted at the hearing, and official recognition was taken of the Final Order entered by the Department on August 11, 1998, dismissing the bid protest filed in 1998 by Metcalf & Eddy challenging the Department's decision with respect to the award of a contract by District IV.

The four-volume transcript of the proceedings was filed with the Division of Administrative Hearings on April 6, 2001. The parties timely submitted proposed findings of fact and conclusions of law, which had been considered in preparing this Recommended Order.

#### FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. In March 1999, the Department issued a request for proposals, RFP-DOT-99/2000-6026DS ("RFP"), requesting that experienced firms submit proposals "for the purpose of providing district-wide contamination assessment and remediation services" in the Department's District VI, which consists of Miami-Dade and Monroe Counties. The RFP solicited proposals for an indefinite quantity contract, with a term of three years and a maximum value of \$5 million. The proposals were to be presented in two separate, sealed packages, one containing the proposer's Technical Proposal and the other containing the proposer's Price Proposal. Pursuant to Section 1.16 of the RFP, the Technical Proposal were to be opened and evaluated before the Price Proposals were opened.

2. Section 1.8.2 of the RFP is entitled "Responsiveness of Proposals" and provides:

All Proposals must be in writing. A responsive Proposal is an offer to perform the Scope of Services in accordance with all the requirements of this Request for Proposal and receiving a score of seventy (70) points or more on the Technical Proposal. Proposals found to be non-responsive shall not be considered. Proposals may be rejected if found to be irregular or not in conformance with the requirements and instructions herein contained. A Proposal may be found to be irregular or non-responsive by reasons that include, but are not limited to, failure to utilize or complete prescribed forms, conditional Proposals, incomplete Proposals,

indefinite or ambiguous Proposals, and  
improper or undated signatures.

(Emphasis in original.)

3. Eight firms submitted proposals in response to the RFP, including WRS, OHM, and Metcalf & Eddy. A three-member Technical Review Committee was assembled, and the Technical Proposals were submitted to the Technical Review Committee for evaluation; all eight Technical Proposals received a score of 70 points or more. The Price Proposals were then opened and evaluated in accordance with the criteria set forth in the RFP.

4. The Department posted a Notice of Intent to Award on August 26, 1999, in which it stated its intention to award the District VI contract to OHM. OHM was the highest-ranked proposer with a total score of 125.879 points; WRS was the second-highest-ranked proposer with a total score of 125.675 points; and, Metcalf & Eddy was the third-highest-ranked proposer with a total score of 118.569 points. It was noted in the Notice of Intent to Award that all eight proposals were accepted as responsive.

5. On August 31, 1999, WRS filed a notice of its intent to protest the intended award of the District VI contract to OHM, and it filed its Formal Protest and Petition for Formal Administrative Hearing on September 10, 1999. Metcalf & Eddy

did not file a protest with regard to the August 26, 1999, Notice of Intent to Award.

6. As a result of information obtained by the Department subsequent to the filing of WRS's protest, OHM's proposal was re-evaluated, and, on October 20, 1999, the Department posted a Notice of Intent to Award (Revised), in which it stated its intention to award the District VI contract to WRS. The scores of WRS and Metcalf & Eddy remained unchanged as a result of the re-evaluation of OHM's proposal, but OHM's score decreased to 124.212 points. As a result, WRS became the highest-ranked proposer, OHM became the second-highest-ranked proposer, and Metcalf & Eddy remained the third-highest-ranked proposer.

7. On October 25, 1999, Metcalf & Eddy filed its Notice of Intent to Protest with the Department, and it filed the Formal Protest of Metcalf & Eddy, Inc., on November 4, 1999. A settlement conference was conducted on November 17, 1999, but the Department and Metcalf & Eddy were unable to resolve the issues raised in Metcalf & Eddy's protest. As a result, the Formal Protest of Metcalf & Eddy, Inc., was referred to the Division of Administrative Hearings on January 28, 1999, and initiated this proceeding.

8. On December 9, 1999, the Department's Awards Committee met to re-consider its decision of October 15, 1999, to award the District VI contract to WRS in light of the issues raised in



the protests filed by OHM and Metcalf & Eddy. The Awards Committee decided not to disturb the decision reflected in the October 20, 1999, Notice of Intent to Award (Revised).

SPURS Number

9. Section 1 of the RFP provides that the "State of Florida Department of Transportation Request for Proposal Contractual Services Acknowledgement (Pur #7033) . . . will be handed out at the mandatory pre-proposal meeting." The form itself is entitled "State of Florida Request for Proposal, Contractual Services Bidder Acknowledgement" ("Bidder Acknowledgement form"). A box that appears near the top of the Bidder Acknowledgement form is labeled "STATE PURCHASING SUBSYSTEM (SPURS) VENDOR NUMBER."<sup>3</sup>

10. The Bidder Acknowledgement form also includes a statement of General Conditions, which provides in pertinent part:

1. Execution of Proposal: Proposal must contain a manual signature of authorized representative in the space provided above. Proposal must be typed or printed in ink. Use of erasable ink is not permitted. All corrections made by proposer to his proposal price must be initialed. The company name and SPURS vendor number shall appear on each page of the bid as required. . . .

11. WRS, OHM, and Metcalf & Eddy included an executed copy of the Bidder Acknowledgement form at the beginning of their

proposals. The Bidder Acknowledgement form is not a part of either the Technical Proposal or the Price Proposal.

12. Metcalf & Eddy inserted "042428218-003" in the box reserved for the SPURS number; WRS inserted "P13202"; and OHM inserted "#94-1259053." "042428218-003" is a SPURS number assigned by the Department of Management Services, and Metcalf & Eddy is a vendor registered with that department. "P13202" is not a SPURS number. "#94-1259053" is OHM's federal identification number, and is the number that they commonly use as their SPURS number in the proposals they submit to the Department. Both WRS and OHM are registered as interested vendors with the Department of Management Services, pursuant to Section 287.042(4), Florida Statutes.<sup>4</sup>

13. Metcalf & Eddy included its name and its SPURS number on each page of the proposal it submitted in response to the District VI RFP. Neither WRS nor OHM included the name of the company and the SPURS number on each page of their proposals.

14. There is no requirement in the District VI RFP that the name of the company and the SPURS number be included on each page of the proposal.

15. Section 1.8.6 of the RFP is entitled "Waivers" and provides:

The Department may waive minor informalities or irregularities in Proposals received where such is merely a matter of form and

not substance, and the correction or waiver of which is not prejudicial to other Proposers. Minor irregularities are defined as those that will not have an adverse effect on the Department's interest and will not affect the price of the Proposal by giving a Proposer an advantage or benefit not enjoyed by other Proposers.

Paragraph 6 of the General Conditions set forth on the Bidder Acknowledgement form provides in pertinent part: "AWARDS: As the best interest of the State may require, the right is reserved to reject any and all proposals or waive any minor irregularity or technicality in proposals received. . . ."

16. Nancy Lyons is the Contractual Services Unit Administrator for District VI. Ms. Lyons reviews the proposals to determine if they are responsive and to determine if an irregularity or omission is minor and can be waived under the terms of the RFP. It is Ms. Lyons practice to waive as a minor irregularity the omission of a SPURS number or the inclusion of an incorrect SPURS number to be a minor irregularity because, if a vendor is registered with the Department of Management Services, the SPURS number is readily available to the Department. In addition, the SPURS number does not effect either the technical content of the proposal or the price in the proposal.

17. The WRS and OHM proposals were not rejected by the Department's District VI Contractual Services Unit even though

WRS and OHM failed to include their SPURS numbers on the Bidder Acknowledgement form and failed to include the company name and SPURS number on each page of their proposals.

Disparate treatment.

18. In 1998, Metcalf & Eddy submitted a proposal in response to a Request for Proposals issued by the Department's District IV. In its Price Proposal, Metcalf & Eddy failed to include a price or a zero in three blanks reserved for the daily rate, weekly rate, and monthly rate for an X-Ray Fluorescence (XRF) Spectrum Analyzer; Metcalf & Eddy included as the "Total" for this item "\$0.00." Metcalf & Eddy's District IV proposal was rejected as non-responsive as a result of these omissions.

19. Metcalf & Eddy filed a Formal Written Protest and Request for Formal Administrative Hearing and challenged the decision to reject its proposal as non-responsive. After informal efforts to resolve the issue raised in the protest were unsuccessful, Metcalf & Eddy withdrew its protest; the Department entered a Final Order on August 11, 1998, dismissing the protest.

Summary

20. The evidence presented by Metcalf & Eddy is not sufficient to establish that the Department's decision to accept the WRS and OHM proposals as responsive is clearly erroneous, contrary to competition, arbitrary, or capricious. The omission

of the SPURS number on the Bidder Acknowledgement form is a minor irregularity that did not give WRS or OHM a substantial advantage over Metcalf & Eddy and was of no consequence to the Department because it has ready access to the SPURS numbers included in the database of interested vendors maintained by the Department of Management Services. Furthermore, WRS and OHM were not required to include their company name and SPURS number on each page of the proposal because this requirement was not included in the specifications in the RFP. Finally, Metcalf & Eddy has failed to present evidence to establish that it is the victim of disparate treatment by the Department; the decision of the Department to reject the proposal it submitted to District IV in 1998 is irrelevant to the issues raised in this proceeding.

#### CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (1999).

#### Standing

22. In its Proposed Recommended Order, the Department contends that Metcalf & Eddy has no standing to pursue its bid protest because it is the third-highest-ranked proposer for the District VI contract. This contention is rejected. The facts

in this case are distinguishable from those in Preston Carroll Co. v. Florida Keys Aqueduct Authority, 400 So. 2d 524 (Fla. 3d DCA 1981), the case on which the Department relies in its argument. Preston Carroll was the third-lowest bidder and filed a bid protest challenging the agency's intended award. Preston Carroll tried to establish its standing by proving that it was, in fact, the second lowest bidder; it failed in this proof, and the court held that, as the third-lowest bidder, it had no substantial interest that could be resolved in the bid protest. Id. at 525. In this case, on the other hand, Metcalf & Eddy has asserted that the proposals of both WRS and OHM, the highest- and second-highest-ranked proposers, should be rejected as non-responsive because they neither included their SPURS number on the Bidder Acknowledgement form or the company name and SPURS number on each page of its proposal. Were Metcalf & Eddy to succeed in its challenge, it would be entitled to an award of the contract, and, therefore, it does have a substantial interest in the outcome of the bid protest. See Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981).

#### Responsiveness of WRS and OHM proposals

23. Metcalf & Eddy's bid protest was filed pursuant to Section 120.57(3), Florida Statutes (1999), which provides:

(f) In a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, 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. In any bid protest proceeding contesting an intended agency action to reject all bids, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

24. Metcalf & Eddy, therefore, has the burden of proof by a preponderance of the evidence. Specifically, in accordance with the issues presented in its formal protest, Metcalf & Eddy has the burden of proving by a preponderance of the evidence that the Department's decision accept the proposals of WRS and OHM as responsive was invalid under the standards set forth in Section 120.57(3)(f), Florida Statutes. See Section 120.57(1)(j), Florida Statutes (1999)("[F]indings of fact shall be based upon a preponderance of the evidence, except in licensure disciplinary proceedings or except as otherwise provided by statute.").

25. The requirement in Section 120.57(3)(f) that "the administrative law judge is to conduct a de novo proceeding" was defined by the court in State Contracting and Engineering Corp. vs. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998), as "a form of intra-agency review. The 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." See also Intercontinental Properties, Inc. v. State Department of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 3d DCA 1992).

26. As set forth in Section 120.57(3)(f), Florida Statutes, an agency must exercise its discretion in a manner that is not "clearly erroneous, contrary to competition, arbitrary, or capricious." "A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic." Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner involves consideration of "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enterprises v.



Department of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has more recently been formulated by the court in Dravo Basic Materials Co., Inc. v State Department of Transportation, 602 So. 2d 632, 634 n. 3 (Fla. 2d DCA 1992), as follows: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious." The court in Dravo also observed this "is usually a fact-intensive determination." Id. at 634.

27. In Section 287.012(17), Florida Statutes (2000), an "agency" is defined as "any of the various state officers, [and] departments . . . of the executive branch of government." Section 287.032(2), Florida Statutes (2000), provides that one of the purposes of the Department of Management Services is "[t]o provide uniform contractual service procurement policies, rules, procedures, and forms for use by the various agencies in procuring contractual services." The Department of Management Services has, accordingly, enacted rules governing the competitive procurement process in Florida, which are applicable to the Department.

28. Rule 60A-1.002(9), Florida Administrative Code, which was adopted by the Department of Management Services to implement various provisions of Chapter 287, provides that

"[t]he agency shall reserve the right to waive any minor irregularities in an otherwise valid bid or proposal or offer to negotiate. Variations which are not minor cannot be waived."

29. The Department of Management Services has defined "minor irregularity" in Rule 60A-1.001(17), Florida Administrative Code, as

[a] variation from the invitation to bid or invitation to negotiate or request for proposal terms and conditions which does not affect the price of the commodities or services, or give the bidder or offeror an advantage or benefit not enjoyed by other bidders or offerors, and does not adversely impact the interests of the agency

30. An agency is given wide discretion in soliciting and accepting competitive bids and proposals. Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988)<sup>5</sup>; Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982). In Tropabest Foods, Inc. v. State of Florida, Department of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986), the court found that an agency has the discretion to waive an irregularity in a bid when the irregularity is not material, that is, when it does not give the bidder "a substantial advantage over the other bidders."

31. On the basis of the findings of fact herein, Metcalf & Eddy has not proven by a preponderance of the evidence that the Department's decision to accept the proposals of WRS and OHM as

responsive was contrary to its governing statutes, rules or policies, or the provisions of the RFP or that its decision was clearly erroneous, contrary to competition, arbitrary, or capricious. First, even if there were such a provision in the RFP, a company is not required to register with the Department of Management Services as an interested vendor as a pre-condition for submitting a bid or proposal to a state agency. See Section 287.042(4)(a), Florida Statutes (1999)(The list of interested vendors maintained by the Department of Management Services may "not be used . . . to exclude any interested vendor from bidding."). Therefore, a proposer's failure to include a SPURS number on the Bidder Acknowledgement form cannot be used as a basis for finding a proposal non-responsive. In addition, the failure of WRS and OHM to include their correct SPURS number on the Bidder Acknowledgement form is a minor irregularity: The omission did not affect the price of the proposals; WRS and OHM were not placed at a competitive advantage with respect to Metcalf & Eddy or the other proposers; and the Department was not adversely impacted because it has ready access to SPURS numbers in the state's database.

32. Second, there is nothing in the RFP that requires a proposer to include the company's name and SPURS number on each page of the proposal, and, even if there were, the failure of WRS and OHM to include the company name and SPURS number on each

page of their proposals was a minor irregularity that could be waived by the Department.

33. Finally, it may be that the Department's decision to reject the proposal Metcalf & Eddy submitted to District IV in 1998 would have been reversed had Metcalf & Eddy pursued the bid protest it filed challenging that decision. However, the only decision at issue in the instant case is the Department's decision that the proposals submitted by WRS and OHM in response to the District VI RFP were responsive to the specifications of the RFP. The Department's decision in 1998 to reject a proposal submitted by Metcalf & Eddy to District IV because it left three spaces blank in its Price Proposal is irrelevant to determining whether the Department's decision to accept the proposals of WRS and OHM was contrary to its governing statutes, rules or policies, or the provisions of the RFP or clearly erroneous, contrary to competition, arbitrary, or capricious.

34. Based on the proof herein, Metcalf & Eddy has not established a basis for invalidating the Department's decision to award the District VI contract to WRS.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Transportation issue a final order dismissing the Formal Protest of Metcalf & Eddy, Inc.

DONE AND ENTERED this 30th day of July, 2001, in  
Tallahassee, Leon County, Florida.

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PATRICIA HART MALONO  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of July, 2001.

ENDNOTES

<sup>1/</sup> On November 1, 1999, OHM, the second-highest-ranked bidder, filed its Formal Protest and Petition for Formal Administrative Hearing, which was also forwarded to the Division of Administrative Hearings on January 28, 2000. The actions were consolidated for purposes of these proceedings because both OHM and Metcalf & Eddy relied on the same witnesses at the hearing. Because the two cases present separate legal and factual issues, the undersigned requested that the parties submit separate proposed findings of fact and conclusions of law for the OHM and the Metcalf & Eddy protests. By order entered contemporaneously with this Recommended Order, these cases have been severed, and a separate Recommended Order has been entered in DOAH Case No. 00-0494BID.

<sup>2/</sup> In its Proposed Recommended Order, Metcalf & Eddy also relies on OHM's Exhibits 1, 2, 3, 4, 7, and 8.

<sup>3/</sup> The SPURS number is the number assigned to a vendor when it registers with the Department of Management Services as an interested vendor, pursuant to Section 287.042(4)(a), Florida Statutes (1999)(As part of its responsibilities with respect to competitive procurements, the Department of Management Services is charged with developing and maintaining a list of interested vendors.). See Rule 60A-1.006(1), Florida Administrative Code.

<sup>4/</sup> The evidence establishes that OHM was registered, and Metcalf & Eddy concedes in its Formal Protest that WRS was registered.

<sup>5/</sup> Although the ruling of the court in Groves-Watkins that an agency's decision "to award or reject all bids" may be overturned only if the agency acted "fraudulently, arbitrarily, illegally, or dishonestly" has been limited in Section 120.57(3)(f), Florida Statutes, to an agency's decision to reject all bids, there is nothing in the statute to indicate that the Legislature intended to change the degree of deference given to agency decisions to award a contract pursuant to the competitive procurement process.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.