

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

OHM REMEDIATION SERVICES CORP., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 00-0495BID  
 )  
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

For Petitioner: William C. Davell, Esquire  
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For Respondent: Brian F. McGrail, Esquire  
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For Intervenor: Betty J. Steffens, Esquire  
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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. The standard of proof is whether the Department of Transportation's actions were clearly erroneous, contrary to competition, arbitrary, or capricious.

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 1, 1999, OHM Remediation Services Corp. ("OHM"), the second-highest-ranked proposer, filed a Formal Protest and Petition for Formal Administrative Hearing.

WRS was permitted to intervene by the Department, and the Department transmitted OHM'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 OHM protest was consolidated with the Formal Protest of Metcalf & Eddy filed by Metcalf & Eddy, Inc. ("Metcalf & Eddy"), DOAH Case No. 00-0494BID.<sup>1</sup>

The hearing in these cases was originally scheduled for May 8 through 12, 2000. A series of discovery disputes arose, 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 these cases were 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.

On July 24, 2000, OHM filed a Motion for Leave to Amend Formal Petition and Petition for Formal Hearing. After considering the responses of WRS and the Department, the motion was granted in part in an order entered August 31, 2001, and OHM's Amended Formal Petition and Petition for Formal Hearing, with the exception of Section V, was substituted for OHM's

original petition.<sup>2</sup> In its Amended Formal Protest and Petition for Formal Administrative Hearing, OHM alleged that, in determining that the District VI contract should be awarded to WRS, the Department was acting "contrary to its governing statutes and illegally" because the process by which the Department made this determination violated Section 120.57(3)(c), Florida Statutes (1999); that the Department's "actions subverted the purpose of competitive bidding and were contrary to competition"; and that the Department's "actions were arbitrary and capricious."

At the hearing, OHM presented the testimony of the following witnesses: Tom McSweeney, a vice-president of OHM; Curtis Lee, a project manager employed by OHM; 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; 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. OHM Exhibits 1 through 27, 29 through 34 (including 29(a)), 36 through 39, 44 through 48, 52, and 86 through 95 were offered and received into evidence.

At the hearing, the Department presented the testimony of Mauricio Gomez, and DOT Exhibit 86 was offered and received into evidence. WRS presented the testimony of Paul Lampley, and WRS Exhibits 70 and 78 were offered and received into evidence.

On rebuttal, OHM sought to have admitted certain portions of the deposition testimony of Gustavo Pego to rebut a portion of the testimony elicited by the Department from Mr. Gomez during its case-in-chief; the Department and WRS objected. Ruling was withheld on OHM's request, and OHM was permitted to proffer the selected portions of the deposition testimony. The parties submitted memoranda of law with respect to the admissibility of the testimony, and the proffered testimony was rejected in an order entered April 24, 2001.

On April 12, 2001, the Department filed a Motion for Official Recognition, which was granted in part in an order dated April 25, 2001. Pursuant to this order, official recognition was taken of the opinion and mandate of the Third District Court of Appeal in OHM Remediation Services Corp. v. State Department of Transportation, 782 So. 2d 882 (Fla. 3d DCA

2001). In its response to the Department's April 12, 2001, motion, OHM filed its Additional Motion for Official Recognition, which was granted in an order entered May 4, 2001. Pursuant to this order, official recognition was taken of the answer briefs filed by the Department and by WRS in OHM Remediation Services Corp. v. State Department of Transportation.

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 and, in addition, OHM submitted OHM's Closing Argument; each of these submittals has been considered in preparing this Recommended Order.

On May 8, 2001, OHM filed OHM's Motion to Supplement Proposed Findings of Fact and Conclusions of Law; on May 11, 2001, the Department filed the Department of Transportation's Motion to Supplement Proposed Recommended Order; and, on May 18, 2001, OHM filed OHM's Response to DOT's Motion to Supplement Proposed Recommended Order. Having considered the grounds for the motions, as well as OHM's response to the Department's motion, the motions of OHM and the Department are granted, and the substance of these motions and of OHM's response has 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.

### I. The Request For Proposals

1. In March 1999, the Department issued a request for proposals, RFP-DOT-99/2000-6026DS ("RFP"), "from experienced firms to provide district-wide contamination assessment and remediation services" for the Department's District VI, consisting of Miami-Dade and Monroe Counties. The contract to be awarded pursuant to the RFP is a three-year indefinite quantity contract pursuant to which the Department "does not guarantee any maximum or minimum quantities" of services to be provided during the duration of the contract. The contract has a maximum value of \$5 million over its three-year term.

2. In Attachment V, Exhibit A, of the RFP, entitled "Scope of Services," the Department specified that the services under the District VI contract are to be provided

on an as-needed basis for response to situations that would require assessment and/or remedial activities to be performed prior to, or during the construction phase of transportation projects when associated with hazardous materials and/or petroleum contamination removal within the immediate areas of the project; provide response to emergency situations; conduct site assessments and audits; and sampling and

analytical testing, clean-up and containment for any situation determined by the Department of Transportation to represent an immediate threat to the environment or citizens of the State or for situations deemed necessary by the Department of Transportation.

In carrying out the responsibilities under the District VI contract, the company awarded the contract must "[b]e available on a twenty four (24) hour, seven (7) days a week, fifty two (52) weeks a year basis, and provide adequate/timely response to a given situation (including construction emergencies and highway spills) with adequate equipment, personnel and materials in accordance with the Department's requirements."

3. The proposers are instructed in the RFP to submit a Technical Proposal and a Price Proposal in separately sealed packages. The Technical Proposal is the only portion of the proposal pertinent to this proceeding and, for evaluation purposes, is assigned a maximum value of 100 points. The Price Proposal is assigned a maximum value of 25 points, and Disadvantaged Business Participation has a maximum value of five points, for a total point value of 130 points for the entire proposal.

4. Section 1.16.2 of the RFP contains an outline of the components of the Technical Proposal, the point value of each component, and instructions as to the content of each component.



Section 1.16.2 of the RFP specifies that the Technical Proposal shall contain three parts:

a. The Executive Summary, worth a maximum of 15 points, must contain a summary of the "Proposer's overall capabilities and approaches for accomplishing the services."

Section 1.16.2.A.

b. The Proposer's Management Plan, worth a maximum of 45 points, must contain an explanation "in detail," of the proposer's "qualifications as they relate to the successful performance of the requested services as well as the approach, capabilities, and means to be used to administer and manage the work." Section 1.16.2.B. With a maximum value of 45 points, the Management Plan is the most heavily weighted portion of a proposal.

c. The Technical Plan, worth a maximum of 40 points, must contain an explanation of "the approach, capabilities, and means to be used to accomplish the tasks" specified in the Scope of Services portion of the RFP. Section 1.16.2.C.

5. Pursuant to Section 1.16.2.B. of the RFP, the Proposer's Management Plan is composed of four parts: Organization and Management; Professional Staff Experience; Consultant's Experience; and Consultant's Background. The portion of the Management Plan pertinent to these proceedings is

Section 1.16.2.B.b., "Professional Staff Experience," which requires inclusion in the proposal of the following information:

- 1) A list of the Proposer's personnel, as well as those of Subconsultants who would be assigned to this project, and the task in which assigned, their experience level, applicable knowledge (include resume and their physical work location) and all appropriate registrations, licenses, and certifications.
- 2) Explain why this level of proficiency is necessary.
- 3) Additionally, include Proposer's personnel time (percentage) availability to be devoted to subject contract. Consequently, present Proposer's current work load and projected workload for the next twelve (12) months.
- 4) The Proposer is to identify the Contract Manager who will remain involved throughout the Contract term. Removal of the Contract Manager from the project will require the Department's prior written approval of whomever the Proposer intends to substitute. Without this prior written approval, the Proposer will be considered in default.

The RFP does not contain a definition of "current workload" and "projected workload."

6. Section 1.17 of the RFP is entitled "Proposal Evaluation" and includes an explanation of the evaluation process and of the criteria for evaluation of the Technical and Price Proposals. Section 1.17.1, "Evaluation Process," provides in pertinent part:

A Technical Review and an Awards Committee, hereinafter referred to as the "Committee", will be established to review and evaluate each Proposal submitted in response to this Request for Proposal (RFP). The Committee will be comprised of at least three (3) persons with background, experience, and/or professional credentials in relative service areas.

The Contractual Services Office will distribute to each member of the Committee a copy of each Technical Proposal. The Committee members will independently evaluate the Proposals on the criteria established in the section below entitled "Criteria for Evaluation" in order to assure that Proposals are uniformly rated. The Committee will evaluate each Technical Proposal on its own merit without comparison to Proposals submitted by other firms and individuals. The Committee will assign points, utilizing the Technical evaluation criteria identified herein and complete a Technical summary. . . .

The Contractual Services Office (CSO) will open Price Proposals in accordance with Section 1.15, Proposal Openings. The CSO and/or Project Manager/Selection Committee will review and evaluate the price proposals and prepare a summary of its price evaluation. The Committee will assign points based on price evaluation criteria identified herein.

During the process of evaluation, the Contractual Services Office will conduct examinations of Proposals for responsiveness to requirements of the Request for Proposal (RFP). Those determined to be non-responsive will be automatically rejected.

During the evaluation, the Florida Department of Transportation (FDOT) may seek clarifications and explanations, if any, at

least three (3) working days prior to the deadline for completing reviews. The Consultant shall respond to the Florida Department of Transportation's (FDOT)'s request within two (2)- working days. Any delay in the response or lack of response may adversely affect the evaluation of the proposal and the Florida Department of Transportation (FDOT) may reject the proposal as noncompliant.

Upon completion of the summaries, the assigned points for each Technical and Price Proposal will be combined on the Proposal Tabulation form. The contract will be awarded to the Proposer receiving the highest total assignment of points.

(Emphasis in original.)

7. Section 1.17.2.a. of the RFP sets forth the "Criteria for Evaluation" of the Technical Proposal: "Technical evaluation is the process of reviewing the Proposer's Technical Proposal including the Executive Summary, Proposer's Management Plan and Proposer's Technical Plan for understanding of project, qualifications, approach and capabilities, to assure a quality product."

8. In addition to the instructions in the Technical Proposal "Evaluation Criteria" section of the RFP, the Department has published a document entitled "Contractual Services Acquisition," the purpose of which is to

provide uniform procedures for procurement of contractual services. Contractual services shall be acquired in accordance with Chapter 287, Florida Statutes, and

Department of Management Services Rule Chapter 60A. This procedure describes Department processes which supplement law and rule and must be followed by Departmental units when procuring contractual services.

This document further provides that the "selection team" is responsible for, among other things, evaluating all technical proposals. The document further provides:

Selection team members should strive to provide objective evaluations based on the evaluation criteria established in the RFP, so that value uniformity can be established. Selection team members will conduct ratings individually, not in a meeting type environment where a consensus is determined. The evaluators should provide narrative explanation for scores. When each evaluator has completed their [sic] evaluation of each proposal, their raw scores will be transmitted to the CSU [Contractual Services Unit] or project manager, who will calculate the average score for each proposal. All individual evaluations should be signed and dated by the evaluator.

## II. OHM's Proposal

9. Curtis Lee, a project manager employed by OHM in its Clermont, Florida, office, was the proposal coordinator for OHM's proposal in response to the subject RFP. In carrying out this responsibility, Mr. Lee gathered information to include in the proposal from personnel in OHM's Miami office; he wrote some portions of the proposal himself; and he assigned responsibility for writing other portions. In addition, Mr. Lee made decisions

regarding what to include in the proposal. Thomas McSweeney, a vice-president of OHM and manager of OHM's Miami office, had overall responsibility for the preparation of the proposal, and he had final authority over its contents.

10. In its Technical Proposal, OHM identifies Mr. McSweeney as its proposed Contract Manager and Dean Carter as its proposed Project Manager, both of whom are presented in the Technical Proposal as eminently qualified for these positions. Both Mr. McSweeney and Mr. Carter work out of OHM's Miami office, and OHM referred to them in its proposal as the "management team" for the District VI contract.

11. The résumés of Mr. McSweeney and Mr. Carter are included in OHM's proposal as required by Section 1.16.2.B.b.1. of the RFP, and Mr. McSweeney noted in his résumé that, among selected examples of his experience, he had "[m]anaged OHM's contract with FDOT District IV to provide contamination assessment and remediation throughout the district. . . ." Although there are no dates specified in the résumé for this entry, the entry describes Mr. McSweeney's experience managing a contract OHM had with District IV in 1992.

12. Throughout its Management Plan, OHM emphasizes the competence, experience, and accessibility of Mr. McSweeney and Mr. Carter, and OHM repeatedly refers in its proposal to

Mr. McSweeney and Mr. Carter as the OHM personnel that will be most involved in the District VI contract. They are described as the "point[s] of contact for all contractual and field activities."<sup>3</sup> Mr. McSweeney is further identified as "the primary contact for FDOT-VI and will have overall contractual and administrative responsibility." Mr. Carter is described as supporting Mr. McSweeney and as "the secondary contact with management responsibility for individual field and project activities."<sup>4</sup>

13. In Section 1.16.2.A.3. of its Technical Proposal, OHM sets forth the responsibilities and authority of its key personnel, which are summarized in Table 2.A-6 of the proposal. As summarized in Table 2.A-6, Mr. McSweeney's responsibilities include:

- Primary client liaison
- Develops proposals
- Directs and manages all aspects of project activities in compliance with contract requirements
- Reviews all contract QA
- Commits resources

14. Mr. Carter's responsibilities include:

- Secondary client liaison
- Develops work plans, project schedules/budgets
- Assigns project personnel
- Oversees H&S and QA/QC
- Assigns subcontractors

Prepares/coordinates project status  
and final reports  
Review invoices

15. In response to Section 1.16.2.B.b.3. of the RFP, OHM has included in Figure 2.B.1 of its proposal "the approximate percent of time each key person will be available to devote exclusively to this project and to the assigned tasks." OHM represents in Figure 2.B.1 that both Mr. McSweeney and Mr. Carter will have 90 percent of their time available to devote to the District VI contract.

16. As a vice-president of OHM and manager of its Miami office, Mr. McSweeney's duties include substantial administrative and managerial responsibilities. Mr. McSweeney estimates that he devotes approximately two percent of his 50-to-100 hour work week to general administrative responsibilities. In addition, OHM represents in its proposal that Mr. McSweeney "currently serves as Director of Projects in Florida, manages the DERM [Miami-Dade County Department of Environmental Resources Management] services contract [for groundwater, surface water, and soil cleanup services], and is the Miami Office Program Manager for FDOT contracts."<sup>5</sup>

17. Also in response to Section 1.16.2.B.b.3. of the RFP, OHM set out in chart form "the current and projected workload for September 1999 through August 2000 for our Miami office" in



Figure 2.B-2 of its proposal," noting that "[t]he majority of this work will be completed when the FDOT-VI contract is initiated. . . . This contract will receive the highest priority of resource allocation."<sup>6</sup> OHM listed seven projects for the Miami office in Figure 2.B-2, several of which are part of the DERM contract that Mr. McSweeney manages:

a. "Pratt-Whitney" in West Palm Beach, with an estimated duration of ten weeks extending from November 1999 into January 2000;

b. "Miami Dade Aviation O&M" in Miami, with an estimated duration of 52 weeks extending from September 1999 through September 2000;

c. "Miami Dade Solid Waste Design" in Miami, with an estimated duration of 12 weeks extending from September 1999 through November 1999;

d. "Miami Dade Solid Waste Construct" in Miami, with an estimated duration of 36 weeks extending from December 1999 through September 2000;

e. "Miami Dade Aviation Conc J" in Miami, with an estimated duration of 12 weeks extending through October 1999;

f. "Miami Dade Aviation Tank Farm" in Miami, with an estimated duration of 20 weeks extending from September 1999 through November 1999;

g. "South Florida Water Management District" in Belle Glade, with an estimated duration of 20 weeks extending through mid-November 1999.

18. In preparing the portion of OHM's Technical Proposal identifying OHM's "current and projected workload" for OHM's Miami office, Mr. McSweeney and Mr. Lee decided to include as "current" workload only those projects for which OHM had received a work order, a task order, or a purchase order at the time the proposal was being prepared. Mr. McSweeney and Mr. Lee decided to include as "projected" workload only those projects approved and assigned to OHM at the time the proposal was being prepared on which work would commence after September 1, 1999, and those projects for which OHM had been requested to prepare project proposals and cost estimates at the time the proposal was being prepared. In addition, Mr. McSweeney and Mr. Lee decided that OHM would not list any projects as "current or projected workload," even though work was in progress at the time the proposal was being prepared, if work on the projects would be completed by the beginning of September 1999. Mr. McSweeney and Mr. Lee based this decision on their conclusion that the Department would award the District VI contract in September 1999 and would, therefore, not be interested in work that would be completed by September 1, 1999.

### III. Initial Evaluation and Posting of Intent to Award

19. WRS, OHM, Metcalf & Eddy, and five other companies submitted proposals to the Department on July 8, 1999, in response to the subject RFP.

20. In accordance with the RFP, a three-member Technical Review Committee was formed, the members of which were to score the Technical Proposals. Mauricio Gomez was the unofficial chairman of the Technical Review Committee; Mr. Gomez is the District VI Contamination Impact Coordinator and Environmental Manager and is the Department's contract manager for the District VI contract. Mr. Gomez developed those portions of the RFP dealing with the Technical Proposal, as well as the scoring system contained in the Technical Proposal Evaluation Sheets used by the Technical Review Committee to record the results of their evaluation. Mr. Gomez selected the two other members of the Technical Review Committee, Javier Rodriguez, who is employed by the Department in District VI as a project development engineer, and Lillian Costa, who is employed by the Department in District VI as an environmental scientist.

21. Mr. Rodriguez has served as a member of Technical Review Committees on numerous occasions, but does not work on a daily basis with contamination assessment and remediation projects. Ms. Costa had before never served on a Technical

Review Committee, but she is involved on a daily basis with contamination assessment and remediation projects.

22. In their professional capacities as employees of the Department in District VI, Mr. Gomez and Ms. Costa work with WRS personnel on a daily basis because WRS is the incumbent on the District VI contract. That is, the contamination assessment and remediation contract to be awarded as a result of the proposals submitted in response to the RFP at issue herein is the successor to the contamination assessment and remediation contract currently held by WRS. Both Mr. Gomez and Ms. Costa are pleased with the work done by WRS under the current contract and are comfortable working with the WRS personnel that would be assigned to the contract at issue herein. Mr. Gomez and Ms. Costa have also worked with OHM and developed a good working relationship with OHM personnel.

23. Before the proposals were received, Mr. Gomez met with Mr. Rodriguez and Ms. Costa and reviewed the project requirements, the major points of emphasis, and the evaluation criteria for Technical Proposals set forth in the RFP. Mr. Gomez also explained how to score the Technical Proposals using the Technical Proposal Evaluation Sheet.

24. The Technical Proposal Evaluation Sheet sets out the various components of the Technical Proposal, with the maximum

number of points noted for each. The components of the Technical Proposal are further broken down into their separate parts, and a range of scores for each part is provided as follows:

1. Executive Summary (0 - 15 points)
  - a. Overall Capabilities and Approach 0 - 15
2. Management Plan (0 - 45 points)
  - a. Organization & Management 0 - 15
  - b. Professional Staff Experience 0 - 10
  - c. Consultant's Experience 0 - 15
  - d. Consultant's Background 0 - 5
3. Technical Plan (0 - 40 points)
  - a. Facility Capabilities 0 - 12
  - b. Service/Availability 0 - 15
  - c. Equipment 0 - 7
  - d. Laboratory Support 0 - 6

The bottom of the form contains a place for general notes or comments. On the back of the Technical Proposal Evaluation Sheets for WRS and OHM which are part of the record herein, each of the Technical Review Committee members broke down each part of each component of the Technical Proposal into the various subparts identified in the RFP and set forth the number of points awarded to WRS and OHM for each subpart of their Technical Proposals.

25. In carrying out their responsibilities as members of the Technical Review Committee, Mr. Gomez, Mr. Rodriguez, and Ms. Costa evaluated and scored each of the Technical Proposals. The Technical Review Committee members prepared a Technical

Proposal Evaluation Sheet for each proposer and marked their scores and comments on these forms.<sup>7</sup> During the evaluation of the Technical Proposals conducted in July 1999, each of the members of the Technical Review Committee scored the Technical Proposals independently, and none of the committee members discussed the merits of the Technical Proposals or the points they intended to award for any portion of any proposer's Technical Proposal.

26. Mr. Gomez awarded OHM a score of 96 on its Technical Proposal, awarding 13 points to OHM's Executive Summary, 43 points to OHM's Management Plan, and 40 points to OHM's Technical Plan. Mr. Gomez deducted one point from subsection b.3. of the "Professional Staff Experience" portion of OHM's Management Plan because he was concerned that, given the many roles and responsibilities attributed to him in OHM's proposal, Mr. McSweeney would not have sufficient time available to devote to the District VI contract. Mr. Gomez included several comments on the Technical Proposal Evaluation Sheet that he prepared for OHM's proposal, describing OHM's Technical Proposal generally as "excellent" and remarking on several "strong" and "excellent" portions of the proposal.

27. Mr. Gomez awarded WRS a score of 95 on its Technical Proposal. He included several comments on the Technical

Proposal Evaluation Sheet that he prepared for WRS's proposal, describing the proposal as "excellent" overall. Mr. Gomez also stated that "WRS has a thorough understanding of DOT D-6 contamination program and needs as they currently have this contract w/ D-6."

28. Mr. Rodriguez awarded OHM a score of 96 on its Technical Proposal, awarding 14 points to OHM's Executive Summary, 43 points to OHM's Management Plan, and 39 points to OHM's Technical Plan. Mr. Rodriguez deducted one point from subsection b.3. of the "Professional Staff Experience" portion of OHM's Management Plan, without explanation. Mr. Rodriguez included several comments on the Technical Proposal Evaluation Sheet that he prepared for OHM's proposal, describing several portions of the Technical Proposal as "excellent" and remarking that "[s]election of this consultant will be [an] asset to [the] Department."

29. Mr. Rodriguez awarded WRS a score of 95 on its Technical Proposal. He included several comments on the Technical Proposal Evaluation Sheet he prepared for WRS's proposal, describing several portions of the Technical Proposal as "excellent." Mr. Rodriguez also stated that WRS "mentions existing contract too much (assumes reviewer is completely familiar with their work)." Mr. Rodriguez noted on the WRS

Technical Proposal Evaluation Sheet that "[s]election of this consultant will be [an] asset to [the] Department."

30. Ms. Costa awarded OHM a score of 96 on its Technical Proposal, awarding 15 points to OHM's Executive Summary, 42 points to OHM's Management Plan, and 39 points to OHM's Technical Plan. Ms. Costa deducted one point from subsection b.3. of the "Professional Staff Experience" portion of OHM's Management Plan, including the comment "all→workload."

Ms. Costa included several other comments on the Technical Proposal Evaluation Sheet that she prepared for OHM's proposal, but these are, regrettably, illegible on the copy of the Technical Proposal Evaluation Sheet received into evidence.

31. Ms. Costa awarded WRS a score of 97 on its Technical Proposal. She awarded the same number of points to WRS and OHM for their Executive Summaries and Management Plans, but she awarded WRS 40 points for its Technical Plan compared to the 39 points she awarded to OHM. In addition to including comments relating to several of the categories on the Technical Proposal Evaluation Sheet that she prepared for WRS's proposal, Ms. Costa noted the following under the section reserved for general notes and comments: "[O]n going, outstanding project[s] that need continuity. [C]lose to OHM proposal. [O]ther departments like working with them like maintenance, RW & Legal plus construction



outstanding projects." Notwithstanding her comment that the WRS proposal was "close to" the OHM proposal, Ms. Costa scored the two proposals separately.

32. After they completed scoring the Technical Proposals, the members of the Technical Review Committee gave their Technical Proposal Evaluation Sheet forms to Nancy Lyons, the Contractual Services Unit Administrator for District VI. As the Contractual Services Unit Administrator, Ms. Lyons is responsible for managing and coordinating the competitive procurement process in District VI, from advertising the projects to execution of the contracts. She collects the proposals submitted in response to requests for proposals and distributes them to the Technical Review Committees, she prepares the tabulations of the scores for each proposer, and she presents the total scores and rankings to the Awards Committee.

33. Mr. Gomez, Mr. Rodriguez, and Ms. Costa each prepared and signed a form containing the tabulation of the total scores he or she awarded for the Technical Proposals submitted by the eight proposers. The forms include the total points the Technical Review Committee member awarded for each proposer's Executive Summary, Management Plan, and Technical Plan, as well

as the total points awarded to each proposer's Technical Proposal as a whole.

34. These forms were submitted to Ms. Lyons, who averaged the points awarded to each proposer's Executive Plan, Management Plan, and Technical Plan and the total points awarded by the Technical Review Committee for each proposer's Technical Proposal and entered these scores on "composite" Proposal Tabulation form. All three members of the Technical Review Committee signed this form. Pertinent to these proceedings, the composite tabulation showed that OHM received an average score of 96.0 points for its Technical Proposal, and WRS received an average score of 95.7 points for its Technical Proposal. None of the eight proposals were rejected as non-responsive.

35. The price proposals for those proposers that received a score of 70 points or more on their Technical Proposals were opened on August 8, 1999, and evaluated pursuant to the formula contained in the RFP.

36. In a memorandum dated August 24, 1999, Ms. Lyons presented the final point tabulation to the District VI Awards Committee. This committee is composed of Gustavo Pego, John Martinez, Gary Donn, and Nan Markowitz. Mr. Pego is the Director of Operations for District VI and is the Chairman of the District VI Awards Committee; Mr. Martinez is the Director

of Production for District VI; and Mr. Donn is the Director of Planning for District VI. Ms. Markowitz's position with the Department is not identified in the record herein.

37. The final point tabulation established OHM as the highest-ranked proposer, with a total score of 125.879 points, consisting of the sum of the 96 points awarded to its Technical Proposal, the 24.879 points awarded to its Price Proposal, and the maximum five points awarded for Certified Disadvantaged Business Enterprise participation. WRS was the second-highest ranked proposer, with a total score of 125.675 points, consisting of the sum of the 95.675 points awarded to its Technical Proposal, the 25 points awarded to its Price Proposal, and the maximum five points awarded for Certified Disadvantaged Business Enterprise participation. Mr. Martinez, Mr. Pego, and Ms. Markowitz, sitting as the District VI Awards Committee, approved the award of the contract to OHM at its meeting on August 25, 1999.

38. On August 26, 1999, the Department posted a Notice of Intent to Award the District VI contract to OHM; the notice included the same breakdown of the total scores that was submitted to the Awards Committee in Ms. Lyons memorandum of August 24, 1999.

IV. WRS's Protest and OHM's Written Rebuttal.

39. On August 31, 1999, WRS filed with the Department its Notice of Intent to Protest the intended award to OHM. On September 10, 1999, WRS filed its Formal Written Protest and Petition for Formal Administrative Hearing with the Department. Pertinent to these proceedings, WRS alleged in its Formal Written Protest and Petition for Formal Administrative Hearing the following:

20. What OHM has failed to disclose in its proposal, is that OHM is currently under contract with the DOT District 4 office located in Ft. Lauderdale to provide substantially similar remediation services for the entire District 4, a five county area.<sup>[8]</sup> The key personnel currently servicing the District 4 contract include Mr. Tom McSweeney and Mr. Dean Carter from the Miami office, among others. The District 4 Remediation Services contract which is exclusive to OHM, commenced through a Notice to Proceed issued by Department of Transportation on or about February 25, 1999. The contract between DOT District 4 and OHM will run for a period of three (3) years, or until approximately February 2002.

21. Nowhere in the OHM proposal are these material facts disclosed or even referenced, although this information was not only required to be disclosed, but was also able to be provided within several sections of the proposal. Neither the Projected Workload Chart shown in Figure 2.B-2 (p.2-5) or the text of the OHM Proposal mentions the existing and ongoing workload of OHM just up the road being managed by the very same management team to be "devoted exclusively" to the District 6 contract. In addition,

OHM indicated that the majority of its projected workload would be completed when the District 6 Contract was initiated, further misleading the Department reviewers into believing that dedicated staff and resources were readily available despite the fact that the same personnel and resources are dedicated to the current District 4 Contract until approximately February 2002.

22. Even Mr. McSweeney's resume, submitted as part of OHM's Proposal and located in Appendix C, fails to discuss his commitment to the current District 4 contract, merely stating in the past tense that he "had managed OHM's contract with FDOT District VI." Other current projects such as the Metro-Dade County DERM Contract are described in the present tense.

23. . . . Mr. Carter also fails to disclose in his resume any experience with FDOT, especially his current workload being performed under the current ongoing District 4 Contract, of which he is dedicated and serving as the Project Manager.

40. When OHM learned of WRS's Formal Written Protest and Petition for Formal Administrative Hearing, OHM submitted a letter dated September 24, 1999, to Brian McGrail, the Department's attorney. Mr. McGrail transmitted this letter to Ms. Lyons, who shared it with the members of the Technical Review Committee.

41. OHM's letter contained its "response to certain assertions contained in the Formal Written Protest and Petition for Formal Administrative Hearing" filed by WRS:

Specifically, the following responses address Point I of the Protest ([paragraphs]13-30), wherein WRS' [sic] claims that OHM/IT's proposal contained inaccuracies, misrepresentations, and/or omissions which materially affected the Department's decision. . . . As will be seen, WRS' [sic] protest is completely unfounded. We trust that this will be of assistance to the committee in resolving the Protest.

42. With respect to WRS's allegations in paragraph 20 of its petition, OHM responded that "it is correct that OHM/IT is currently under contract with District 4," but that "this contract is certainly not exclusive. In fact, District 4 maintains three environmental service contracts with three separate service providers, one of whom is WRS." (Emphasis in original.) OHM further asserted that "the District 6 RFP does not require other contracts to be listed." Rather, OHM pointed out, the RFP requires that current and projected workload be disclosed. OHM contended, however, that

it would have been inaccurate to present the OHM/IT's District 4 contract as a significant ongoing workload, as suggested by WRS. The District 4 contract was signed on September 14, 1998. The first task assignment was not awarded until February 1999. Over the 12-month contract period, less than seven projects have been assigned, for a total of approximately \$60,235.00. This averages to approximately \$5,000 per month or an equivalent contract/project manager availability of less than 1%.

In fact, at the time the proposal was prepared, no ongoing work was being performed or proposed by OHM/IT for District 4.<sup>[9]</sup> Thus, because of the general lack - and at times complete absence - of work in the District 4 contract, there were no ongoing projects or present contract activity for OHM/IT to list in the District 6 proposal. Accordingly, given that the OHM/IT workload under the District 4 contract activity is slow at best, assigned personnel described in the District 6 proposal are available and the proposal is accurate.

(Emphasis in original.)

43. With respect to WRS's allegations in paragraph 21 of its petition, OHM responded by reiterating that it "did not fail to disclose anything required by the RFP" and that it "was not performing any ongoing work nor was any proposed for District 4" "at the time the proposal was prepared." OHM further asserted that "the 'current and projected workload' of OHM/IT was accurately stated in the proposal, and is consistent with the intent of the FDOT District 6 RFP." Finally, OHM noted that "[t]he small amount of work which has arisen in District 4 since the time of the proposal will all be completed prior to the time the District 6 contract is initiated."

44. With respect to WRS's allegations in paragraph 22 of its petition, OHM stated that

because there was no ongoing or projected work by OHM/IT in District 4 at the time the proposal was prepared, Mr. McSweeney's

commitment was properly described [in his resume] in the past tense. (Further, because OHM/IT's activities in District 4 have been insignificant from a workload standpoint, it would have been misleading to represent experience in FDOT District 4 by Mr. McSweeney.)

V. OHM's District IV Contract

45. In June 1998, OHM submitted a proposal in response to an RFP issued by the Department's District IV office, which is located in Fort Lauderdale, Florida. The RFP solicited proposals for contamination assessment and remediation work in District IV. After the proposals were evaluated, OHM received one of three identical contracts awarded as a result of the District IV RFP. The contracts are indefinite quantity contracts pursuant to which none of the three contractors is guaranteed any work; rather, work is assigned to the three contractors based on the Department's needs in District IV.

46. After the District IV contracts were awarded, the three contractors were each designated to receive work generated by specific sources of funding. OHM was to be assigned work funded through the District IV Right-of-Way Department ("right-of-way contract"); this work had been assigned to Metcalf & Eddy pursuant to the previous District IV contract.<sup>10</sup>

47. The contract between OHM and District IV was executed on September 14, 1998, and, by its terms, extends 36 months from



the date the written Notice to Proceed was issued by the Department. The Encumbrance Input Form attached to the contract provides: "This is an indefinite quantity contract for environmental response services with a budgetary ceiling of \$5,000,000.00. Funds will be encumbered by various cost centers with L.O.A.'s [Letters of Authorization]."

48. Paul Lampley, the contamination impact coordinator for District IV, is the contract manager for OHM's District IV contract. Mr. Lampley is not responsible for actually assigning work to OHM, but he manages the projects assigned to OHM by the District IV Right-of-Way Department. Mr. Lampley held the kick-off meeting for the District IV contracts on October 8, 1998, and OHM was made aware at that meeting that it would be doing work funded from and assigned by the District IV's Right-of-Way Department.

49. The procedure followed in District IV to initiate projects under an indefinite quantity contract such as the one held by OHM is first to notify the consultant of the project. The consultant then prepares and submits a proposal and work plan that includes a cost estimate for the project. District IV encumbers the funds specified in the work plan and issues a letter of authorization notifying the consultant that it may proceed with the project.

50. OHM submitted its first project proposal to District IV on February 17, 1999. The Notice to Proceed on the District IV contract was issued to OHM on February 25, 1999, and OHM's first Letter of Authorization to proceed with work under the District IV contract was issued on that date.

51. In addition to the February 25, 1999, Letter of Authorization and pertinent to these proceedings, OHM received Letters of Authorization to proceed with projects under the District IV contract on March 25, 1999; April 2, 1999; June 18, 1999; July 19, 1999, August 6, 1999; and August 20, 1999. The total amount allocated by the Letters of Authorization to these projects was slightly more than \$60,000.00,<sup>11</sup> an amount of work that Mr. McSweeney considers insignificant.

52. Mr. Lampley relies on Mr. Carter, OHM's Project Manager for the District IV contract, as the single point of contact. Mr. McSweeney is OHM's Contract Manager for the District IV contract, but Mr. Lampley never speaks with Mr. McSweeney about work being done or to be done under the contract.

53. At the time OHM submitted its proposal to District VI, Mr. McSweeney had devoted virtually no "billable" time to the District IV contract, and he determined that he could devote 90 percent of his time to fulfilling his responsibilities as

Contract Manager for the District VI contract. OHM also represented in its proposal that, even though OHM had two-and-a-half years remaining on the District IV contract in July 1999, Mr. Carter could devote 90 percent of his time to fulfilling his responsibilities as Project Manager for the District VI contract.

54. In July 1999, when OHM's proposal for the District VI RFP was prepared, OHM was working on at least one project under its District IV contract. OHM also was aware of another project under the District IV contract at the time it submitted its District VI proposal, having submitted a project proposal to District IV on July 9, 1999; a Letter of Authorization for the work on this project was issued by District IV on July 19, 1999.<sup>12</sup>

55. Nonetheless, under their interpretation of "current and projected workload," Mr. McSweeney and Mr. Lee did not list any District IV work in its proposal: They decided that OHM had no "current" workload in District IV because they anticipated that all of the work that had been assigned under the District IV contract as of July 8, 1999, would be completed by September 1, 1999; they decided that OHM had no "projected" workload in District IV because, as of July 8, 1999, OHM had not been assigned any specific projects or been asked for project

proposals and cost estimates for any specific projects in District IV on which OHM would be working as of September 1, 1999, or thereafter. Mr. McSweeney and Mr. Lee also considered the volume of work under the District IV contract to be insignificant, and Mr. Lee decided to include in the list of projects only those that significantly impacted the workload of the project team designated in OHM's proposal for the District VI contract.<sup>13</sup>

56. Mr. McSweeney did not indicate in the résumé attached in Appendix C to OHM's District VI proposal that he was the Contract Manager for OHM's 1999 District IV contract because "[w]e had no work at that time on that contract."<sup>14</sup>

57. OHM did not mention in its September 24, 1999, written rebuttal to WRS's protest that it had received Letters of Authorization in July and August 1999 for projects under the District IV contract.

58. Prior to submitting OHM's proposal, neither Mr. McSweeney nor Mr. Lee contacted Mr. Lampley to inquire whether he was aware of any projects that would be assigned to OHM under the District IV contract during the following year. Indeed, no one from OHM contacted Mr. Lampley to inquire about the future work for OHM under the District IV contract until Mr. Lee telephoned Mr. Lampley on October 12, 1999.<sup>15</sup>

## VI. Re-evaluation of OHM Proposal

59. After WRS's protest was received by District VI but before OHM filed its written rebuttal, Ms. Costa spoke by telephone with Mr. Lampley on a matter unrelated to WRS's protest. During their conversation, Mr. Lampley advised Ms. Costa that OHM had a current environmental services contract with District IV for environmental contamination work and that Mr. McSweeney and Mr. Carter were the Contract Manager and the Project Manager, respectively, for that contract. Ms. Costa passed this information on to Mr. Gomez.

60. Near the end of September 1999, after OHM had submitted its rebuttal, Mr. Gomez telephoned Mr. Lampley to learn more about OHM's District IV contract. Mr. Gomez asked Mr. Lampley about the amount of work OHM could expect to receive pursuant to the District IV contract. Because the contract is an indefinite quantity contract, Mr. Lampley could not tell Mr. Gomez the exact value of the work that would be assigned to OHM over the contract's 36-month term, but he advised Mr. Gomez that Metcalf & Eddy, the consultant who had the previous right-of-way contract in District IV, had been assigned \$6 million worth of work over the three-year contract period.

61. Mr. Lampley identified for Mr. Gomez the projects in which OHM was involved at the time of their conversation, and he

gave him a breakdown of the value of work assigned to OHM in Letters of Authorization for projects from February 1999 through September 1999. According to this information, OHM had been issued Letters of Authorization for projects in District IV in February, March, April, June, July, August, and September 1999, although the cost of each of these projects was relatively low. Mr. Lampley advised Mr. Gomez that OHM would be getting busier in District IV because more work would be assigned as Metcalf & Eddy completed the work assigned to it before OHM took over the contract.

62. Although Mr. Gomez took notes of his telephone conversation with Mr. Lampley, he did not ask Mr. Lampley to put his comments in writing.

63. Mr. Gomez did not contact OHM after his conversation with Mr. Lampley to confirm the accuracy of the information Mr. Lampley had provided.

64. On or about October 4, 1999, Ms. Lyons called a meeting of the Technical Review Committee. Before the meeting, the members of the Technical Review Committee had each received a copy of WRS's protest and a copy of OHM's September 24, 1999, written rebuttal to WRS's protest; in addition, Mr. Gomez had advised Mr. Rodriguez and Ms. Costa of the information he had

received from Mr. Lampley with respect to the District IV contract.

65. The purpose of the October 4, 1999, meeting was to decide how to proceed in light of the new information that had come to light as a result of the WRS protest. Ms. Lyons and the members of the Technical Review Committee went through both WRS's protest and OHM's rebuttal letter at the meeting, point by point, and Ms. Lyons took notes of the discussion. The notes state, in pertinent part:

RESPONSE TO THE PROTEST BY WRS AND THE  
INTERVENTION BY OHM

ITEM #12, PAGE 3 OF WRS PROTEST

WRS asserts that the OHM proposal contains inaccuracies and/or misrepresentations which substantially affect its score and ranking...

RESPONSE BY CONTRACTS ADMINISTRATOR AND  
TECHNICAL COMMITTEE

1) OHM's proposal did not mention the contract they currently have in District 4 and especially did not mention that the contract manager proposed for District 6 was also the project [contract?] manager currently on the District 4 contract.

\* \* \*

OHM'S INTERVENTION

PAGE 2 OF OHM'S PROTEST<sup>[16]</sup>

First, although it is correct that OHM/IT is currently under contract with District 4, this contract certainly is not exclusive.<sup>[17]</sup>

RESPONSE BY CONTRACTS ADMINISTRATOR AND  
TECHNICAL COMMITTEE

1) This contract was exclusive to Right Of Way.

PAGE 2 OF OHM'S PROTEST

Further the District 6 RFP does not require other contracts to be listed.

RESPONSE BY CONTRACTS ADMINISTRATOR AND TECHNICAL COMMITTEE

- 1) True, but RFP request[s] workload and projected workload for next 12 months.
- 2) Attachment III, Section 1.16.2 Technical Proposal, Section B, Proposer's Management Plan, and subsection b, Professional Staff Experience.

\* \* \*

PAGE 2 OF OHM'S PROTEST

However it would have been inaccurate to present the OHM/IT/s District 4 contract as a significant ongoing workload, as suggested by WRS. The District 4 contract was signed on September 14, 1998. The first task assignment was not awarded until February 1999. Over the 12 month contract period, less than seven projects have been assigned..

RESPONSE BY CONTRACTS ADMINISTRATOR AND TECHNICAL COMMITTEE

- 1) This period is over 7 months not 12 month[s] as the NTP [Notice to Proceed] was not issued until February. Work cannot begin until the NTP has been issued.

PAGE 2 OF OHM'S PROTEST

In fact at the time the proposal was prepared, no ongoing work was being performed or proposed by OHM/IT for District 4.

RESPONSE BY CONTRACTS ADMINISTRATOR AND TECHNICAL COMMITTEE

- 1) Incorrect, minimum work, but there was some as per Paul Lampley, the project manager in District 4.

PAGE 2 OF OHM'S PROTEST

Accordingly, given that OHM/IT workload under the District 4 contract activity is



slow at best, assigned personnel described in the District 6 proposal are available and the proposal is inaccurate.<sup>[18]</sup>

RESPONSE BY CONTRACTS ADMINISTRATOR AND TECHNICAL COMMITTEE

- 1) Other contract is being phased out now, which is why the work is slow, however they will be busy.
- 2) Based on the historical data of this contract the average is approximately \$2 million/year.
- 3) OHM should have checked with Paul Lampley prior to bidding to find out what the workload would be for the contract or at least mention[ed] the contract in their proposal.

PAGE 2 OF OHM'S PROTEST

. . . Further as noted above there was no "ongoing workload of OHM just up the road" because at the time the proposal was prepared, no [sic] OHM/IT was not performing any ongoing work nor was any proposed for District 4.

RESPONSE BY CONTRACTS ADMINISTRATOR AND TECHNICAL COMMITTEE

- 1) Incorrect Paul Lampley said that work was going on.

\* \* \*

PAGE 3 OF OHM'S PROTEST

Finally OHM/IT's Figure 2, B-2, Miami office Project Workload is accurate. The small amount of work which has arisen in District 4 since the time of the proposal will all be completed prior to the time the District 6 contract is initiated and personnel/equipment resources will be available to service the needs of District 6 as described in OHM/IT's proposal.

RESPONSE BY CONTRACTS ADMINISTRATOR AND TECHNICAL COMMITTEE

- 1) This is a three (3) year contract with District 4 which ends in February 2002, we

are in September 1999, historically \$2 million and also Paul Lampley says more work is coming.

PAGE 3 OF OHM'S PROTEST

As stated previously, because there was no ongoing or projected work by OHM/IT in District 4 at the time the proposal was prepared, Mr. McSweeney's commitment was properly described in past tense.<sup>[19]</sup>

RESPONSE BY CONTRACTS ADMINISTRATOR AND TECHNICAL COMMITTEE

1) Not correct re: ongoing work, please see previous paragraph.

2) WRS does not mention District 4 either for relevant experience as he is not the contract manager.

*Talks about District 4 as for past tense.*<sup>[20]</sup>

PAGE 4 OF OHM'S PROTEST

In fact if OHM/IT had represented the District 4 contract work as significantly ongoing involvement (as WRS suggests) this would have certainly been misleading given the lack of historical and current work in District 4.

RESPONSE BY CONTRACTS ADMINISTRATOR AND TECHNICAL COMMITTEE

1) Historically District 4 has spent \$2 million.

2) DOT does not know if information was intentionally omitted, but had this information been included in the proposal it would have affected the scoring.

PAGE 4 OF OHM'S PROTEST

Again as explained in the responses to items 1-4 above, OHM/IT gave the Evaluation Committee accurate and complete information as to OHM/IT's ability to perform the workload and the commitment of key personnel.

RESPONSE BY CONTRACTS ADMINISTRATOR AND  
TECHNICAL COMMITTEE

- 1) 100% of a normal workload is 8 hours.
- 2) Russell from WRS is not a contract manager for District 4.
- 3) Mr. McSweeney's resume is in past tense which leads us to believe that the projects were completed.

PAGE 4 OF OHM'S PROTEST

Again as noted above, the services Mr. McSweeney and Mr. Carter are providing in District 4 are anything but "identical" [to the services to be provided in District 6] and they are in fact 90% available for District 6.

RESPONSE BY CONTRACTS ADMINISTRATOR AND  
TECHNICAL COMMITTEE

- 1) Mr. McSweeney is contract manager for District 4 and District 6. Mr. Carter is project manager for District 4 and District 6.  
*Jeff Northrup - not submitted to District 4.*

PAGE 4 OF OHM'S PROTEST

Further, the District 6 RFP does not require OHM/IT to identify information from other proposals.

RESPONSE BY CONTRACTS ADMINISTRATOR AND  
TECHNICAL COMMITTEE

- 1) District 6 does not care what is in other proposals. Current projected workloads should have been addressed.

PAGE 4 OF OHM'S PROTEST

In fact to provide information not requested could result in the proposal being found non-responsive as described in the RFP, Attachment III, Section 1.8.2, Page 6 of 21.

RESPONSE BY CONTRACTS ADMINISTRATOR AND  
TECHNICAL COMMITTEE

This is not totally accurate. Section 1.8.2 states as follows: . . .<sup>[21]</sup>

\* \* \*

PAGE 5 OF OHM'S PROTEST

The RFP did not require disclosure of other contracts.

RESPONSE BY CONTRACTS ADMINISTRATOR AND TECHNICAL COMMITTEE

1) True, but it did require current and projected workloads to be identified.

PAGE 5 OF OHM'S PROTEST

Although the RFP did not require current contracts to be identified, it did request current and projected workloads. These were accurately stated by OHM/IT.

RESPONSE BY CONTRACTS ADMINISTRATOR AND TECHNICAL COMMITTEE

1) Untrue, did not address workload of District 4 contract correctly.

\* \* \*

PAGE 5 OF OHM'S PROTEST

b. The RFP did not require contract to be identified in resumes. Further, based on the current and projected workload, it would be misleading to present FDOT District 4 experience in the resume [of Mr. McSweeney].

RESPONSE BY CONTRACTS ADMINISTRATOR AND TECHNICAL COMMITTEE

1) Past work experience in District 4 was identified in the resumes.

PAGE 5 OF OHM'S PROTEST

c. OHM/IT did not list [sic] District 4 in its projected workload because at the time the proposal was being prepared, there was no ongoing or projected work in District 4 for OHM/IT.

RESPONSE BY CONTRACTS ADMINISTRATOR AND TECHNICAL COMMITTEE

1) Speculation, [OHM] did not ask about future workload.

\* \* \*

General observations

- 1) DOT did not request specific percentage of time. *Attachment III, Section B,B, we just asked for availability and graded them accordingly.*
- 2) OHM and WRS proposed percentage of time to District 6.
- 3) OHM did not reveal the contract manager *or the project manager* which is the same for District 4 and District 6.
- 4) OHM did not address the District 4 current or projected workload.
- 5) OHM did not communicate with Paul Lampley in District 4 regarding the future workload of the project prior to committing themselves to District 6.
- 6) DOT feels that if they had know[n] that this contract manager & *project manager* was committed to *another District* it would have greatly affected their scoring.
- 7) What is to say that they could not commit this project manager for another project and then find themselves unable to perform the work.
- 8) Historically the contract with District 4 is \$2 million.
- 9) OHM had the District IV contract prior to this and knows how busy this contract is. *Project [illegible] in District 6.*

66. In Mr. Gomez's opinion, the District IV project that OHM was working on at the time it submitted its proposal should have been included in the proposal as current workload, and OHM should have disclosed as projected workload that it had a contract with District IV that would generate work during the 12-month period following submission of the proposal.<sup>22</sup>

Ms. Costa commented at the meeting that she would have accorded

this information some weight in her initial evaluation of OHM's proposal.

67. As reflected in Ms. Lyons' notes, the members of the Technical Review Committee discussed the information provided by Mr. Lampley and concluded that OHM should have included work on the District IV contract as "current and projected workload" and should have disclosed in its proposal that Mr. McSweeney and Mr. Carter were Contract Manager and Project Manager for the District IV contract. The members of the Technical Review Committee agreed at the meeting that they would have evaluated OHM's proposal differently if, at the time of the initial evaluation, this information had been included in OHM's proposal.

68. After the meeting on October 4, 1999, the members of the Technical Review Committee and Ms. Lyons placed a telephone conference call to Brian McGrail, the Department's attorney. Mr. McGrail advised the members of the Technical Review Committee that, if they would have evaluated OHM's proposal differently had the newly-acquired information been included in OHM's proposal, they could re-evaluate OHM's proposal in light of the new information. Mr. McGrail did not identify any specific authority permitting the Technical Review Committee to re-evaluate OHM's proposal.

69. The members of the Technical Review Committee decided that they would re-evaluate OHM's proposal. They further decided that there was no need to go forward with the informal settlement conference that had been scheduled with WRS and OHM, and they did not contact OHM to obtain further information about its workload under the District IV contract.

70. Before they began their re-evaluation, the three members of the Technical Review Committee were aware that OHM was the highest-ranked proposer and had been identified in the initial Notice of Intent to Award posted August 26, 1999, as the company to which the Department intended to award the subject contract. They also must have been aware of the very small difference between WRS's and OHM's total scores.

71. On October 5, 1999, Mr. Gomez re-evaluated the OHM proposal and decreased by two points the number of points he awarded to OHM for "Professional Staff Experience." He did the re-evaluation independently and did not discuss with Mr. Rodriguez or Ms. Costa his scoring on the re-evaluation.

72. On re-evaluation of OHM's Technical Proposal, Mr. Gomez decreased from three to two points the score he awarded OHM on Section 1.16.2.B.b.3. of its proposal. This section of the RFP requires a proposer to list the percentage of time its designated personnel will be available for the

District VI contract and to list its current and projected workload. Mr. Gomez took off an additional point on his re-evaluation of OHM's proposal because he was concerned that Mr. McSweeney and Mr. Carter would not be able to fulfill their responsibilities as Contract Manager and Project Manager of the District VI contract. According to the information he had been given by Mr. Lampley, OHM would be getting more work in District IV as Metcalf & Eddy was phased out, and he questioned whether Mr. McSweeney and Mr. Carter would, in fact, be able to devote 90 percent of their time to the District VI contract, as OHM had represented in its proposal.

73. Mr. Gomez decreased from two points to one point the score he awarded OHM on Section 1.16.2.B.b.4. of its proposal. This section of the RFP requires the proposer to identify the contract manager "who will remain involved throughout the Contract term." Mr. Gomez knew that, as the Department's contract manager for the District VI contract, he would rely on the company's Contract Manager as his main point of contact for work under the contract. Mr. Gomez's concern with respect to this section was whether Mr. McSweeney could, in fact, remain involved with the District VI contract throughout its term, given that he was the Contract Manager of the District IV contract and had numerous other responsibilities,



74. Mr. Gomez included the following comment on his Technical Proposal Evaluation Sheet on October 5, 1999:

After proposal submitted D-6 learned that proposed Contract Manager and Project Manager are already involved w/ DOT D-4 contract also. BIG CONCERN. This is critical b/c based on contract needs they would not be able to properly & timely provide svces [services] to D-6 and address these needs!!!

(Emphasis in original.)

As a result of the re-evaluation, Mr. Gomez awarded OHM a revised total score of 94 on its Technical Proposal.

75. On October 5, 1999, Mr. Rodriguez re-evaluated the OHM proposal and decreased by one point the number of points he awarded to OHM for "Professional Staff Experience." He did the re-evaluation independently and did not discuss with Mr. Gomez or Ms. Costa his scoring on the re-evaluation.

76. On re-evaluation of OHM's Technical Proposal, Mr. Rodriguez decreased from three points to two points the score he awarded OHM for Section 1.16.2.B.b.3. of its proposal. He stated his reasoning on his Technical Proposal Evaluation Sheet as follows: "[B]ased on information received post award. Projected workload in D-4 not discussed thus Cont Manager & Project Manager may be over committed in % of time available." In Mr. Rodriguez's experience with the Department, a company that has a Department contract will have work under the

contract. As a result of the re-evaluation, Mr. Rodriguez awarded OHM a revised total score of 95 on its Technical Proposal.

77. On October 5, 1999, based on all of the information available to her, Ms. Costa re-evaluated the OHM proposal and decreased by two points the number of points she awarded to OHM for "Professional Staff Experience." She did the re-evaluation independently and did not discuss with Mr. Gomez or Mr. Rodriguez her scoring on the re-evaluation.

78. On re-evaluation of OHM's Technical Proposal, Ms. Costa decreased from two points to one point the score she awarded OHM for Section 1.16.2.B.b.1. of its proposal. This section of the RFP requires the proposer to list the personnel that would be assigned to the project and to include their résumés. Ms. Costa deducted a point from OHM's score because Mr. McSweeney failed to include in his resume that he was the Contract Manager for a current District IV contract, referring instead to his experience in District IV in the past tense.

79. Ms. Costa decreased from three to two points the score she awarded OHM for Section 1.16.2.B.b.3. of its proposal. In Ms. Costa's experience with the Department, if the Department awards a contract to a company, the company will have work under the contract, and the contract manager and project manager

assigned to the contract will necessarily have the work under the contract. According to the information provided by Mr. Lampley, OHM had done work under the District IV contract and could expect more work, and Ms. Costa concluded that Mr. McSweeney and Mr. Carter would have work under the District IV contract over the following 12 months, and she was concerned about the amount of time Mr. McSweeney and Mr. Carter could devote to the District VI contract. As a result of the re-evaluation, Ms. Costa awarded OHM a revised total score of 94 on its Technical Proposal.

80. After they had re-evaluated OHM's proposal, each of the Technical Review Committee members revised his or her final tabulation form to reflect the revised total score for OHM's Technical Proposal. They initialed and dated the revisions, and submitted the forms to Ms. Lyons, who recalculated OHM's scores.

81. As a result of the re-evaluation, OHM's average score for its Technical Proposal decreased from 96 points to 94.333 points, and its average total score for the proposal as a whole decreased from 125.879 points to 124.212 points. The total average combined score for WRS's proposal remained unchanged at 125.675.

82. The District VI Awards Committee met on October 15, 1999, to consider the award of the subject contract.<sup>23</sup> In

accordance with her usual practice, Ms. Lyons prepared a package for the Awards Committee meeting that contained, among other items, the proposals submitted in response to the RFP at issue herein, WRS's protest, and OHM's written rebuttal; she presented this package to the Awards Committee at the October 15, 1999, meeting. Ms. Lyons also presented to the Awards Committee the form she had prepared containing OHM's revised scores and identifying WRS as the proposer with the highest total score.

83. Mr. Gomez attended the Awards Committee meeting and advised the Awards Committee of the information he had obtained regarding OHM's District IV contract. He conveyed the concern of the Technical Review Committee regarding the ability of Mr. McSweeney and Mr. Carter to devote 90 percent of their time as Contract Manager and Project Manager of the District VI contract while occupying the same positions with respect to the District IV contract.

84. The Awards Committee accepted the Technical Review Committee's revised score for OHM's proposal and voted to award the contract to WRS, as the highest-ranked proposer. The minutes of the October 15, 1999, meeting, which are dated October 21, 1999, include the following comments:

Action: This contract was awarded to OHM the first time. WRS protested and job was reposted. The Technical Review Committee recommends contract be awarded to WRS due to

OHM's workload, only 90% availability and they have the same contract in District Four with the same manpower. (See Francine Steelman's Memo attached).

85. Ms. Steelman's memorandum, which is dated October 20, 1999, was prepared at the direction of Mr. Pego to memorialize the basis for the Awards Committee's action at the October 15, 1999, meeting. Ms. Steelman stated in her memorandum:

OHM failed to disclose that it was awarded a substantial environmental contract in District four in which OHM committed the same Contract Manager and other key personnel as committed in the subject contract. OHM's contractual commitment for those key personnel in District Four is such that it would be impossible for the same key personnel to perform the proposed workload on the subject contract in District Six.

Therefore, the Department has determined that it is in its best interest to award the contract to the second lowest bidder, WRS, rather than OHM . . . as initially posted.

86. Although the wording used by Ms. Steelman does not necessarily reflect the exact words used by Mr. Gomez or by the members of the Awards Committee during the discussion at the October 15, 1999, meeting, the memorandum accurately conveys the concern of at least Mr. Pego and Mr. Martinez that the workload of OHM's proposed Contract Manager and Project Manager might be too great to permit them to devote the necessary time to the District VI contract, given their commitment to a similar contract in District IV.<sup>24</sup>

87. On October 20, 1999, the Department posted its Notice of Intent to Award (Revised) advising that it intended to award the subject contract to WRS. Included on the notice are the following comments:

The District Six Technical Review Committee for the District-Wide Contamination Assessment and Remediation Services Contract Fin number 249943 has re-evaluated Proposals submitted by both OHM Remediation Services Corp. and WRS Infrastructure & Environment, Inc. and determined that OHM Remediation Services Corp. failed to fully disclose facts in its Technical Proposal which affected the scores and ranking initially given to OHM's Proposal. It has been determined that it is in the Department's best interest that the contract be awarded to WRS Infrastructure & Environment, Inc.

88. On October 22, 1999, OHM filed its Notice of Intent to Protest with the Department, and, on November 1, 1999, it filed with the Department its Formal Protest and Petition for Formal Administrative Hearing.

89. Meanwhile, on October 25, 1999, OHM filed an Emergency Motion to Enforce Statutory Procedures with respect to the WRS protest. OHM argued in this motion that the Department had violated the provisions of Section 120.57(3)(c), Florida Statutes, by proceeding to re-evaluate and rescore OHM's proposal while the WRS protest was pending.

90. On October 26, 1999, WRS withdrew its formal protest, and, on November 17, 1999, the Department issued its Final Order

in FDOT 99-0218, dismissing the WRS protest. Even though WRS had withdrawn its protest, the Department included in its Final Order Findings of Fact with respect to the WRS protest and the actions taken by the Department in response to the protest, including the Department's decisions to re-evaluate OHM's proposal and to revise its decision to award the contract to OHM. In the Final Order's Conclusions of Law, the Department addressed OHM's Emergency Motion and found that the actions of the Department were consistent with the requirements of Section 120.57(3)(c), Florida Statutes.

91. On December 3, 1999, the Department and OHM participated in a settlement conference but failed to resolve the issues raised in OHM's protest. The Department referred OHM's formal protest to the Division of Administrative Hearings on January 28, 2000, and initiated this proceeding.

92. The District VI Awards Committee met on December 9, 1999, and they were presented with a package of information containing, among other items, WRS's protest, OHM's protest, and Metcalf & Eddy's protest.<sup>25</sup> Ms. Lyons again presented the Technical Review Committee's final point tabulation to the Awards Committee; the tabulation was unchanged from that included in the October 15, 1999, submittal to the Awards Committee. Mr. Martinez, Mr. Pego, and Mr. Donn, sitting as the

District VI Awards Committee, approved the award to WRS and included the following comment:

THE PURPOSE OF THIS MEMORANDUM IS TO DOCUMENT THE AWARD COMMITTEE MEMBERS AGREEMENT OF [sic] THE RANKING OF THE ABOVE PROPOSERS AFTER REVIEW[ING] ALL THE INFORMATION REGARDING THE PROTEST OF RFP-DOT-99/2000-6026DS SUBMITTED BY WRS INFRASTRUCTURE AND ENVIRONMENT, INC., OHM REMEDIATION SERVICES, INC., METCALF AND EDDY, INC., THE CONTRACTUAL SERVICES OFFICE AND THE TECHNICAL REVIEW COMMITTEE.

93. Mr. Gomez telephoned Mr. Lampley after the December 9, 1999, meeting to verify that the information he had provided to the Technical Review Committee and to the Administrative Complaint regarding OHM's workload under the District IV contract was accurate.<sup>26</sup> Mr. Gomez sent an e-mail to Mr. Lampley dated December 13, 1999, regarding the "Phone Conversation," in which Mr. Gomez stated:

Paul, the purpose of this e-mail is to document the fact that I spoke with you last Thursday, December 9 regarding your current contract with OHM.

In our conversation you relayed to me that in your current contract with OHM you have Mr. Tom McSweeney as the contract's Contract Manager and Mr. Dean Carter as Project Manager. Additionally, you mentioned that you met with OHM representatives as well as Ann Marie Frazier of your district's Right of Way Office on or about October 20 to discuss the district's Work Program for the next few years. In this meeting future projects were discussed that will be addressed by OHM to assess for potential



contamination impacts (including SR 80 and SR 7). I understood from our conversation that it is evident that OHM will have work in D-4 (historically the district's Right of Way Office is one of the busiest offices with the CAR [Contamination Assessment and Remediation] Contract averaging approx. 2 Million dollars per year). I also understood that contamination related work in the future that is required for Right of Way will be assigned to OHM due to the fact that they are the current D-4 Right of Way CAR Contractor.

94. OHM appealed the Department's Final Order in FDOT Case No. 99-0218 to the Third District Court of Appeal. On March 7, 2001, the court issued a per curiam affirmance, without citation, of the Department's order. The mandate issued on March 23, 2001.

#### VII. Summary

95. OHM has failed to establish by the greater weight of the evidence that the Department's decision to award the subject contract to WRS was contrary to its governing statutes, its rules or policies, or the specifications of the RFP or that the decision was arbitrary or capricious.<sup>27</sup>

##### A. Failure of the Department to stay the contract award process.

96. The evidence presented by OHM fails to establish that the Department proceeded with the "contract award process" during the time that WRS's protest was pending. It is uncontroverted that the Technical Review Committee re-evaluated

OHM's proposal and revised its intent to award the contract while the WRS protest was pending, but these actions are not part of the "contract award process." There is no evidence that the Department executed a contract pursuant to the subject RFP or assigned any work under the contract. Rather, the contract has not yet been awarded, pending final agency action resolving OHM's protest.

B. The Department's decision to re-evaluate OHM's proposal.

97. The evidence presented by OHM is not sufficient to establish with the requisite degree of certainty that the Department's decision to re-evaluate OHM's Technical Proposal was arbitrary or capricious or was contrary to any rule or policy or provision of the RFP. In reaching the decision to re-evaluate, the members of the Technical Review Committee considered the information that was gathered subsequent to WRS's filing its protest, determined that information regarding OHM's work in District IV should have been disclosed in OHM's proposal, and they concluded that they would have given the information some weight during the initial evaluation had it been included in OHM's proposal. OHM has failed to present sufficient persuasive evidence to establish that the process by which the Technical Review Committee reached its decision was

fundamentally flawed or that the Technical Review Committee's actions were unreasonable, irrational, or illogical.

98. WRS brought OHM's District IV contract to the Department's attention, and the Department could not reasonably ignore the existence of the contract or the possible implications on the Technical Review Committee's evaluation of OHM's District VI proposal. OHM was given the opportunity to respond to the allegations in WRS's protest, and, in its written rebuttal, it confirmed that OHM had been awarded a contract in District IV but claimed that "no ongoing work was being performed or proposed by OHM/IT for District 4."<sup>28</sup> Mr. Gomez took the next logical step and contacted his counterpart in District IV to inquire further about the contract.<sup>29</sup>

99. Mr. Gomez presented the information he acquired to the Technical Review Committee at the October 4, 1999, meeting, and the information was discussed by the committee members at that meeting.<sup>30</sup> OHM presented no evidence at the hearing establishing that any of the information relied on by the Technical Review Committee was inaccurate or that it was unreasonable for the Technical Review Committee to consider this type of information. The evidence is sufficient to establish that OHM was aware of all of the information considered by the Technical Review Committee when it submitted its written rebuttal on

September 24, 1999; in fact, the greater weight of the persuasive, credible evidence supports the finding that OHM knew in October 1998 that it would be taking over the right-of-way contract for Metcalf & Eddy and knew the contract's historical value.<sup>31</sup> The Department had no obligation to allow OHM another opportunity to explain the omission in its proposal of any mention of the District IV contract.

100. As a necessary part of its decision to re-evaluate OHM's Technical Proposal, the Technical Review Committee determined that OHM should have disclosed the District IV contract in its proposal as part of its "current and projected workload." OHM has failed to establish by the greater weight of the persuasive, credible evidence that the Technical Review Committee's interpretation of "current and projected workload" is unreasonable, irrational, or illogical. The purpose of the requirement in the RFP that the proposer's "current and projected workload" be disclosed is to provide information on which the Technical Review Committee can base its evaluation of the availability of the proposer's key personnel to work on the contract that is the subject of the RFP. In light of this, the Technical Review Committee had a reasonable factual basis on which to conclude that OHM should have at least included the project on which it was working on July 8, 1999, and the project

for which it received a Letter of Authorization on July 9, 1999, in its Technical Proposal as "current and projected workload." Furthermore, OHM has failed to establish a factual basis to support a finding that it was unreasonable to expect OHM to disclose the District IV contract as the source of work over the 12 months following the submission of its proposal.<sup>32</sup>

101. Once it concluded that OHM should have included information about its District IV workload in its proposal, the Technical Review Committee could arguably have recommended to Ms. Lyons that OHM's proposal be rejected as non-responsive, pursuant to Section 1.8.2 of the RFP.<sup>33</sup> Instead, the Technical Review Committee decided to re-evaluate OHM's proposal in light of the information available to it on October 4, 1999. OHM has failed to present sufficient persuasive evidence to support a finding that the Technical Review Committee's decision to re-evaluate its proposal was unreasonable, irrational, illogical, or not supported by a good faith consideration of the facts before it at the time.

C. The Technical Review Committee's evaluation and re-evaluation of OHM's proposal.

(1) Lillian Costa's initial evaluation.

102. OHM failed to present sufficient persuasive evidence to establish that Ms. Costa's initial evaluation of OHM's and WRS's proposals, which resulted in her assigning OHM 96 points

for its Technical Proposal and WRS 97 points for its Technical Proposal,<sup>34</sup> was arbitrary or capricious or violated any rule or policy or provision of the RFP. OHM presented no direct evidence establishing that Ms. Costa failed to independently evaluate the proposals of OHM and WRS or that she favored WRS as the incumbent on the contract and, therefore, evaluated WRS's proposal using criteria that were not included in the RFP. Rather, OHM asserts that the handwritten comments Ms. Costa included in the "NOTES/COMMENTS" section of the Technical Proposal Evaluation Sheet that she prepared for WRS's proposal, in themselves, support such a finding.

103. Ms. Costa's comment on the WRS's Technical Proposal Evaluation Sheet that it was "close to the OHM proposal" is not sufficient to support an inference that Ms. Costa inappropriately compared the WRS and OHM proposals when scoring them rather than scoring them separately, on their own merits. This comment could reasonably be interpreted as a comment on the quality of the proposals rather than the number of points she awarded. Ms. Costa's comments that the "ongoing, outstanding project" needed "continuity" and that "other departments like[d]" working with WRS should not have been included on the Technical Proposal Evaluation Sheet that she prepared for WRS's proposal. The comments are not sufficient, however, to support

the inferences that Ms. Costa based her scores on criteria other than those specified in the RFP or that she failed to give good faith consideration to the contents of both OHM's and WRS's proposals. The conscientiousness with which she evaluated both proposals is evident from the annotations she made on the relevant pages of the proposals<sup>35</sup> and from the extensive handwritten comments she made on the Technical Proposal Evaluation Sheets beside the various components of both WRS's and OHM's Technical Proposals. Although she believed that WRS was doing a good job as the incumbent on the contract, OHM failed to present sufficient persuasive, credible evidence to establish that Ms. Costa based the scores she awarded to WRS on favoritism or that she based the scores she awarded to WRS on criteria that were not contained in the RFP.

(2) The Technical Review Committee's discussion at the October 4, 1999, meeting.

104. OHM has failed to present sufficient persuasive evidence to establish with the requisite degree of certainty that the Technical Review Committee violated any provisions of the RFP and Department policy by discussing at the October 4, 1999, meeting the WRS protest, the OHM rebuttal, and the information Mr. Gomez obtained from Mr. Lampley. Neither the notes taken by Ms. Lyons at the meeting nor the evidence presented herein reflect that the members of the Technical

Review Committee discussed the points they intended to award to OHM on re-evaluating its Technical Proposal much less that they reached a consensus regarding the scores that should be awarded OHM's proposal. Rather, the notes and the evidence are sufficient to establish that the members of the Technical Review Committee discussed the new information in the context of reviewing OHM's written rebuttal to WRS's protest and concluded that they would have considered and given weight to the information in their initial evaluations if it had been included in OHM's proposal.

105. The notes do not reflect, as OHM contends, that the "TRC agreed [at the October 4, 1999, meeting] [that] OHM's scores should be lower,"<sup>36</sup> nor did OHM present any direct evidence to establish that the Technical Review Committee engaged in any type of collusion or improper conduct. The members of the Technical Review Committee had access to the total scores awarded to all of the proposers in the initial evaluation because the scores were included in the Notice of Intent to Award posted on August 26, 1999. However, OHM presented no persuasive evidence that the members of the Technical Review Committee were actually aware at the time of the October 4, 1999, meeting that little more than .2 points separated the total scores of OHM and WRS. Even assuming that



the members of the Technical Review Committee were aware that any decrease in the points awarded for OHM's Management Plan might result in its losing the contract award, it cannot reasonably be inferred that the Technical Review Committee members decided to re-evaluate OHM's proposal for improper motives or out of favoritism to WRS.

(3) The re-evaluation of OHM's Technical Proposal by the Technical Review Committee members.

106. OHM has failed to present sufficient persuasive evidence to establish that Mr. Gomez, Ms. Costa, or Mr. Rodriguez acted in violation of the provisions of the RFP or Department policy or acted arbitrarily or capriciously when they each deducted a point from OHM's Management Plan under Section 1.16.2.B.b.3. of the RFP because of their concerns regarding the amount of time Mr. McSweeney and Mr. Carter would have available to devote to the District VI contract. Because of the information the Department had gathered regarding OHM's District IV contract, the Technical Review Committee members could reasonably question whether Mr. McSweeney and Mr. Carter would be available 90 percent of their time for work on the District VI contract.<sup>37</sup> Neither Mr. Lampley nor Mr. Gomez nor OHM could predict exactly how much work OHM would have in District IV in the 12 months following the submission of the proposals for the District VI contract. Nonetheless, the

Technical Review Committee members could reasonably rely on the information provided by Mr. Lampley regarding OHM's current and projected workload, as well as the historical value of the contract and their own experience, in re-evaluating OHM's Technical Proposal with respect to Mr. McSweeney's and Mr. Carter's availability.

107. Furthermore, OHM has not presented sufficient persuasive evidence to establish that it was unreasonable, irrational, illogical, or without any reasonable basis in fact for the Technical Review Committee members to assume that Mr. McSweeney and Mr. Carter would have work in District IV if OHM had work in District IV. Mr. McSweeney was OHM's Contract Manager and Mr. Carter was OHM's Project Manager for the District IV contract, and they would necessarily have some work under the District IV contract whenever OHM is working on a District IV project. OHM had the opportunity to describe Mr. McSweeney's and Mr. Carter's workload in District IV in their September 24, 1999, rebuttal letter, but OHM referred to Mr. McSweeney's workload only in terms of the time he had billed to the District IV contract rather than the time he had actually spent working on the District IV contract and repeatedly asserted that Mr. McSweeney and Mr. Carter had no "ongoing workload" in District IV.<sup>38</sup> OHM's contention that "the Technical

Review Committee and the Awards Committee acted on unsubstantiated and false information, because no member of the Technical Review Committee learned the actual workload of McSweeney and Carter in District 4" is not supported by the evidence or by any reasonable construction of the RFP.

108. OHM presented sufficient persuasive evidence to establish that Ms. Costa acted arbitrarily and considered criteria not included in the RFP when she deducted a point from OHM's Management Plan because Mr. McSweeney had not mentioned in his résumé that he was the Contract Manager for the District IV contract. Section 1.16.2.B.b.1. of the RFP requires only that the resumes of key personnel be included in the proposal. Mr. McSweeney included his resume, and OHM thereby satisfied the requirements of the RFP. It was not reasonable for Ms. Costa to penalize OHM because of Mr. McSweeney's failure to mention the current District IV contract.

109. OHM presented sufficient persuasive evidence to establish that Mr. Gomez acted arbitrarily when he deducted a point from OHM's Management Plan because he was not confident that Mr. McSweeney would be involved in the District VI contract for the entire contract term. Section 1.16.2.B.b.4. of the RFP requires the proposer to "identify the Contract Manager who will remain involved throughout the Contract term." Although it was

reasonable for Mr. Gomez to be concerned about the degree to which Mr. McSweeney could be involved in the District VI contract given his other responsibilities, Mr. Gomez could not reasonably conclude from the facts available at the time he re-evaluated OHM's Technical Proposal that Mr. McSweeney would not be able to remain involved to some degree in the District VI contract. There is nothing in this section of the RFP that requires assurances regarding amount of time the Contract Manager would be involved in the contract; that information was to be provided in response to Section 1.16.2.B.b.3. of the RFP.

110. Even though OHM's score on re-evaluation should be credited with two points because Ms. Costa and Mr. Gomez acted arbitrarily by deducting points from OHM's proposal on the basis of criteria not contained in the RFP, WRS remains the highest-ranking proposer.

#### CONCLUSIONS OF LAW

111. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569, 120.57(1), and 120.57(3), Florida Statutes (1999).

112. OHM has included in its Amended Formal Protest and Petition for Formal Hearing Department two bases on which the Department's decision to award the subject contract to WRS

should be invalidated. First, OHM asserts that the Department violated Section 120.57(3)(c), Florida Statutes (1999), because it continued with the contract award process while the protest filed by WRS was pending. Second, OHM asserts that the Department's decision to award the contract to WRS was arbitrary and capricious, and "subverted the purpose of competitive bidding and w[as] contrary to competition."

113. OHM'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.

114. OHM, therefore, has the burden of proof by a preponderance of the evidence. Specifically, in accordance with

the issues presented in its amended formal protest, OHM has the burden of proving by a preponderance of the evidence that the Department's decision to award the subject contract to WRS was invalid because the Department violated Section 120.57(3)(c) and/or because the actions of the Department were arbitrary, capricious, or contrary to competition. 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.").

I. The Department did not violate Section 120.57(3)(c), Florida Statutes (1999).

115. Section 120.57(3)(c), Florida Statutes (1999), provides:

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 the 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.

OHM argues that the provisions of this section impose an automatic stay of the "contract award process," which it defines as "the entire process, from bidding to award."<sup>39</sup> According to

OHM, the automatic stay prohibited the Department from re-evaluating OHM's proposal and revising its intent to award the contract while WRS's protest was pending because these actions are part of the "contract award process." OHM's proposed construction of Section 120.57(3)(c) is rejected.

116. The automatic stay provision in Section 120.57(3)(c) halts the "bidding process" when a protest is filed challenging the contents of the bid specifications; likewise, the stay halts the "contract award process" when a protest is filed challenging the agency's decision to award the contract to a particular bidder. The purpose of the stay is to prevent an agency from receiving bids under a set of specifications or from awarding the contract while a bid protest makes its way through the administrative process provided in Chapter 120, Florida Statutes.<sup>40</sup> The administrative process involving a bid protest includes efforts by the Department to reach an informal settlement of the issues raised in the bid protest. See Section 120.57(3)(d)1., Florida Statutes.<sup>41</sup> If the issues raised in a bid protest are resolved by settlement, and if the settlement involves a change in the agency's decision as to which bidder will be awarded the contract, the adversely affected bidder may, as OHM did here, file a protest challenging the agency's decision. When such a protest is filed, the

automatic stay provision of Section 120.57(3)(c) again operates to prevent the agency from awarding the contract until the bid protest is resolved.

117. If no resolution is reached by mutual agreement of the parties, the administrative process continues with an informal hearing conducted by the agency pursuant to Sections 120.569 and 120.57(2), Florida Statutes, if there are no disputed issues of material fact, or with the referral of the matter to the Division of Administrative Hearings for proceedings conducted pursuant to Sections 120.569 and 120.57(1), Florida Statutes, if there are disputed issues of material fact.<sup>42</sup> These proceedings both are resolved by entry of a final order by the agency, which may be appealed pursuant to Section 120.68, Florida Statutes. Because entry of a final order is final agency action, the automatic stay imposed by Section 120.57(3)(c) is no longer in effect, and the agency is free to re-commence the bidding solicitation process or to award the contract.<sup>43</sup>

118. The opinions in NEC Business Communications Systems (East), Inc. v. Seminole County School Board, 668 So. 2d 338 (Fla. 5th DCA 1996) and in Cianbro Corp. v. Jacksonville Transportation Authority, 473 So. 2d 209 (Fla. 1st DCA 1985) and Cianbro Corp. v. Jacksonville Transportation Authority, 473 So.



2d 206 (Fla. 1st DCA 1985)(Memorandum Opinion), support the conclusion that the automatic stay of the "contract award process" mandated in Section 120.57(3)(c) simply prohibits an agency from executing a contract or permitting work to begin under a contract until a timely-filed bid protest challenging the intended award is resolved.<sup>44</sup>

119. In NEC, the school board authorized Siemens to begin work under a contract after NEC filed a protest challenging the school board's decision to award the contract to Siemens. The school board had enacted a rule that was virtually identical to Section 120.57(3)(c), and the court found that the school board had failed to justify the necessity for lifting the automatic stay of the contract award process imposed by rule. The court reimposed the automatic stay to prohibit Siemens from continuing to perform work under the contract until NEC's protest was resolved. NEC, 668 So. 2d at 339-40.

120. In the Cianbro cases, the court found that the Jacksonville Transportation Authority had failed to state adequate grounds for avoiding the automatic stay of the contract award process imposed by Section 120.53(5)(c) (now Section 120.57(3)(c)) and, therefore, could not execute subject contract that was the subject of the bid protests until the protests were resolved. The court observed that the statutory

scheme for resolving bid protests "envisions that all contract awards will be stayed until the protest is resolved. There are several reasons for staying the contract award process: preventing the agency from wrongly awarding the contract; resolving disputes over the contract award before construction is undertaken; [and] preserving the rights of the protesting parties . . . ." Cianbro Corp., 473 So. 2d at 212.

121. The contract that is the subject of this proceeding has not yet been "awarded"; the Department has proceeded no further in the "contract award process" than posting the revised notice of intent to award the contract to WRS. When the revised notice was posted, WRS's protest became moot; only OHM's substantial interests had been adversely affected by the Department's action. The Department satisfied its responsibilities under Chapter 120, Florida Statutes, by providing OHM with a point of entry for filing a bid protest challenging its decision to award the contract to WRS and by staying the award of the contract until the bid protest is resolved by final agency action. Thus, in accordance with the preceding conclusions of law as applied to the undisputed facts of this case, OHM has failed to satisfy its burden of proving by a preponderance of the evidence that the Department violated Section 120.57(3)(c), Florida Statutes (1999).

II. The Department's decision to award the subject contract to WRS was not clearly erroneous, contrary to competition,<sup>45</sup> arbitrary, or capricious, nor did it violate the Department's rules or policies or the specifications of the RFP.

122. 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." The court in State Contracting cited as the source for this definition the opinion in Intercontinental Properties, Inc. v. State Department of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 3d DCA 1992), in which the court observed that an administrative law judge in a bid protest proceeding sits in a review capacity with respect to the agency's actions:

Although the hearing before the hearing officer was a de novo proceeding, that simply means that there was an evidentiary hearing during which each party had a full and fair opportunity to develop an evidentiary record for administrative review purposes. It does not mean . . . that the hearing officer sits as a substitute for the Department and makes a determination whether to award the bid de novo.

123. The courts have consistently accorded agencies broad, though not unbridled, discretion in soliciting and evaluating competitive bids and proposals. See Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913, (Fla. 1988);<sup>46</sup> Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982). 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."

124. "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.

125. On the basis of the findings of fact herein, OHM failed to prove by a preponderance of the evidence that the Department's decision to re-evaluate OHM's Technical Proposal in light of the information obtained by the Department after WRS's protest was filed was contrary to its rules or policies or the specifications in the RFP or was arbitrary or capricious. The Department was not required by any statute, rule, policy, or RFP provision to ignore the information Mr. Gomez obtained from Mr. Lampley regarding OHM's District IV contract and to send WRS's protest to the Division of Administrative Hearings for an administrative hearing. OHM had the opportunity herein to produce evidence disputing the accuracy of the information on which the Technical Review Committee relied in deciding to re-evaluate OHM's Technical Proposal, but OHM failed to prove by the greater weight of the evidence that any of the information Mr. Lampley gave to Mr. Gomez was inaccurate.<sup>47</sup> Finally, neither

the Technical Review Committee's construction of the provision of the RFP that required the proposers to include "current and projected workload" nor its conclusion that OHM should have included work under the District IV contract as "current or projected workload" was contrary to the requirements of the RFP or arbitrary or capricious.

126. This conclusion is supported by the ruling in GTECH Corp. v. State, Department of the Lottery, 737 So. 2d 613, 618 (Fla. 1st DCA 1999), in which the court considered the issue of "whether an administrative agency can properly correct errors in the competitive bidding process by referring the proposals back to the same evaluation committee after committee members have testified in a bid protest hearing." The court held as follows:

In our view, the decision to refer the proposals back to the committee was a reasonable exercise of the Department's authority. Typical remedies for a violation of the procurement procedures include the reopening of the bids or the referral of the proposals to a new committee . . . but these remedies are not exclusive. Administrative agencies certainly have discretion to employ less drastic measures when appropriate. In the present case, the bidding process was protracted and complicated. The decision to refer the proposals back to the evaluation committee enabled the Department to correct its errors without the need to repeat the bidding process and the entire bid protest proceeding. We cannot say that this decision was an abuse of discretion.

127. Although in GTECH an administrative hearing had been held pursuant to Section 120.57(1), Florida Statutes, and a recommended order had been entered finding flaws in the evaluation process and recommending that the agency re-evaluate portions of the proposals, there is nothing in the opinion of the court to suggest that an agency does not have the discretion to decide to re-evaluate a proposal in circumstances such as those in this case. Once the Technical Review Committee determined that OHM had failed to disclose material information in its proposal, it could have rejected OHM's proposal as non-responsive pursuant to Section 1.8.2 of the RFP and awarded the contract to WRS as the second-highest-ranked proposer. Therefore, OHM actually benefited from the Technical Review Committee's decision to re-evaluate its proposal because, by doing so, it accepted the responsibility of conducting the re-evaluation in a manner that was not arbitrary or capricious or contrary to its governing statutes, rules or policies or the provisions of the RFP.

128. Based on the findings of fact herein, OHM has failed to prove by a preponderance of the evidence that the Technical Review Committee acted improperly or in violation of the Department's policies or the provisions of the RFP as a result of the members' discussion of WRS's protest, OHM's rebuttal, and

the information that Mr. Gomez obtained from Mr. Lampley regarding OHM's District IV contract at the October 4, 1999, meeting. OHM has also failed to prove by a preponderance of the evidence that either Mr. Gomez, Ms. Costa, or Mr. Rodriguez violated Department rule or policy or the provisions of the RFP or acted arbitrarily or capriciously by each deducting a point on the re-evaluation of OHM's Technical Proposal from Section 1.16.2.B.b.3. of OHM's Management Plan because of their concerns regarding the availability of Mr. McSweeney and Mr. Carter to devote 90 percent of their time to the District VI contract.

129. Based on the findings of fact herein, OHM has proven by a preponderance of the evidence that Ms. Costa acted arbitrarily and considered criteria not contained in the RFP when she deducted a point from Section 1.16.2.B.b.1. of OHM's Management Plan because Mr. McSweeney failed to include in his resume that he was currently the Contract Manager for the District IV contract. Likewise, based on the findings of fact herein, OHM has proven by a preponderance of the evidence that Mr. Gomez acted arbitrarily and considered criteria not contained in the RFP when he deducted a point from Section 1.16.2.B.b.4. of OHM's Management Plan because of his concerns that Mr. McSweeney could not remain involved in the



District VI contract as Contract Manager for the duration of the contract term.

130. As a result of this conclusion, the Department should credit OHM with one point on Ms. Costa's Technical Proposal re-evaluation tabulation, thereby increasing to 95 points the score she awarded on re-evaluation of OHM's Technical Proposal. It should also credit OHM with one point on Mr. Gomez's Technical Proposal re-evaluation tabulation, thereby increasing to 95 points the score he awarded on re-evaluation of OHM's Technical Proposal. These revisions to OHM's score produce a final score of 124.879 points (95(Technical Proposal) + 5(DBE) + 24.879(Price Proposal) = 124.879). Nonetheless, factoring these two additional points into OHM's final score does not render the Department's decision to award the contract to WRS invalid because WRS remains the highest-ranked proposer, with a final score of 125.666 points. Nor does the fact that Mr. Gomez and Ms. Costa erred in a portion of their re-evaluations otherwise require that the intended award to WRS be invalidated because these errors did not impair the fairness of the Department's decision or render the process whereby the decision was reached fundamentally flawed. Accordingly, OHM has failed to carry its burden of proving by a preponderance of the evidence that the

Department's intended award of the subject contract to WRS should be invalidated.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Transportation enter a final order dismissing the bid protest of OHM Remediation Services, Corp.

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

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PATRICIA H. MALONO  
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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 4, 1999, Metcalf & Eddy, Inc. (Metcalf & Eddy), the third-highest-ranked proposer, filed the Formal Protest of Metcalf & Eddy, Inc., 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 Orders has been entered in DOAH Case No. 00-0494BID.

<sup>2/</sup> A subsequent motion for leave to amend the amended petition was filed by OHM but was denied.

<sup>3/</sup> OHM Proposal, OHM Exhibit 2 at 2-5.

<sup>4/</sup> OHM Proposal, OHM Exhibit 2 at 2-28.

<sup>5/</sup> OHM Proposal, OHM Exhibit 2 at 2-35.

<sup>6/</sup> OHM Proposal, OHM Exhibit 2 at 2-49.

<sup>7/</sup> Although only the WRS and OHM Technical Proposal Evaluation Sheets are part of the record in these proceedings, it is inferred from the record that the Technical Review Committee members followed the same procedure with each of the eight proposers.

<sup>8/</sup> District IV is composed of Broward County, Palm Beach County, Indian River County, Martin County, and St. Lucie County.

<sup>9/</sup> Mr. Lee testified that there was one statement in the September 24, 1999, letter with which he disagreed:

[I]t seems like there was a statement made when it got wordsmith'd or manipulated that had [sic] we had no work at the time of the proposal submittal for District 4, when in fact we had one LOA [letter of authorization] that we were finishing around the same time period.

Transcript at 280.

<sup>10/</sup> WRS was also awarded a contract pursuant to District IV's June 1998 RFP, and it was designated to receive all maintenance work during the contract period. Handex was the third contractor awarded a contract pursuant to District IV's June 1998 RFP, and it was designated to receive worked funded from all sources other than right-of-way and maintenance during the term of the contract.

<sup>11</sup>/ These figures are derived from OHM's Exhibit 47.

<sup>12</sup>/ This information is derived from OHM's Exhibit 47.

<sup>13</sup>/ Mr. Lee testified with respect to the decision to omit reference to the District IV project as follows:

[W]e [Mr. Lee and Mr. Carter] had a discussion about the projects with activity during the time period and I believe I brought it up, I said, "What about the District 4 contract?" He indicated things were very slow there, that he was working on a project at that time but it would be finished and we bantered about putting it in and we agreed not to put it in at that time, not put it in at all because there was no projected work load or for that matter, current work load.

I didn't even want to go there because I just felt that if we had shown something that it would have been a potential protest issue. They would have called the District [4] and said,, "OHM has listed work for this period. Do you have work for them," and they would likely say no because we didn't know of anything.

Transcript at 266. According to Mr. Lee, he was concerned that OHM's proposal would be found misleading if it included any current or projected workload for District IV.

<sup>14</sup>/ Transcript at 118.

<sup>15</sup>/ Mr. Lee telephoned Mr. Lampley to discuss the "Handex contract," one of the contracts that was awarded at the same time that OHM was awarded its District IV contract. Mr. Lee also inquired about the potential for OHM to be assigned additional work under its District IV contract. As reported by Mr. Lee in an e-mail he sent on October 13, 1999, to Mr. McSweeney, the accuracy of which was affirmed during his testimony at the hearing, Mr. Lampley "could sense my frustration and told me we have a valuable contract that will produce 2 to 3 million dollars per year, but [Mr. Lampley]

couldn't offer when this will occur." (OHM Exhibit 46.) Mr. Lee's testimony to the contrary, found at pages 282 and 283 of the transcript, is rejected as unpersuasive.

Mr. Lampley advised Mr. Lee during their October 12, 1999, telephone conversation that he would need to talk with Ms. Frazier of the Right-of-Way Department with respect to future projects for OHM under the District IV contract. Mr. Lee suggested to Mr. McSweeney and Mr. Carter that he schedule a meeting with Mr. Lampley and Ms. Frazier "in an attempt to identify schedule and volume projections." (OHM Exhibit 46.) Mr. Lee and Mr. Carter met with Mr. Lampley and Ms. Frazier on October 20, 1999, and discussed the projects included in the five-year work plan for road construction in the district.

Mr. McSweeney testified that, every time Mr. Lampley requested a proposal from OHM for a project under the District IV contract, Mr. Carter asked Mr. Lampley about future projects and always received the same response: Mr. Lampley did not know of anything. This testimony is hearsay that is not corroborated by any other evidence in the record. It cannot, therefore, provide a basis for a finding of fact that OHM did regularly inquire about future work under the District IV contract. See Section 120.57(1)(c), Florida Statutes (2000).

<sup>16/</sup> The reference should have been to OHM's response to the allegations in WRS's protest. OHM had not filed a protest as of October 4, 1999.

<sup>17/</sup> This and all other entries attributed to OHM's protest in Ms. Lyons notes are direct quotes from OHM's September 24, 1999, response to the allegations in WRS's protest, OHM Exhibit 27.

<sup>18/</sup> This misquotes OHM's response. The last word is actually "accurate."

<sup>19/</sup> This quote is in reference to the contents of Mr. McSweeney's résumé.

<sup>20/</sup> Italics are used to indicate handwritten notes added to the typewritten notes on the document quoted.

<sup>21/</sup> The quotation has been omitted because it is not relevant to the issues herein. For the text of Section 1.8.2 of the RFP, see OHM Exhibit 1, Attachment III, page 6 of 21.

<sup>22</sup>/ Mr. Gomez defines "current workload" as "work that was going on at the time of the proposal preparation." Transcript at 493. Mr. Gomez defines "projected workload" as "work that would be potentially performed within the next twelve months." Id. at 494.

<sup>23</sup>/ OHM has asserted in its Proposed Recommended Order that there was an "interim" meeting of the Awards Committee, that took place after its August 24, 1999, meeting and before the October 4, 1999, meeting of the Technical Review Committee, during which Mr. Gomez and Ms. Lyons advised the Awards Committee of the information obtained from Mr. Lampley regarding OHM's District IV contract. Mr. Pego recalls that there was a "second" meeting of the Awards Committee before the October 15, 1999, meeting; Mr. Martinez does not recall whether there was such an interim meeting; Mr. Gomez specifically denies that he attended such meeting.

In light of the totality of the evidence presented on this issue, OHM has failed to present sufficient persuasive, credible evidence to establish that there was an "interim" meeting or that Mr. Pego's recollection is more reliable in this regard than Mr. Gomez's. Even though minutes of the meetings of the Awards Committee are routinely prepared, there are no minutes of an "interim" meeting of the Awards Committee in the record, and, according to Mr. Gomez's recollection, the subject contract was the only matter considered by the Awards Committee at its October 15, 1999, meeting. In any event, the relevance of whether this interim meeting did or did not take place to the issues to be resolved herein is questionable.

<sup>24</sup>/ The following exchange took place during the testimony of Mr. Pego:

Q [by Mr. Davell]: Do you recall that the Awards Committee said specifically that you wanted them [Mr. Gomez] to investigate the issue of manpower, of the proposed manpower, versus the allegation that was made of their just being the same team?

A: Yes. We wanted to make sure that if there was a duplication of personnel, what impact it would have on our contract, and we

also required them to call the project manager in District 4 to make sure what that work load was projected for their contract so that, you know, [sic] evaluate as much facts as we could obtain.

Q: But the issue though that you wanted investigated was manpower, correct, and the impact on your contract and District 4's contract?

A: When I say manpower, it's not only the same personnel, okay.

Q: Right.

A: If I recall correctly, it was assigned to both contracts, was the availability of that personnel to do the job that we required in our RFP, which I believe was like a full-time project engineer or project manager for this contract

\* \* \*

Q [by Mr. Davell]: But your concern as an Awards Committee was not just that the contract manager and project manager were the same two named individuals, you wanted them to find out the actual manpower being used in District 4 or work load in District 4?

A: To try to assess, like for example and let me frame it this way, if the District 4 contract was winding down and was going to complete in a month, it may not be that big of an issue to the Department. But if that contract was just starting and our contract was just starting, then obviously you can't have the same personnel doing the same contract for two districts at the same time.

Q: Was it the issue of the contract of the company, or was it the amount of work load

of the individuals that you were concerned about?

A: Work load of the individuals.

Transcript at pp. 862 - 64.

<sup>25</sup>/ See endnote 1.

<sup>26</sup>/ OHM asserts that Mr. Gomez was directed by the Awards Committee at the "interim meeting" referred to in endnote 23 to obtain verification in writing from Mr. Lampley of the "actual" workload of Mr. McSweeney and Mr. Carter with respect to OHM's District IV contract. First, the evidence presented by OHM is not sufficiently persuasive to support a finding that Mr. Martinez did give Mr. Gomez such specific instructions. Second, even if Mr. Gomez had been so instructed, the RFP did not require the proposer to disclose the "actual" workload of its key personnel for the 12 months following submission of the proposals, probably because this would, in most cases, be impossible to do. Consequently, the Technical Review Committee was not required to consider Mr. McSweeney's and Mr. Carter's "actual" workload in its re-evaluation of OHM's proposal, and any failure on Mr. Gomez's part to provide Awards Committee documentation of the actual workload of Mr. McSweeney and Mr. Carter in District IV would not impair the fairness of the re-evaluation process.

<sup>27</sup>/ Although OHM asserted in its formal protest and argued in its Proposed Recommended Order that the Department's decision to award the contract to WRS was contrary to competition, it did not present any evidence tending to establish that WRS received a competitive advantage as a result of the Department's actions in re-evaluating OHM's Technical Proposal. As a result, no findings of fact are made with respect to this assertion.

<sup>28</sup>/ OHM Exhibit 27.

<sup>29</sup>/ OHM also finds it objectionable that Mr. Gomez did not contact OHM after speaking with Mr. Lampley for clarification of Mr. McSweeney's and Mr. Carter's workload in District IV. The Department had already given OHM the opportunity to respond to the allegations in WRS's protest, and OHM has presented no evidence or persuasive argument to support its contention that



the Department was obligated to do more prior to re-evaluating OHM's proposal.

<sup>30</sup>/ As reflected in Ms. Lyons notes, the Technical Review Committee considered the following information: (1) OHM had a contract with District IV whereby it would provide environmental services in District IV; (2) the contract term began to run in February 1999 and expires in February 2002; (3) Thomas McSweeney and Dean Carter were the Contract Manager and Project Manager, respectively, for the District IV contract; (4) OHM had done several projects in District IV, beginning in February 1999; (5) OHM was working on a project in District IV when it submitted its proposal on July 8, 1999, and was issued a Letter of Authorization on July 9, 1999, to begin work on another District IV project; (6) Metcalf & Eddy, the company that had the right-of-way contract in District IV prior to OHM, had been assigned \$6 million of work during the three-year term of its contract; (7) several Letters of Authorization were issued to OHM for work in District IV in August 1999; and (8) OHM would be assigned more work and become busier in District IV as Metcalf & Eddy completed projects assigned under the previous contract.

<sup>31</sup>/ Mr. McSweeney even conceded in his testimony that it was not unreasonable to look at the value of work assigned under the previous contract as one indicia of the future value of the contract.

<sup>32</sup>/ OHM's failure to disclose anywhere in its proposal the existence of the District IV contract was primarily a consequence of Mr. McSweeney's and Mr. Lee's rather strained interpretation of "current and projected workload" that they employed when preparing OHM's District VI proposal. Mr. McSweeney and Mr. Lee chose a day almost two months after the proposal was to be submitted, September 1, 1999, and decided that the Department would only be interested in knowing OHM's "current and projected workload" as of that date. Accordingly, they used September 1, 1999, as the benchmark for determining what to include in the proposal as OHM's "current and projected workload." As a result, OHM did not disclose as "current" workload the District IV project that it was working on when its District VI proposal was submitted on July 8, 1999, because the work would be completed before September 1, 1999; it did not disclose as "projected" workload the District IV project that was authorized on July 9, 1999, because work on that project would also be completed by September 1, 1999; and it did not

disclose any "projected" workload for the District IV contract because, when it submitted its proposal on July 8, 1999, OHM had not been assigned or asked to provide a project proposal for any project on which work would begin during the 12 months beginning September 1, 1999.

<sup>33/</sup> Section 1.8.2 of the RFP provides in pertinent part:

. . . 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.

<sup>34/</sup> The points Ms. Costa assigned to OHM's Technical Proposal were identical to the points she assigned to WRS's Technical Proposal except that she awarded WRS the maximum 15 points for the "Service/Availability" portion of its Technical Plan. Ms. Costa awarded OHM 14 points for this portion of its Technical Proposal, and she included the comment "Highway spills?" beside the point allocation for this category on the Technical Proposal Evaluation Sheet that she prepared for OHM.

<sup>35/</sup> The copies of excerpts of the WRS proposal and the OHM proposal annotated by Ms. Costa were received into evidence as OHM's Exhibits 23 and 24.

<sup>36/</sup> OHM's Closing Argument at 8.

<sup>37/</sup> Mr. Pego, Mr. Martinez, and Ms. Steelman may have overstated the commitment of Mr. McSweeney and Mr. Carter to District IV when they concluded that it would be impossible for them to carry out their responsibilities were OHM to be awarded the District VI contract. OHM presented insufficient persuasive evidence to establish that Mr. Gomez made such a representation to the Awards Committee, but, even if he had, it would not render irrational or without a reasonable basis in fact the

decisions of Mr. Gomez, Ms. Costa, and Mr. Rodriguez to deduct a point from OHM's Management Plan.

<sup>38</sup>/ This position was apparently based on OHM's construction of "current and projected workload" as applying only to those projects that would be "ongoing" as of September 1, 1999.

<sup>39</sup>/ OHM's Closing Argument at 5.

<sup>40</sup>/ Consider, for example, Section 287.042(2)(b), Florida Statutes, which provides:

As an alternative to any provision in s. 120.57(3)(c), the department [of Management Services] may proceed with the bid solicitation or contract award process of a term contract bid when the secretary of the department or his or her designee sets forth in writing particular facts and circumstances which demonstrate that the delay incident to staying the bid process or contract award process would be detrimental to the interests of the state. After the award of a contract resulting from a bid in which a timely protest was received and in which the state did not prevail, the contract may be canceled and reawarded to the prevailing party.

<sup>41</sup>/ OHM concedes that Section 120.57(3)(d), Florida Statutes (1999), allows the Department to attempt to resolve the issues raised in a bid protest "by mutual agreement between the parties." It asserts, however, that the Department allowed it to intervene as a party to the WRS protest and that no "mutual agreement" between the WRS, OHM, and the Department was reached. Although it is not necessary to the resolution of the issues raised in these proceedings to determine whether the Department had the authority to grant OHM party status with respect to the WRS protest, the possible implications of the Department's decision are worth considering.

<sup>42</sup>/ OHM contends that, because there was no resolution of WRS's bid protest by mutual agreement of the "parties," the Department had no option but to refer the matter to the Division of Administrative Hearings for proceedings pursuant to

Sections 120.569 and 120.57(1), Florida Statutes. (OHM's Closing Argument at 6.) Had the Department referred WRS's protest to the Division of Administrative Hearings, it would have been placed in the anomalous position of having to defend in an adversarial proceeding a decision with which it disagreed in a case in which there was no dispute between the WRS and the Department with respect to the material facts.

<sup>43/</sup> If an appeal is taken from final agency action, the provisions of Section 120.68, Florida Statutes, are applicable.

<sup>44/</sup> OHM's reliance on Caber Systems, Inc. v. Department of General Services, 530 So. 2d 325, 336 (Fla. 1st DCA 1988), to support its argument that the "contract award process" encompasses all actions with respect to a competitive procurement from bidding to award of the contract is misplaced. The decision of the court in Caber Systems stands only for the proposition that an agency is not prohibited by the automatic stay provision in Section 120.57(3)(c) from rejecting all bids while a bid protest is pending as long as the agency gives the protester an opportunity to protest the decision to reject all bids before it begins the bidding process under a new invitation to bid. Id. at 336.

<sup>45/</sup> As noted in the findings of fact, OHM failed to present any evidence to support its assertions that the Department's actions gave a competitive advantage to WRS not enjoyed by the other proposers. Therefore, no conclusions of law will be included on this issue.

<sup>46/</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.

<sup>47/</sup> OHM did establish that, as of September 2000, OHM had been assigned work in District IV valued at \$539,782.46, which is substantially less than the \$2 million per year Mr. Lampley estimated. Nonetheless, the administrative law judge's function is to review the Department's decision in light of the facts on

which it based the decision, and this information is, therefore, not relevant to resolving the issues presented herein. See State Contracting, 709 So. 2d at 609; Fairbanks North Star Borough School District v. Bowers Office Products, Inc., 851 P.2d 56, 60 (Alaska 1992).

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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.