

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TELECOM RESPONSE, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 00-3439BID
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Notice was given and on September 11, 2000 and September 19-20, 2000, a final hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1)(3), Florida Statutes. The hearing location was the Division of Administrative Hearings, the DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida. The hearing was conducted by Charles A. Stampelos, Administrative Law Judge.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether the Department of Management Services' (Department) intent to award the contract pursuant to Invitation to Bid (ITB), Bid Number 33-840-980-E, to Frebon International Corporation, (FREBON), the second low bidder by price discount, and to reject the bid offered by Telecom Response, Inc. (TELECOM or TRI), the low bidder by price discount, was contrary to the Department's governing statutes, rules, policies, or the ITB? Further, whether the Department's proposed action was clearly erroneous, contrary to competition, arbitrary, or capricious? See Section 120.57(3), Florida Statutes.

PRELIMINARY STATEMENT

TRI and FREBON and other vendors submitted responses to the ITB. When the Department determined to disqualify TRI from participation in the bid process, TRI opposed that decision by filing a notice of protest followed by a formal written protest. The parties were unable to resolve the protest by mutual agreement. See Section 120.57(3)(d)1., Florida Statutes. As a consequence, the case was forwarded to the Division of Administrative Hearings for conduct of a final hearing in accordance with Section 120.57(1), Florida Statutes, to resolve disputed issues of material fact. See Section 120.57(3)(d)3., Florida Statutes.

After the protest was filed by TRI, and unbeknown to TRI at the time, the Department re-reviewed the bids submitted by FREBON, Global Communications Technologies, Inc. (GLOBAL), and Digital Video Systems a Division of NuPhase Electronics, Inc. (DIGITAL)-- the other vendors proposing to offer Tandberg Inc.'s (Tandberg) video teleconferencing systems and equipment. On August 1, 2000, the Department posted a second bid tabulation sheet. The Department rejected DIGITAL's bid because DIGITAL supplied multiple discounts within the same Tandberg product line. Material here, the GLOBAL and DIGITAL bids were rejected because they did not supply the complete, unaltered manufacturer's (Tandberg) list price sheet with the bids. This was the same reason given by the Department for initially rejecting TRI's bid.

The Department again noticed an intent to award the contract to FREBON for the Tandberg line of video teleconferencing systems and equipment.

On or about September 7, 2000, TRI filed a Motion for Leave to Supplement the Formal Written Protest and represented that it was unaware of the Department's second posting. TRI requested to present evidence regarding the Department's re-review of the bids and the second posting.

On the first day of the final hearing, after hearing argument of counsel, TRI's Motion was granted to the extent that TRI was permitted to offer evidence regarding the facts and circumstances

surrounding the second posting because the parties disputed whether the second posting was related to the first posting. There was no formal challenge to the second posting pursuant to Section 120.57(3)(b), Florida Statutes.

At hearing, TRI presented the testimony of Mr. Kris Brown, Mr. Chuck Williams, Ms. Charlotte Brock, and Mr. Bobby Hinson. TRI's Exhibits 1-6, 8-11, 13-14, 16-18, and 20-21, including the deposition transcripts of Mr. Hinson, Mr. H. P. "Buddy" Barker Jr., and Mr. Richard Grace, were admitted. TRI Exhibit 19 was rejected. The Department's objections made during the depositions were overruled. The Department presented the testimony of Mr. Hinson, Mr. Barker, Mr. Steve Welsh, and Mr. Kenneth Gay. The Department's Exhibits 1-5 were admitted.

The hearing Transcript was filed on October 26, 2000. After requesting an eight-day extension of time, the parties timely submitted proposed recommended orders which have been considered in preparing this Recommended Order.

FINDINGS OF FACT

The ITB

1. During the spring of this year, the Department developed an ITB for video teleconferencing equipment and video bridging equipment for all State of Florida agencies and other eligible users. Department staff developed the specifications for the ITB. The ITB was a revision of the existing contract held by

TRI, which expired on August 20, 2000, rather than a new contract. During the ITB/specifications review process, a new condition was added to require vendors to give a percentage discount from a list price to aid users in getting more choices and complete systems.

2. On May 9, 2000, the Department advertised ITB 33-840-980-E actively soliciting bids. The bid title refers to "videoteleconferencing equipment." Vendors were notified that bids would be opened on June 14, 2000, at 2:00 p.m. and that the bid tabulations would be posted on July 20, 2000.

3. The ITB contains two (2) pages of general conditions which are used in most if not all Department ITB solicitations. The ITB also contains special conditions which, among other things, provide for the "purpose" and "scope" of the bid.

4. "The purpose of this bid is to establish a 12-month contract for the purchase of Video Teleconferencing Equipment & Video Bridging Equipment by all State of Florida agencies and other eligible users in accordance with the Eligible Users paragraph, General Conditions." (emphasis added).

5. Under the "scope" section, the Department provided:

The objective of this Invitation To Bid (ITB) is to establish a contract for the purchase, installation and a maintenance of video teleconferencing systems and bridging equipment. The prospective bidder must offer the complete line of videoconferencing products and/or video bridge products to

configure desktop and/or room videoconferencing systems, for each manufacturer bid. In addition the bidder must provide replacement parts as needed for repairs. In accommodating the specific agencies needs for auxiliary hardware necessary to make the videoconferencing equipment and video bridges operationally complete, the bidder must also provide and support the **Optional Bid Items** as shown in the Price Sheets section of this bid. (bold emphasis in original).

This section requires the bidder to offer the complete line of a manufacturer's products to configure desktop and/or room videoconferencing systems for each manufacturer bid, and to further provide optional equipment by brand name, which could include more than one manufacturer.

6. The "prices" section of the ITB also states:

[p]rices shall be submitted in the form of a percentage(%) discount off manufacturer's current published price list. Only a single discount may be offered for each category. List Prices & percentage discount will remain firm for the entire contract period. Discounted prices shall be firm net delivered price to ordering agency. A copy of the Manufacturer's **unaltered** list price sheet as originally published, in general distribution and in effect on the date of bid opening **must** be submitted with the bid. Failure to include this with bid package **will** result in rejection of bid. (bold emphasis in original).

7. The "evaluation/award" special condition provides:

"Award shall be by manufacturer's products, based on the highest discount given from the manufacturer's list price sheet for each

item, on a multiple award basis. If the same manufacturer's brand is bid by more than one bidder, only the bid with the highest discount percentage shall be considered for an award. All other provisions of Awards Paragraph, General Conditions, shall prevail." (emphasis added). Compare with Findings of Fact 12.

8. The Department also provided several specific specifications for video teleconferencing equipment. Subsection 1.1 provides that the specifications were specifically written for two (2) categories of equipment: "(1) Videoconferencing Systems (includes Set-top, Desktop & Room Systems) (2) Video Bridging Systems." There were two types of commodities listed, i.e. videoconferencing equipment and video bridging equipment, types 1 and 2, respectively. Vendors, including TRI, understood that they could bid on either type or both at their choosing.

9. The Department offered detailed specifications for the videoconferencing systems, category one. Specification 3.1.1 deals with "completeness of systems" and provides for room, set-top, and desktop systems. No other systems are discussed in the ITB. "A typical room system would include the codec, monitor(s), rollabout cart, and control unit." "A typical set-top system would include an integrated codec/camera unit; an external microphone pickup, and a control unit." A desktop system would "minimally include the PC codec card, a desktop video camera, a

microphone/headset, and all associated cables for network connections & required peripherals." The remaining specifications, Sections 3.1.2 through 3.1.12.8, provide additional requirements for the room, set-top and desktop systems.

10. Specification 3.3 provides for "optional bid items" which

are provided for the convenience and benefit of the contract users as well as the awarded vendors. The optional bid items allow the purchaser a 'one-stop' procurement mechanism, as well as facilitating the ability of a contractor to provide a 'complete system' for the purchaser. It is incumbent on the purchaser to 'shop' the contract and purchase products that meet their needs at the lowest net delivered costs. The optional bid items shall never exceed the manufacturer's suggested list price (MSRP). Vendors must list all options to the contract that are to be offered as indicated on the attached bid sheets. The list must describe the item brand name/manufacturer, model number, and the net prices (see optional bid items price sheets).

11. These "optional bid items" are products, which are not subject to the discount referred to in the "prices" or "evaluation/award" sections of the ITB.

12. The ITB contains a price sheet for "videoconferencing systems" which, among other things, requires the vendor to provide the manufacturer's name bid, brand name bid, and the discount to be used with the manufacturer's price list. The

price sheet has a "note" which provided: "Percentage discount applies to the entire manufacturer's line of videoconferencing equipment." (emphasis added).

13. Immediately following the price sheet, the Department provided the vendor with a sheet to be used for "optional bid items" which required an item description, brand name, model number, and net price to be filled in by the vendor. The ITB does not require the vendor to apply the discount to the optional items.

14. The ITB also contains a "manufacturer's certificate." A "special condition" provided: "All bids submitted, must include a certification executed by the manufacturer, stating that the bidder is an authorized dealer/representative of the manufacturer. Manufacturers **must** complete this form even if they own their own equipment. Dealer agreements shall not be accepted in lieu of manufacturer certification. Bids requiring manufacturer certification will not be considered if certification is not submitted with the bid." (bold emphasis in original). The certificate provided a "NOTE" which stated:

"THIS MUST BE EXECUTED BY THE MANUFACTURER.
DEALERS/REPRESENTATIVES ARE NOT AUTHORIZED TO SIGN THE
CERTIFICATION FORM ON BEHALF OF THE MANUFACTURER. THIS
CERTIFICATION MUST BE EXECUTED BY THE MANUFACTURER EVEN IF THEY
ARE BIDDING THEIR OWN EQUIPMENT. FAILURE TO SUBMIT THIS

CERTIFICATION WITH YOUR BID SHALL RESULT IN DISQUALIFICATION OF BID." The manufacturer certifies that the vendor is authorized to represent the manufacturer in the State of Florida.

15. TRI did not believe the ITB, including the specifications and conditions, were unreasonable. There was no challenge to the ITB.

TRI Inquiry

16. On May 31, 2000, at the request of Mr. Brown of TRI, Ms. Brock of TRI, asked Mr. Hinson whether bidders were required to submit a bid response for categories one and two, mentioned above. Mr. Hinson advised her that a vendor could bid on either category.

17. On June 12, 2000, and less than ten (10) days before the bid opening, Ms. Brock asked Mr. Hinson to clarify whether the Department was asking for a single or multiple discount, as to the set-top, desktop, and room teleconferencing systems. However, the general conditions of the ITB, paragraph 7, interpretations/deputes, provides that "[a]ny questions concerning conditions and specifications shall be directed in writing to this office for receipt no later than ten (10) days prior to the bid opening." This letter was untimely submitted pursuant to paragraph 7.

The Department's Interpretation of the ITB

18. Mr. Steve Welsh is an engineer. He received a Bachelor of Science degree in electrical engineering and a Master of Science degree in civil engineering. He has been employed by the Department's state technology office two and one-half years. He is not an expert in videoconferencing systems and this ITB was his first exposure to video teleconferencing systems.

19. Mr. Hinson has been a purchasing specialist with the Department for more than five (5) years. He currently administers twelve (12) to thirteen (13) state contracts including the State's existing video teleconferencing contract with TRI.

20. Mr. Welsh drafted the technical specifications for the videoconferencing equipment or systems in the ITB, including pages eleven (11) through seventeen (17), excluding Section 3.3, Optional Bid Items, which were prepared by Mr. Hinson. Mr. Welsh also drafted pages nineteen (19)(price sheet) and twenty (20)(optional bid items), with Mr. Hinson. Pages twenty-one (21) through twenty-seven (27) are standard forms.

21. Set-tops, desktops, and room systems are three (3) generic types of videoconferencing systems. The definitions of these systems were general. Mr. Welsh was unaware of any industry standard regarding desktop, set-top, and room systems. The specifications required each vendor to offer a complete line

of the manufacturer's videoconferencing equipment and systems, which might be included under these categories. The Department intended that the percentage discount apply to the complete manufacturer's line of videoconferencing equipment. Conversely, a vendor's offer of a manufacturer's partial line of equipment under "optional bid items" would be inconsistent with the objective of the "scope" section of the ITB.

22. In general terms, Mr. Welsh knew that state agencies have differing needs for videoconferencing equipment and systems to communicate more effectively. However, he was able to give only one example; he knew that community colleges were looking for videoconferencing equipment for distance learning-type needs. Nevertheless, it was important for each vendor to offer a manufacturer's pre-configured or packaged systems, or configured systems from components and prices as the customer needed, or both.

23. The ITB was not written to specifically address health care systems. Mr. Welsh did not consider certain industry specialties, such as education and health care systems, when he drafted the specifications, and there are no specifications expressly relating to videoconferencing products for use in educational or health care settings nor any mention of education or health care systems. However, it was his intent to draft

flexible and wide-open specifications, so there may have been several types of industry specialties that he did not consider.

24. The eligible users of this contract include any state, city, or county government, community and state universities, private colleges and universities, and any federal agency located within the State of Florida.

25. The Department intended to award one contract with multiple manufacturers. The vendor could bid either category of equipment. The contract would be awarded to the vendor giving the highest discount for a particular manufacturer's products within each category.

26. If a vendor did not offer a complete line of the manufacturer's products, the vendor could offer a greater discount and achieve a competitive advantage over other vendors who may have provided a more complete list. It was important to the Department to be able to compare each vendor's manufacturer's price list and then apply the vendor's discount in order to appropriately compare their bids. The Department was unable to compare TRI's bid because it submitted a discount for only one (1) page of Tandberg products versus the twenty-two (22) pages of discounted products offered by FREBON.

27. Mr. Hinson explained that Tandberg's complete manufacturer's list price must consist of all items offered by Tandberg. However, Mr. Hinson did not know of the complete line

of Tandberg video teleconferencing equipment and/or bridging equipment.

28. The Department interprets the word "includes," which appears on TRI Exhibit 1, page 11, paragraph 1.1(1) of the specifications, to mean that desktop, set-top, and room systems could be included as part of a manufacturer's product line. However, it was not meant to be exclusive.

29. The Department asserts that TRI's bid was non-responsive because TRI did not submit a complete, unaltered price list for all of Tandberg's video telecommunication products at a discount. TRI would have been awarded the contract for the Tandberg products if the bid had been responsive.

30. On the other hand, the Department contends that FREBON's bid, containing approximately twenty-two (22) pages seemed complete and appeared to have included a complete line of Tandberg products. But, like TRI, GLOBAL's bid containing eight (8) pages, and DIGITAL's bid containing twelve (12) pages of discounted Tandberg products, were likewise non-responsive for being incomplete.

31. TRI's one-page price list would not have been complete, in the Department's view, even if TRI had submitted a complete line of Tandberg products in the options portion of TRI's bid because TRI did not offer the discount for the options.

32. Mr. Buddy Barker explained that a minor irregularity is a deviation from a specification which does not affect price and does not give one vendor a competitive advantage over another. He did not consider TRI's omission of other Tandberg's products to be a minor irregularity.

The Tandberg Products

33. There appears to be a major distinction between Tandberg videoconferencing systems, such as desktops, set-tops, and room systems, and Tandberg special "Application" products, such as health care and education products, in both appearance and functionality.

34. Mr. Richard Grace is an Executive Vice President employed by the Applications Group at Tandberg, Inc.

35. The term "Applications" within Tandberg, Inc. refers to market segments within their business. In this case, "Applications" pertains to distance education and health care products.

36. During his deposition, admitted over objection as TRI Exhibit 18, Mr. Grace reviewed several documents, which were identified as DMS 0001, DMS 0006-0027, DMS 0029, and a memorandum dated June 9, 2000. These DMS numbered documents appear in TRI Exhibit 5. The DMS labeled documents were submitted with FREBON's bid.

37. DMS 0006-0027 is the price list for the "Business Solutions" products manufactured by Tandberg, as well as the maintenance costs for various products, and also include the Tandberg health care and education products. These documents include the entire product lines price list for Tandberg's "Business Solutions" and "Applications" products.

38. DMS 0006 is the first page from FREBON's bid and lists the "systems" products from Tandberg's "vision products price list." Tandberg's "vision products" are considered Tandberg "Business Solution" products, i.e., standard CODEC's or what Tandberg refers to as "off-the-shelf roll-abouts or set-top boxes." Off the shelf products are standard video conferencing systems that Tandberg designs and sells. They are also called roll-abouts, set-tops, and CODEC's.

39. According to Mr. Grace, the Department's ITB asked vendors to offer to bid, material here, Tandberg's "Business Solutions" systems products. Mr. Grace said that Tandberg "education" and "health care" products would be considered room systems, but "the nature of the bid was looking for a more traditional answer of roll-abouts, which are administrative-type devises," and the "roll-abouts" are the systems referenced on TRI Exhibit 5, DMS 0006 and 0007, above the line, "Tandberg Educator," which were offered by TRI and FREBON.

40. The products listed on TRI Exhibit 5, DMS 0006 to DMS 0007, above the notation "Tandberg Educator," are the videoconferencing systems manufactured and sold by Tandberg and, from a systems standpoint, are all of the "Business Solutions" products sold by Tandberg. The "systems" listed on these pages, (TRI Exhibit 5, DMS 0006 and the top of DMS 0007), include the only desktop, set-top, and room systems manufactured by Tandberg. Except for the omission of three (3) portable products listed in TRI Exhibit 5, DMS 0006 and 0007, of the FREBON bid, TRI's Tandberg "vision product price list" contained the same "systems" products as in FREBON's bid. (TRI Exhibit 2, BID 0033). The portables listed in FREBON's bid at DMS 0007, are not desktop, set-top, or room systems.

41. TRI Exhibit 5, DMS 0007 through DMS 0013, lists accessories and optional items that can be attached to videoconferencing systems. DMS 0014 through DMS 0017, appear to be the maintenance pricing for the "Business Solution" products. DMS 0018 and 0019 refer to the "Application" products for Tandberg. DMS 0020 through DMS 0023 refer to the maintenance and service prices for the "Application"-based products, such as education systems, tutor products, and health care systems. Currently, Tandberg only focuses on the education and health care systems as part of its "Application" products. DMS 0024 through

DMS 0027 are fees for the installation and on-site support for the Tandberg system throughout the world.

42. Tandberg only manufactures the products listed on TRI Exhibit 5, DMS 0006-0027. However, Tandberg sells, but does not manufacture, other products such as "accord bridges," which are not included on these DMS pages.

The Bids

TRI

43. TRI has been selling Tandberg video teleconferencing systems since February of 1998. TRI currently has the contract with the State of Florida for video teleconferencing equipment.

44. TRI submitted a pricing sheet for videoconferencing systems and, in part, proposed to offer a 29.4 percent discount for "Tandberg Vision Business Solution Systems," the brand name for the bid. The discount applied to the "systems" products listed in the one-page, April 1, 2000, Tandberg price list.

45. TRI's one-page price list, (TRI Exhibit 2, BID 0033), is the same as the first page of FREBON's Tandberg price list. (TRI Exhibit 5, DMS 0006). However, the second page of FREBON's price list (TRI Exhibit 5, DMS 0007), includes three (3) portable products which were included with the FREBON bid, but not included in the TRI bid. TRI felt that portables were not desktop, set-top, or room systems. Further, the products listed on TRI Exhibit 5, DMS pages 0007 (after the "portables" section)

through DMS 0027, included by FREBON, were not included by TRI because they are not desktop, set-top, or room systems.

46. TRI defines video teleconferencing systems to include only desktop, set-top, and room systems. Also, the terms videoconferencing systems and equipment are used interchangeably. Accordingly, TRI, consistent with its understanding of the Department's ITB, submitted a one-page price list for Tandberg desktop, set-top, and room system products.

47. Having reviewed the ITB, TRI thought the Department, in requesting bids for video teleconferencing systems, was requesting a manufacturer's, here Tandberg's desktop, set-top, and room "systems" products only, and not the manufacturers, here Tandberg's, special "Application" products.

48. TRI also offered a price list for optional items, which were accessories that could be attached and used as part of a system, with brand names including, but not limited, to Panasonic, Tandberg, and ELMO. TRI also provided a price schedule, 4.1.00, Exhibit A, which provided net prices for described systems, portables, CODEC's, for example. TRI's 29.4 percent discount does not apply to these items.

FREBON, GLOBAL, and DIGITAL

49. Three other vendors submitted bids offering discounts for the Tandberg line of video teleconferencing equipment. FREBON offered a 22.3 percent discount off Tandberg's price list

consisting of twenty-two (22) pages of Tandberg products. Page one of FREBON's submission (TRI Exhibit 5, DMS 0006), provides the same information set forth in TRI's one (1) page price list, Exhibit B (TRI Exhibit 2, BID 0033). The remaining pages (TRI Exhibit 5, DMS 0007-DMS 00027), were not provided by TRI.

50. GLOBAL offered a 21 percent discount off of Tandberg's price list for eight (8) pages of Tandberg products. (TRI Exhibit 5, DMS 0031-0038). DMS 0031-0032 provide the same information as TRI's price list, although GLOBAL adds three (3) products under the heading "portables," which are omitted from the TRI price sheet.

51. DIGITAL also submitted a bid for video teleconferencing equipment offering the Tandberg line of products. However, DIGITAL offered multiple discounts. DIGITAL provided twelve (12) pages of Tandberg products.

The Initial Bid Tabulation Posting

52. On July 20, 2000, the Department posted the initial bid tabulation form for the video teleconferencing equipment. TRI received a copy of the bid tabulation.

53. DIGITAL'S bid was deemed non-responsive because DIGITAL offered multiple discounts within the same product line, whereas the bid called for a single discount. The Department accepted the GLOBAL and FREBON bids. The Department rejected TRI's bid with a discount of 29.4 percent because TRI did not supply, at a

discount, the complete, unaltered manufacturer's (Tandberg) price list with the bid offering all of the videoconferencing equipment and products manufactured by Tandberg, i.e., the twenty-two (22) pages offered by FREBON. This was the sole reason given by the Department for finding TRI's bid to be non-responsive. TRI's bid complied with all the other technical requirements required of the ITB.

54. TRI filed a timely notice of protest, followed by a formal petition, challenging the Department's intended action to award the bid the FREBON and finding TRI's bid non-responsive.

The Second Bid Tabulation Posting

55. Unknown to TRI, on August 1, 2000, the Department posted a second bid tabulation involving the same bid and the same vendors. During the interval between the first and the second postings, the Department re-reviewed the bids. In the second posting, the Department again noticed its intent to award the contract to FREBON as an "SBN" i.e., "single bid negotiated," having determined that FREBON was the only responsive bidder. This was the only factor considered by the Department. In fact, the Department acknowledged that the products were available from multiple sources. Also, this bid was not an "exceptional purchase."

56. Aside from the reference to "single bid negotiated" in the second tabulation, there is no written explanation for the

Department's decision. See Section 287.057(4), Florida Statutes (" . . . The agency shall document the reasons that such action [negotiate if less than two responsive bids are received] is in the best interest of the state in lieu of resoliciting competitive sealed bids. . . ."); Florida Administrative Code Rule 60A-1.002(5)(requiring, in part, the agency to document the conditions and circumstances when less than two (2) responsive bids are received).

57. The Department changed its mind about the responsiveness of the GLOBAL bid and found GLOBAL's bid to be non-responsive on the ground that GLOBAL did not supply the complete manufacturer's price sheet with the bid. Mr. Hinson said that DIGITAL's bid was rejected on the same ground, although there is no documentation to support this testimony.

58. The Department did not furnish TRI with a copy of the second posting nor notify TRI of the posting because the Department felt, pursuant to an unwritten policy, that TRI was not adversely affected by the decision, because the Department previously found TRI's bid non-responsive. FREBON and GLOBAL were notified of the second posting pursuant to the same policy.

Resolution of the Conflict Between TRI and the Department

59. It is undisputed that FREBON offered a discount for the entire product line price list for all of the "Business Solutions" and "Applications" products manufactured by Tandberg.

The price lists include, among other products, Tandberg health care and education products. Conversely, TRI offered a discount based on a complete, unaltered price list for all of the videoconferencing systems manufactured by Tandberg, and, from a systems standpoint, all of the "Business Solutions" products sold by Tandberg. Specifically, TRI offered a discount for all of the desktop, set-top, and room systems manufactured by Tandberg.

60. The resolution of this matter is not without some difficulty. We have heard from only one (1) vendor, TRI. All of the vendors offered different discounts for various products manufactured by Tandberg and no two vendors furnished the same Tandberg price list for the same products, although there was some overlap among the vendors. Yet no one, including TRI and the Department, suggests that the ITB was ambiguous or not clearly understood. Nonetheless, the ITB is not a model of clarity and, on this record, the ITB did not convey the intent of the Department expressed during the hearing.

61. Notwithstanding the Department's expression of intent articulated during the final hearing, a plain reading of the entire ITB leads to several conflicting conclusions. The stated material objective of the ITB is to establish a contract for the purchase, installation, and maintenance of video teleconferencing systems, not video teleconferencing equipment, although the bid title says otherwise, and the purpose of the bid is to establish

a contract for the purchase of video teleconferencing equipment. Another objective required each vendor to offer the complete line of videoconferencing products to configure desktop and/or room videoconferencing systems.

62. Further, each vendor was required to offer a percentage discount for the entire Tandberg line of videoconferencing equipment. Stated differently within the ITB, the award is made by manufacturer's products, based on the highest discount given from the manufacturer's list price sheet for each item. But which item?

63. The terms "videoconferencing systems" and "videoconferencing equipment" are used interchangeably in the ITB. The specifications were written specifically for two (2) categories of equipment, material here, videoconferencing systems, which include, set-top, desktop, and room systems, the only "systems" discussed within the four (4) corners of the ITB. The "systems" products offered by TRI, for a discount, are the only desktop, set-top, and room systems manufactured by Tandberg, and, from a systems standpoint, are the only videoconferencing systems that Tandberg manufactures. Thus, it follows that TRI provided the Department with a discount for the complete, unaltered list price sheet for these Tandberg products.

64. While a decision to award the contract to TRI is contrary to the Department's intent expressed in the final

hearing through its representatives, it is consistent with the ITB.

The Manufacturer's Certificate

65. A special condition of the ITB required each bidder to furnish a manufacturer's certificate, which certifies that a bidder is authorized to sell the manufacturer's equipment in the State of Florida.

66. Mr. Hinson was advised by Mr. Grace of Tandberg that as of June 14, 2000, FREBON was authorized to sell and service Tandberg "Application" products, i.e., Tandberg's health care and education series products, only to the federal government in the State of Florida, and not to state governments, including the State of Florida. However, the Department accepted FREBON's certificate based solely on the representations made by Tandberg regarding FREBON's authorization.

67. The Department feels it is unnecessary to investigate the veracity of a manufacturer's certificate because the Department can pursue a remedy against the vendor, here FREBON, if the vendor is not authorized after the contract is awarded.

68. When he signed the manufacturer's certificates for the three (3) vendors, including FREBON, Mr. Grace meant the vendors were authorized resellers of Tandberg's products.

69. Mr. Grace sent a memorandum of June 9, 2000, to any vendor who sent him the State of Florida's manufacturer's certificate for signature authorizing them to participate in the bid. Mr. Grace explained in his memorandum and during deposition, that authorization to act as an "Applications" dealer did not allow the vendor to sell "Business Solutions" products and vice-versa. For example, FREBON was limited to selling the Tandberg "Business Solution" products to the State of Florida and could not sell the Tandberg health care and intern products or education and tutor products to the State of Florida.

70. Tandberg is in the process of discussing with FREBON to expand their capabilities of selling the "Application" products. Mr. Grace would discuss additional authorization with any vendor who wins the bid.

71. Mr. Grace received and signed manufacturer's certificates for TRI, FREBON, and DIGITAL, because they were "authorized resellers of Tandberg's product that was being asked for in the statement of the work," i.e., for the "Business Solution" products that, in his judgment, the Department was requesting in the bid, and he "would sign them again under that" premise.

72. TRI and DIGITAL are authorized to sell Tandberg's "Business Solution" and "Applications" products to the State of Florida.

CONCLUSIONS OF LAW

73. 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.

74. In addition to the provisions set forth in the ITB that are described in the Findings of Fact, certain statutes and rules are relevant in examining the proposed agency action by the Department.

75. The Legislature provided its intent regarding the procurement of goods and services by state agencies in Section 287.001, Florida Statutes, as follows:

The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically; and that documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in the process by which commodities and contractual services are procured. It is essential to the effective and ethical procurement of commodities and contractual services that there be a system of uniform procedures to be utilized by state agencies in managing and procuring commodities and contractual services; that detailed justification of agency decisions in the procurement of commodities and contractual services be maintained; and that adherence by the agency and the contractor to specific ethical considerations be required.

76. Section 287.012, Florida Statutes, provides definitions in reference to competitive bidding. "'Competitive sealed proposals' refers to the receipt of two or more sealed bids or proposals submitted by responsive and qualified bidders or offerors." Section 287.012 (5), Florida Statutes. "'Qualified bidder,' 'responsible bidder,' 'qualified offeror,' or 'responsible offeror' means a person who has the capability in all respects to perform fully the contract requirements and has the integrity and reliability which will assure good faith performance." Section 287.012 (13), Florida Statutes. "'Responsive bid' or 'responsive proposal' means a bid or proposal submitted by a responsive, and responsible or qualified, bidder or offeror which conforms in all material respects to the invitation to bid or request for proposals." Section 287.012 (16), Florida Statutes. "'Responsive bidder' or 'responsive offeror' means a person who has submitted a bid or proposal which conforms in all material respects to the invitation to bid or request for proposal." Section 287.012 (17), Florida Statutes.

77. The Department, in exercising its contracting authority, "reserve[s] the right to reject any or all bids or negotiations or proposals. . . ." Florida Administrative Code Rule 60A-1.002 (9). The Department also "reserve[s] the right to waive any minor irregularities in an otherwise valid bid or

proposal or offer to negotiate. Variations which are not minor cannot be waived." Florida Administrative Code Rule 60A-1.002 (10). A "minor irregularity" is "[a] variation from the invitation to bid or invitation to negotiate or request for proposal terms and conditions which do not affect the price of the commodities or services, or give the bidder or offeror an advantage or benefit not enjoyed by other bidders or offerors, and does not adversely impact the interests of the agency."

Florida Administrative Code Rule 60A-1.002 (17) (emphasis added). See also Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

78. Section 120.57(3)(f) provides in pertinent part:

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

79. "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).

80. Because TRI has challenged the Department's decision to award the contract at issue herein to FREBON, it has the burden of proving "a ground for invalidating the award." State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998); Section 120.57(3)(f), Florida Statutes ("Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action."). Because there is no statute providing otherwise, the Findings of Fact in this proceeding "shall be based upon a preponderance of the evidence." Section 120.57(1)(h), Florida Statutes.

81. TRI, the lowest bidder (by percentage discount) on the bid, filed a bid protest pursuant to Section 120.57(3)(f), Florida Statutes, challenging the Department's decision to award the contract to the second lowest and responsive bidder (by percentage discount), FREBON.

82. In this case, the Department decided that TRI's proposal should be rejected as non-responsive, i.e., TRI's bid did not include a discount for the complete, unaltered price list of Tandberg's complete line of video teleconferencing product equipment/systems. The Department accepted FREBON's bid as the only responsive bidder, and as a "single bid negotiated."

83. Although the Department may reject a proposal deemed non-responsive, it may not, consistent with Section 120.57(3)(f), exercise this discretion in an arbitrary or capricious manner, in a manner that is clearly erroneous, or in a manner that is contrary to competition, or in manner that is contrary to the Department's statutes, rules, policies, or the bid specifications. The same standard applies given the Department's decision to award the contract to FREBON.

84. Based on the Findings of Fact, TRI has proven by a preponderance of the evidence that the Department's decision to award the contract to FREBON, and not to TRI, is contrary to the ITB and statutory and rule requirements for responsive and qualified bidders.

85. Notwithstanding the Department's expression of intent articulated during the final hearing, a plain reading of the entire ITB leads to the conclusion that each vendor was required to offer a percentage discount for the entire Tandberg line of videoconferencing equipment, or the Tandberg manufactured

videoconferencing systems, which include only the desk top, set-top, and room systems. These are the only "systems" discussed within the four (4) corners of the ITB.

86. The "systems" products offered by TRI, for a discount, are the only desktop, set-top, and room systems manufactured by Tandberg. Thus, it follows that TRI provided the Department with the complete, unaltered list price sheet for these Tandberg products. TRI's bid was responsive to the ITB and should have been accepted. The Department's decision to reject TRI's bid is contrary to the ITB and is clearly erroneous.

87. Further, the ITB required each vendor to submit a certification executed by the manufacturer, "stating that the bidder is an authorized dealer/representative of the manufacturer." FREBON submitted a certificate signed by Mr. Grace of Tandberg attesting to FREBON's authorization to represent Tandberg in the State of Florida. However, as of June 14, 2000, the bid submission date, FREBON was authorized to sell Tandberg "Application" products, i.e., Tandberg's health care and education products, solely to the federal government in the State of Florida, not to the State of Florida.

88. The Department emphatically says that the ITB required FREBON to offer the Tandberg products to the State of Florida, if awarded the contract, and the evidence indicates that Tandberg is amenable to considering authorizing FREBON to sell additional

products to the State of Florida. The Department's interpretation of the ITB is not unreasonable. FREBON submitted the required manufacturer's certificate and complied with letter of the ITB.

89. Finally, after the initial bid tabulation posting, the Department re-reviewed the bids and ultimately concluded that FREBON should be awarded the contract as a "single bid negotiated." The Department did not document its decision to award FREBON the contract as required by Section 287.057(4), Florida Statutes, and Department rules, i.e., the Department did not "document the reasons that such action is in the best interest of the state in lieu of resoliciting competitive sealed bids. . . ."

90. The Department did not afford notice to TRI of the second posting. Although the Department initially rejected TRI's bid, TRI was nonetheless adversely affected by this decision. TRI's protest was pending at the time and FREBON's bid in question.

91. The re-review process, and second posting, was a continuation of the Department's initial decision. The Department was required to give TRI notice of a clear point of entry to challenge this decision.

92. The facts and circumstances of the re-review and second posting are relevant and material to the disposition of this case

because the process involved a review of the same bids and vendors. No additional facts were considered. Resolution of this issue in this case is necessary because it bears on the Department's ultimate decision whether to award the contract to FREBON. The Department's second posting and decision to award the contract to FREBON as a "single bid negotiated" is contrary to law and clearly erroneous, and should be rejected.

RECOMMENDATION

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

RECOMMENDED that the Department of Management Services enter a final order and award the contract to TRI because TRI offered the lowest discount for the required Tandberg products. If the Department declines to award the contract to TRI, it is further recommended that the Department re-bid the contract because an award to FREBON cannot be justified as a "single bid negotiated."

DONE AND ENTERED this 14th day of December, 2000, in Tallahassee, Leon County, Florida.

CHARLES A. STAMPELOS
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within ten (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.