STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCHOOL FOOD SERVICE SYSTEMS, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 01-0612BID
BROWARD COUNTY SCHOOL BOARD,	)	
Respondent,	)	
and	)	
SYSCO FOOD SERVICES OF SOUTH FLORIDA, INC., a Delaware corporation,	)	
Intervenor.	)	

RECOMMENDED ORDER

The parties having been provided proper notice, Administrative Law Judge John G. Van Laningham of the Division of Administrative Hearings convened a formal hearing of this matter in Fort Lauderdale, Florida, on April 9, 2001.

APPEARANCES

For Petitioner: Jerome S. Reisman, Esquire
Reisman & Abraham, P.A.
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For Respondent: Robert Paul Vignola, Esquire
Steven H. Feldman, Esquire
School Board of Broward County
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For Intervenor: Thomas R. Tatum, Esquire
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STATEMENT OF THE ISSUE

The issue in this bid protest is whether Respondent acted fraudulently, arbitrarily, illegally, or dishonestly when it decided to reject all of the bids it had received on a contract to deliver food and supplies to the public school cafeterias in Broward County.

PRELIMINARY STATEMENT

On September 28, 2000, Respondent, The School Board of Broward County, Florida (the "Board"), issued an invitation to bid ("ITB") on a four-year contract to provide "Mainline Foods and Supplies for Cafeterias" to the public schools of Broward County. Four bidders timely submitted bids on October 31, 2000. Among these bidders were Petitioner School Food Service Systems, Inc. ("School Food") and the incumbent vendor, Intervenor Sysco Food Services of South Florida, Inc. ("Sysco"). After reviewing the bids, agency staff on November 9, 2000, posted a notice of intent to award the contract to School Food.

Sysco timely filed a protest of the intended award to School Food. In reviewing the issues raised in Sysco's protest of the recommended award, staff determined that the

ITB was fatally flawed due to purportedly defective specifications in the product descriptions of four items out of 186 on which bids were required. Due to these allegedly defective specifications, staff believed that bidders acting in good faith could have offered goods that failed to meet the Board's needs.

On December 1, 2000, a Bid Protest Committee met pursuant to Board rule to consider Sysco's protest. Staff informed the committee that the allegedly defective specifications were believed to have caused confusion which adversely affected competition. The Board's staff and counsel recommended to the Bid Protest Committee that the original recommendation to award the contract to School Food be rescinded, that all bids be rejected, and that the contract be re-bid. The Bid Protest Committee considered these matters and voted to approve the actions that staff had recommended.

School Food filed a formal written protest concerning the intended rejection of all bids. The Bid Protest Committee met on February 9, 2001, to consider School Food's protest, and decided, by a two-to-one vote, to stick with the rejection decision. Thereafter, School Food requested that its formal written protest be referred to the Florida Division of Administrative Hearings, which was done. Sysco filed a

Petition to Intervene on March 2, 2001, which was granted by an Order issued on March 2, 2001.

At a pre-hearing conference on April 6, 2001, the administrative law judge held that the standard of review in this case would be whether the agency's intended action was illegal, arbitrary, dishonest, or fraudulent. It was also held that there was no need, in this proceeding, to consider issues relating to the responsiveness of either School Food's or Sysco's bid, because the Board's rejection decision presupposed that both were qualifying responses.

The parties stipulated to a number of facts in advance of the formal hearing. The stipulated facts were memorialized in the record and taken as established without need of further proof. At the hearing, Joint Exhibits 1-19, 21-23, and 26-27 were admitted into evidence. Joint Exhibit 5 was determined to be a composite document comprised of (a) the bid submitted by School Food (those pages of Joint Exhibit 5 up to and including Page 84 of 84 pages) and (b) documents received by the agency after the opening of bids, for purposes of evaluating School Food's bid (all pages of Joint Exhibit 5 following Page 84 of 84 pages). Petitioner's Exhibit 1 was marked for identification but not received in evidence.

In addition to these documents, School Food presented the testimony of Elaine Blaine of Sysco; and Raymond Papa, Melissa

Grimm, and John Quercia, all of whom are employees of the Board. No further witnesses were called by the Board or Sysco.

The parties requested and were granted leave to serve their proposed recommended orders through and including May 10, 2001. The transcript of the formal hearing was filed on April 26, 2001. All parties timely filed proposed recommended orders containing proposed findings of fact and conclusions of law. The parties' proposed recommended orders have been carefully considered during the preparation of this Recommended Order.

FINDINGS OF FACT

The evidence presented at final hearing established the facts that follow.

I. The Invitation to Bid

1. On September 28, 2000, the Board issued ITB 21-076B for procurement of "Mainline Foods and Supplies for Cafeterias." Through this solicitation the Board sought to let a four-year contract, renewable for two additional one-year periods, pursuant to which the successful bidder would deliver food and supplies to the approximately 192 public school cafeterias in Broward County, Florida. Sysco is the incumbent supplier of foods and supplies for the Board's cafeterias.

2. The ITB listed and described the desired foods and supplies in two separate sections, Section 5.09 and Section 6.02. Bidders were required to bid on each of the 186 individual items listed in the Product Bid Sheets that comprise Section 5.09. In contrast, bidders were instructed not to quote prices for the 130 items listed in Section 6.02; rather, the ITB provided that "[t]he awardee, once selected, shall submit to the [Board] product costs and selling prices for items in Section 6.02." This protest focuses on particular specifications of the Product Bid Sheets in Section 5.09 and is not concerned with Section 6.02.

3. The Product Bid Sheets in Section 5.09 were composed of tables consisting of eight columns and, in total, 189 rows — one row for each item and three empty or "open" rows requiring no response. The first three columns, from left to right, set forth information that identified each item sought. At each row, Column 1 contained the "Sequence Number" that the Board had assigned to each product "for tracking purposes." Column 2 in each row contained a description of the product to be purchased. So-called "approved brands" for each item were listed in Column 3.

4. The ITB identified "approved brands" in several ways. The most specific identification was by brand name and product code or number, for example "Tony's 78642." This form of

identification designated a particular manufacturer's particular product. The term "approved branded product" will be used herein to refer to this type of specific product identification in Column 3.

5. For many items, an approved brand was identified by manufacturer's name only, without an accompanying product code, e.g. "Lykes _____." The ITB instructed bidders that "[i]f a code number, name, or color is not listed by [the Board] along with an approved brand[,] the bidder shall enter the code by the brand in the space provided." (ITB, Section 5.03.) In this Recommended Order, the term "brand-only approval" will denote a brand approval that lacked a specific product code.

6. Finally, the ITB identified a large number of approved brands in Column 3 of Section 5.09 by the term "Distributor's Choice," meaning the distributor's brand of choice. Bidders were instructed to "enter, in the space provided, the brand and code" when quoting a Distributor's Choice. (ITB, Section 5.03.)

7. For 84 of the 186 items listed in the Product Bid Sheets, the approved brands in Column 3 were identified exclusively as Distributor's Choice.[1] Thus, for nearly half of the Section 5.09 items, the bidder needed to select a brand and product that fit the specifications set forth in Column 2.

For another 15 items, Column 3 contained brand-only approvals, meaning that the bidder was required to select an appropriate product from the approved manufacturer's line. Brand-only approvals were combined with a Distributor's Choice option in Column 3 for ten additional items. Consequently, there were 109 items — 59% of the total — on which the bidders were not given the option of bidding an approved branded product.

8. Conversely, for 23 items Column 3 listed just one approved branded product, leaving the bidders no alternative but to bid on a particular manufacturer's particular product. Similarly, for 26 additional items, at least two approved branded products were listed, giving bidders a choice but not requiring them to compare the specifically designated brand-name products with the product descriptions in Column 2. In sum, bidders were obligated (and entitled) to bid an approved branded product on at least 49 items.

9. There were 28 items for which Column 3 combined an approved branded product (or products) with either a brand-only approval (or approvals) or a Distributor's Choice option.[2] Accordingly, a bidder could, in theory, have quoted prices on as many as 77 approved branded products. At the other extreme, a bidder could have bid 137 items for which it had selected brand, product code, or both.

10. Of the 186 items listed in Section 5.09, four are at the heart of the instant dispute. Ignoring for present purposes the sequences above and below the at-issue items, these four were described as follows in the first three columns of the Product Bid Sheets:[3]

1 SEQ NO.	2 PRODUCT DESCRIPTION	3 APPROVED BRANDS
1009	**Breakfast Pizza (F).** Crust topped with cheese, gravy, scrambled eggs and bacon. Minimum size 3 oz. to meet 1 meat/meat alternate plus 1 bread serving. CN Label. Size of portion _____ oz.	Tony's 63564 Nardone's 80MSA-100
1036	**Pizza, French Bread, Pepperoni (F):** 50-50 Mozzarella blend. Minimum 5.45 oz. to meet 2 oz. meat/meat alternative and 2 bread servings. CN label. Size portion _____ oz.	Southland Bagel 8953S Prestige 30215 Nordone's _____ KT Kitchen _____
1037	**Pizza, Mexican Style (F).** Minimum 5 ounces to meet 2 oz. meat/meat alternate and 1 ½ bread serving. With or w/o VPP. CN label. Size portion _____ oz.	Tony's 63669 Nordone's 100MA KT Kitchens 01476
2010	**Pancake and Sausage (F)** Pancake batter around a link sausage on a stick. 2.5 oz.	State Fair 70601 Leon's 28002 Foster Farms 96113

	Minimum weight to meet 1 oz. meat/meat alternative and 1 bread serving. CN Label. Size of portion: _____ oz.	

11. Other provisions of the ITB are relevant to this protest as well. Section 7 of the General Conditions of the ITB stated in pertinent part as follows:

> **AWARDS**: In the best interest of the School Board, the Board reserves the right to withdraw this bid at any time prior to the time and date specified for the bid opening; to reject any and all bids and to waive any irregularity in bids received; to accept any items or group of items unless qualified by bidder; to acquire additional quantities at prices quoted on this invitation unless additional quantities are not acceptable, in which case the bid sheets shall be noted "BID IS FOR SPECIFIED QUANTITY ONLY." All awards made as a result of this bid shall conform to applicable Florida Statutes.

12. Section 1.03 of the ITB's Special Conditions stated in pertinent part as follows:

> **AWARD**: A contract shall be awarded **IN ITS ENTIRETY** to the lowest responsive, responsible bidder (See Section 4.01) with the lowest initial product cost plus fixed fee and meeting all specifications terms and conditions of the bid. It is necessary to bid on every item on the Product Bid Sheets (Section 5.09) in order to have your bid considered for award. Product costs shall be stated in the spaces provided in the Product Bid Sheets (Section 5.09). All items shall have an individual cost. Failure to state the individual cost for an

item shall result in disqualification of bid submitted. Bidder shall carefully consider each item for conformance to specifications. Any item that does not meet the specifications shall be disqualified.

13. Section 1.10 of the ITB stated as follows:

INTERPRETATIONS: Any questions concerning any condition or requirement of this bid shall be received in the Purchasing Department **in writing on or before October 11, 2000**. Submit all questions to the attention of the individual stated in Section 1.37 [sic] of this Bid. If necessary, an Addendum shall be issued. Any verbal or written information which is obtained other than by information in this bid document or by Addenda shall not be binding on the School Board.

14. Section 1.12 of the ITB stated as follows:

BRAND STANDARDIZATION: The specified brands and product numbers listed on the Product Bid Sheets have been approved by SBBC Food and Nutrition Services Department and bids shall be accepted only on these approved items, except where "Distributor's Choice" is indicated.

If a bidder wishes to have an item placed on this approved list for future bidding, the bidder shall furnish Food and Nutrition Services Department samples of the item for testing purposes. If approved, the Food and Nutrition Services Department shall include the new item on the future list of approved items.

In the event that any approved item supplied under this bid does not prove satisfactory, that item shall be removed from the approved list until such time as correction is made to the satisfaction of the Food and Nutrition Services Department.

15. Section 1.13 of the ITB stated as follows:

PRODUCT NUMBER CORRECTIONS: If the **product number** for the brand specified on the Product Bid Sheets **is: a) no longer available** and has been replaced with a new updated number with new specifications, the bidder should **submit complete descriptive literature** on the new product number; or **b) incorrect, the corrected product number should be noted** on the Product Bid Sheets, in the space provided.

16. Section 1.35 of the ITB stated as follows:

INFORMATION: Any questions by prospective bidders concerning this Invitation to Bid should be addressed to **Mr. Charles High, Purchasing Agent, Purchasing Department, (954) 765-6107** who is authorized only to direct the attention of prospective bidders to various portions of the Bid so they may read and interpret such for themselves. Neither **Mr. High** nor any employee of [the Board] is authorized to interpret any portion of the Bid or give information as to the requirements of the Bid in addition to that contained in the written Bid Document. **Questions should be submitted in accordance with Special Condition 1.10.** Interpretations of the Bid or additional information as to its requirements, where necessary, shall be communicated to bidders only by written addendum.

17. Section 2.03 of the ITB stated as follows:

ADDING AND DELETING ITEMS: Food and non-food items utilized by SBBC Food and Nutrition Services Department may be subsequently added, deleted or transferred from or to the lists in Sections 5.09 and 6.0, individually or in groups, at the discretion of SBBC Food and Nutrition Services Department

18. Section 5.02 of the ITB provided in pertinent part as follows:

> **COLUMN 2**: (Product Description) This column provides bidder with descriptions of the products to be purchased, including portion or serving sizes or grades and standards, as may be applicable. **Bidders should fill in the information wherever indicated on portion, serving size, etc., and provide manufacturers' certificates of grades or compliance whenever "CR" is shown.** If there is a conflict between the product description in Column 2 and the approved brands in Column 3, compliance with approved brands shall prevail. [W]hen evaluating bids, [staff] may request that a bidder furnish, within three days of request, further confirmations of grades and standards, copies of specification sheets, and other product data, as may be required.

(Underlining supplied). For ease of reference, the underlined sentence above — which will prove pivotal — will be called the "Reconciliation Clause" in this Recommended Order.

19. Section 5.03 of the ITB stated in pertinent part as follows:

> **COLUMN 3**: (Approved Brands*) Prior to acceptance of a bid, all bid brands are subject to review by SBBC Food and Nutrition Services Department for compliance with the bid product requirements. If a code number, name, or color is not listed by SBBC along with an approved brand; the bidder shall enter the code by the brand in the space provided. Whenever quoting a "Distributor's Choice", a bidder shall enter, in the space provided, the brand and code. Whenever an approved brand, other than "Distributor's

> Choice", is listed, the bidder should indicate in Column 3 the brand bidding, (circle the brand). **IMPORTANT**: Some of the codes listed may be obsolete or incorrect, in which case the bidder is to enter the correct code. After award, SBBC may request the awardee to obtain prices and samples for brands and codes not listed. The decision as to whether a product does or does not meet the requirements of Column 2 is at the discretion of SBBC. A bidder may be requested, prior to bid award, to furnish acceptable confirmation from a packer that a product meets the requirements set forth in Column 2.

20. Section 5.11 of the ITB stated in pertinent part as follows:

> **CN Label**: When a product is CN (Child Nutrition) labeled, it is "certified" by the packer to conform to the nutritional requirements of the USDA Food and Nutrition Service (FNS). The label shows the contribution made by a given amount of product toward meal requirements. When CN label is noted in Column 2 of the Product Bid Sheets, it is understood that the CN label must be in place for the product to be bid.

II. Particular Responses to the Invitation to Bid

A. Sequence No. 1009 – Breakfast Pizza

21. At Sequence No. 1009, Column 3 of the Product Bid Sheet contained two approved branded products: Tony's 63904 and Nardone's 80MSA-100. School Food quoted a price of $28,500 on the specifically approved Nardone's product.

22. In preparing its bid, Sysco obtained a product description from Nardone Bros. Baking Co. Inc. ("Nardone") for its 80MSA-100 product. Sysco believed that Nardone's 80MSA-100 failed to meet the product description set forth in Column 2 and therefore offered the other approved branded product, Tony's 63564, at a price of $33,000.

23. A third bidder, Mutual Wholesale Co. ("Mutual Wholesale"), offered to provide the approved Tony's product at a price of $33,012.00.

B. Sequence No. 1036 – French Bread Pepperoni Pizza

24. The product description in Column 2 of the item listed at Sequence No. 1036 required that a CN label be in place for a product to be bid.

25. A CN label signifies compliance with certain U.S. Department of Agriculture guidelines. The Board must obey these guidelines to obtain reimbursement for its food services program from federal funding sources.

26. School Food offered the Prestige 30215 approved branded product in its response to Sequence No. 1036 at a price of $30,750.

27. In preparing its response to the ITB, Sysco learned that the Prestige 30215 approved branded product had been submitted for CN label approval but lacked that approval at the time of bidding. Perceiving a conflict between the

product description in Column 2 and the approved branded product in Column 3, Sysco concluded that it could not quote a price for Prestige 30215. Instead, Sysco offered to provide another approved brand, KT Kitchen's 01093, at a cost to the Board of $36,397.50.

28. Like School Food, Mutual Wholesale bid on the Prestige 30215 brand name product, quoting a price of $30,000.

29. As of November 29, 2000, the approved branded product, Prestige 30215, had obtained CN approval from the U.S. Department of Agriculture.

C. Sequence No. 1037 – Mexican-Style Pizza

30. In its response to Sequence No. 1037, School Food offered an approved branded product, Nardone's 100MA, quoting a price of $206,620.

31. During its bid preparation, Sysco learned that Nardone used another code for this product — namely, "96MCSA." Sysco believed that it could not bid on "Nardone's 100MA," even though it was an approved branded product. Thus, in its bid Sysco offered to provide another approved branded product, Tony's 63669, at a price to the Board of $229,800.

32. In its response to Sequence No. 1037, Mutual Wholesale quoted a price of $214,020 for yet another approved branded product, KT Kitchen's 01476.

33. "Nardone's 100MA" is an actual product code used internally by Nardone to denote an actual, available product that is referred to externally (or "on the street") as "Nardone's 96MCSA." In other words, "Nardone's 100MA" and "Nardone's 96MCSA" refer to the same product.

D. Sequence No. 2010 – Pancake and Sausage

34. In response to Sequence No. 2010, School Food offered to provide an approved branded product, Leon’s 28002, at a cost to the Board of $14,858.

35. Sysco discovered through its bid preparation research that there might be a conflict between the product description in Column 2 of Sequence 2010 and the approved Leon’s 28002 brand name product, which was unambiguously designated in Column 3, because Leon’s 28002 consisted of a "frankfurter" wrapped in a pancake, and Sysco did not consider a "frankfurter" to be a "link sausage."[4]

36. As the Board has conceded, unless a bidder knew the products well or made a comparison of the approved branded products to the product description in Column 2, it would not have perceived the possible conflict between that description and the approved Leon’s 28002 brand name product listed in Column 3.

37. Around October 20, 2000, Sysco notified the Board of its concern regarding Sequence No. 2010. In so doing,

however, Sysco failed to comply with Section 1.10 of the ITB, which required that questions about the bid specifications be submitted in writing on or before October 11, 2000. In violation of Section 1.10, a Sysco employee named Elaine Blaine, who was responsible for preparing Sysco's bid, left a telephone message with the Board's Purchasing Agent, Charles High, inquiring about Leon's 28002 and letting him know that, in Sysco's opinion, this approved branded product did not match the description in Column 2 of Sequence No. 2010.

38. Mr. High returned Ms. Blaine's phone call on or around October 24, 2000, leaving a message on her voice mail to the effect that Leon's 28002 was not the correct item and advising that another brand name product, Leon's 28012, should be bid in its place. As Section 1.35 of the ITB made plain, however, Mr. High had no authority whatsoever to render an opinion such as this.

39. Although Mr. High's communication with Ms. Blaine was improper, it had no effect on the competitive process. Clearly, Sysco could not reasonably have relied on Mr. High's unauthorized opinion, and anyway it did not do so. Thus, in short, while Mr. High's irregular contact with Ms. Blaine cannot be condoned, his ex parte advice to Sysco fortunately conferred no competitive advantage on any bidder and hence was immaterial.

40. In the end, Sysco offered another approved branded product, State Fair 70601, in lieu of Leon's 28002, quoting a price of $20,111.

41. Mutual Wholesale also bid on State Fair 70601, quoting a price of $20,119.50.

III. Issuance of Addenda and Submission of Bids

42. The Board issued two addenda to the ITB. Addendum No. 1, among other things, inserted the code number for the approved KT Kitchen’s brand name product listed in Column 3 for Sequence No. 1036, and it also changed the approved Foster Farms branded product listed in Sequence No. 2010. The addenda made no other changes to either Sequence Nos. 1009, 1036, 1037, or 2010.

43. On October 31, 2000, the Board opened the four bids that it had received in response to the ITB. Bids were submitted by Big Bamboo, Inc., Mutual Wholesale, Sysco, and School Food.

44. Big Bamboo, Inc. failed to submit a complete proposal and thus its bid was disqualified as non-responsive. The remaining bids, which were determined to be responsive, offered, respectively, the following total annual contract prices:

Mutual Wholesale	$9,757,284.86
Sysco	$9,656,770.21
School Food	$9,263,170.42

Accordingly, School Food was the lowest bidder, its bottom line beating the closest competitor by nearly $400,000 per year.

45. On November 9, 2000, the Board's Purchasing Department posted its recommendation that the contract be awarded to School Food.

IV. The Sysco Protest of the Recommended Award

46. On November 13, 2000, Sysco timely filed a notice of intent to protest the recommended award to School Food. Sysco timely filed its formal written protest with the Board on November 22, 2000.

47. Pursuant to rule, a Bid Protest Committee comprised of three administrators is required to meet with a bid protester in accordance with Section 120.57(3)(d), Florida Statutes, to attempt a resolution of the protest by mutual agreement. By rule, the Bid Protest Committee has been delegated the agency’s authority to perform this function.

48. Consequently, pursuant to School Board Policy 3320 and Section 120.57(3)(d), Florida Statutes, a Bid Protest Committee convened on December 1, 2000, in an attempt to

mutually resolve any disputed issues arising out of Sysco's protest.

49. Despite the fact that the thrust of Sysco's protest was an attack on the responsiveness of School Food's bid, School Food was not invited to attend the December 1, 2000, meeting of the Bid Protest Committee, which apparently was not conducted as a public meeting. A court reporter was present, however, and the transcript of the committee's December 1, 2000, meeting is in evidence.

50. The Bid Protest Committee restricted its review of the procurement to consideration of whether the ITB suffered from defective specifications in Sequence Nos. 1009, 1036, 1037, and 2010, even though Sysco's protest had raised broader issues concerning the responsiveness of School Food's bid.

51. At the December 1, 2000, meeting of the Bid Protest Committee, a Board employee named Raymond Papa, whose title is Supervisor of Field Services for Food and Nutrition Service, made the following representations concerning the sequence numbers in question:

(a) 1009 (Breakfast Pizza). Mr. Papa claimed to have erred by listing Nardone's 80MSA-100 in Column 3 of Sequence No. 1009. This approved branded product, Mr. Papa told the committee, should have been identified

in Column 3 of Sequence No. 1008, which is also a breakfast pizza but has a different product description.

(b) 1036 (French Bread Pepperoni Pizza). Mr. Papa informed the committee that Prestige 30215 was approved by the U.S. Department of Agriculture but did not have a CN label "at this time."

(c) 1037 (Mexican Style Pizza). Mr. Papa advised the committee that there seemed to be some confusion arising from the ITB's use, in Column 3 of Sequence No. 1037, of the Nardone's product code 100MA, which was the manufacturer's internal code for the approved branded product, instead of the more common "street number" (96MCSA) used in the company's literature. Mr. Papa further explained: "Apparently that code [referring to 100MA] would have given me the right product" — in fact, it would have, see Paragraph 33 above — "but it needs more clarification on my part."

(d) 2010 (Pancake and Sausage). Mr. Papa pointed out the purported conflict between the product description in Column 2 of Sequence 2010 and the approved Leon's 28002 brand name product identified in Column 3. He claimed to have been seeking a pancake with a sausage inside, not a frankfurter, asserting that the two meat products were substantially different.

52. The Board’s counsel informed the committee that the specifications for Sequence Nos. 1009, 1036, 1037, and 2010 had created sufficient confusion to adversely affect the competition. He urged the committee to remedy this purported confusion by voting to reject all bids so that the contract could be re-advertised with revised specifications.

53. The committee was not asked to consider the Reconciliation Clause of Section 5.02 of the ITB. The three members did not discuss this provision. It is reasonable to infer, and the trier of fact so finds, that the committee paid no attention to the Reconciliation Clause in weighing the merits of staff's recommendation to reject all bids.

54. With little discussion, the three-member Bid Protest Committee voted unanimously to rescind the recommendation to award School Food the contract and to reject all bids on the ground that the specifications were defective and hence that revisions were needed to "level the playing field."

55. A revised recommendation to reject all bids was posted on December 12, 2000.

V. School Food's Protest of the Rejection of All Bids

56. On December 15, 2000, School Food timely filed its notice of intent to protest the Board's preliminary decision to reject all bids. This was timely followed by a formal

written protest, which was filed with the Board on December 22, 2000.

57. The revised recommendation posted on December 12, 2000, accurately announced the Board's intention to reject all bids. As noted in School Food's formal bid protest, however, the revised recommendation erroneously stated that the action was taken because “no acceptable bids were received.” To remedy this problem, a corrected revised recommendation was posted by the Board on January 12, 2001. It stated that the rejection of all bids was “due to inaccuracies within the bid specifications.”

58. On January 16, 2001, School Food timely notified the Board of its intent to protest the corrected revised recommendation. Thereafter, on January 24, 2001, School Food timely filed its formal protest of the corrected revised recommendation to reject all bids.

59. School Food posted a bid protest bond in the amount of $5,000 in accordance with School Board Policy 3320. This bond is conditioned upon School Food's payment of the Board's litigation costs should the Board prevail.

60. Pursuant to School Board Policy 3320 and Section 120.57(3)(d), Florida Statutes, the Board's Bid Protest Committee conducted a meeting with School Food on February 9, 2001, in an attempt to mutually resolve any matters in

dispute. The Bid Protest Committee was composed of two persons who had participated in the December 1, 2000, meeting and a third member who had not attended that earlier meeting.

61. Sysco received advance notice of the February 9, 2001, meeting of the Bid Protest Committee, and its lawyer was permitted to attend as a witness. These courtesies, tellingly, had not been extended to School Food in connection with the committee meeting that had been held on December 1, 2000, to discuss the original Sysco bid protest.

62. As before, a court reporter was present, and the transcript of the February 9, 2001, meeting is in evidence.

63. The Bid Protest Committee was again informed of staff's opinion that the ITB contained defective specifications in Sequence Nos. 1009, 1036, 1037 and 2010.

64. At the February 9, 2001 meeting, the Board's counsel argued vigorously in support of the decision to reject all bids. For the most part, his argument was an expanded version of that which had been advanced in favor of rejection at the December 1, 2000, meeting. More emphasis was placed, the second time around, on the concern that the supposedly defective specifications would or might, in some cases, result in the Board not receiving the food items that it had desired.

65. Once again, the committee was not asked to consider the Reconciliation Clause of Section 5.02 of the ITB. And

once more, the committee members did not discuss this provision. It is reasonable to infer, and the trier of fact so finds, that the committee failed to take account of the Reconciliation Clause in weighing the merits of staff's recommendation that the previous decision to reject all bids be adhered to.

66. By a vote of two to one, the Bid Protest Committee upheld the recommendation to reject all bids. The contemporaneous comments from the members in the majority, together with other evidence introduced at hearing, reveal that the committee was persuaded that the field of play had been tilted by the purportedly defective bid specifications; its decision clearly was based on a desire to "level the playing field."

VI. Ultimate Factual Determinations

67. All of the purported deficiencies in the bid specifications fall squarely within the operation of the ITB's plain and unambiguous Reconciliation Clause which, to repeat for emphasis, provided as follows:

> If there is a conflict between the product description in Column 2 and the approved brands in Column 3, compliance with approved brands shall prevail.

(ITB, Section 5.02.)[5] There is no evidence that the Reconciliation Clause misrepresented the Board's true intent or was the product of a mistake.

68. The administrative law judge has determined as a matter of law that the Reconciliation Clause is clear and unambiguous; therefore, as a matter of fact, it manifests the Board's intent that a Column 2 description must yield to the identification of an approved branded product in Column 3 in the event of conflict between them.

69. By providing in clear terms a straightforward, easily applied, bright-line rule for resolving the very type of conflict that the Board now urges justifies a rejection of all bids, the ITB reasonably ensured that no such ambiguity or uncertainty would imperil the competitive process.

70. No reasonable bidder could possibly have been confused by the unambiguous Reconciliation Clause. All bidders, of course, were entitled to protest the Reconciliation Clause, and any other bid specifications, within 72 hours after receiving the ITB. See Section 120.57(3)(b), Florida Statutes; see also ITB, Section 1.21. None did.

71. If Sysco believed, as Ms. Blaine testified, that it could not bid on certain approved branded products listed in Sequence Nos. 1009, 1036, 1037, and 2010, then its belief was unreasonable. Confusion that is objectively unreasonable in fact, as Sysco's was, is not evidence of deficiencies in the

bid specifications or of a breach in the integrity of the competitive process.

72. In sum, the purported "deficiencies" upon which the Board based its intended decision to reject all bids are not deficiencies in fact. Thus, the Board's professed reason for starting over — that flaws in Sequence Nos. 1009, 1036, 1037, and 2010 put bidders to the Hobson's choice of either risking disqualification by bidding on an approved branded product that did not strictly conform to the description in Column 2 or offering a higher-priced product meeting the Column 2 description — is factually unfounded and illogical.[6]

73. It should be observed, also, that, in view of the unambiguous Reconciliation Clause, the approved branded products upon which School Food bid in response to Sequence Nos. 1009, 1036, 1037, and 2010 are conforming goods in every respect. That is, School Food did not "mis-bid" these items. Indeed, the Board having identified specific approved branded products; having instructed bidders that "bids shall be accepted only on these approved items, except where 'Distributor's Choice' is indicated," see ITB, Section 1.12; and having made clear, in the Reconciliation Clause, that any conflict between an approved branded product and a product description shall be resolved in favor of the approved branded product, it would be arbitrary and capricious to disqualify

School Food's bid for non-responsiveness in connection with these items. See Footnote 6, supra.

74. The evidence regarding which particular products the Board truly wanted to purchase in connection with the sequences at issue is in conflict. On the one hand, there is the ITB itself, which is strong evidence of the Board's desires. As a written expression of the Board's intent, the ITB gives voice not merely to the opinions of one person, but rather speaks for the whole Board as an organization. (The latter point is underscored by Section 1.35, which plainly stated that no single employee of the Board was authorized unilaterally to interpret the ITB.) The ITB's reliability is further enhanced by the fact that it was prepared before the bids were opened, before it was known that the incumbent vendor was not the apparent low bidder, before the first protest was filed, and before this administrative litigation commenced.

75. On the other hand, there is Mr. Papa's testimony that he made mistakes in Sequence Nos. 1009, 1036, 1037, and 2010, listing approved branded products that, in hindsight, he claimed should not have been listed. Casting doubt on Mr. Papa's credibility, however, is the fact that he did not discover these so-called mistakes until after the Sysco protest helpfully brought the matters to his attention. Also,

in deciding how much weight to give Mr. Papa's testimony, the trier paid particular attention to the picayune nature of the purported conflicts in the specifications. Indeed, it is seriously debatable whether there really were any conflicts in Sequence Nos. 1009, 1036, 1037, and 2010.[7] Additionally, having observed Mr. Papa's demeanor and having given thoughtful consideration to the substance of his testimony, the trier of fact formed the distinct impression that this witness was a bit too anxious to grasp at a plausible excuse — even these hyper-technical "conflicts" — to scuttle the process and do it over. In weighing Mr. Papa's testimony, the trier has factored in a discount for reasonably inferred bias.

76. Further, Mr. Papa's testimony was premised on the view that Column 2 expressed the Board's true intent, taking priority over Column 3 in cases of conflict. To fully credit Mr. Papa's testimony would require that the Reconciliation Clause be turned on its head — which, incidentally, would constitute an impermissible material change in the bid specifications.[8] There is absolutely no basis in this record for doing that.

77. In resolving the conflict in the evidence regarding which goods the Board really wanted, the trier of fact has considered the totality of circumstances and has chosen to give the greatest weight to the plain and unambiguous

Reconciliation Clause in the ITB which, when read in conjunction with the clear designations of approved branded products in Column 3 at the sequences in question, makes manifest the Board's intent. This clear provision speaks for itself and proves that the Board, as an entity, made a reasoned and conscious decision to deem approved branded products in Column 3 of the Product Bid Sheets to be the goods intended for purchase in those instances where a Column 2 product description might suggest a different desire. Neither Mr. Papa's testimony nor any other evidence persuasively calls into question the reliability and credibility of the Reconciliation Clause as an accurate expression of the Board's intent.

78. Thus, under the evidence presented, the following items are approved branded products that, as a matter of fact, the Board wanted to purchase: Nardone's 80MSA-100, Prestige 30215, Nardone's 100MA, and Leon's 28002.

79. Moreover, if the Board decides that one or more of these approved branded products are not what it wants after all, it has the right, pursuant to Section 2.03 of the ITB (see Paragraph 17, supra), to arrange for the purchase and delivery of different products. The argument of the Board and Sysco that the Board's exercise of its right to add and delete items would constitute an impermissible material alteration of

the bid specifications is, in the context of the present circumstances, plainly wrong in fact and illogical.

80. To explain why this is so, let us stipulate that it would be arbitrary for the Board, say, to delete several items from each bidder's proposal because, for example, one or more bidders had mis-bid those items, and then to re-tabulate the bids to determine which bidder would now be the low bidder.[9] Similarly, it would be arbitrary for the Board, under the guise of adding items, to designate as approved branded products certain non-conforming goods offered by a bidder as Distributor's Choices, thereby allowing a bid that otherwise would be disqualified to be considered responsive. As a final example, it would be arbitrary for the Board to delete an approved branded product from the product list and use such deletion as the basis for disqualifying a bidder that had quoted the now-deleted item. Each of these hypothetical situations involves a material change to the specifications on which the bidders based their proposals, which is not allowed, for good reason.

81. It is a different kettle of fish, however, for the Board to add or delete items <u>after</u> making an award to the lowest responsive, responsible bidder in accordance with the terms and conditions of the ITB. When the bids are judged pursuant to the rules clearly spelled out in advance in the

ITB — which would not be the case in the examples set forth in the immediately preceding paragraph — there is simply no change in the specifications, material or otherwise.

82. In the instant case, therefore, if the Board awards the contract to School Food and decides that it does not want a hot dog pancake for Sequence No. 2010, then all it need do is delete Leon's 28002 from the product list and add the desired Leon's product or require the distributor to deliver one of the remaining approved branded products.[10] Nothing about that course of action requires or effects a change in the bid specifications. To the contrary, all of the bidders were notified, upon entering this competition, that such post-award additions and deletions of product were possible. All of the bidders, moreover, could have quoted a price for the hot dog pancake, which was unambiguously designated as a conforming product. If the hot dog pancake were a less expensive item, then Sysco could have and should have bid on it. Put another way, if School Food secured a competitive advantage by bidding on the lower-priced approved branded product, it was a legitimate advantage under the plain rules of the contest — rules that applied equally to all.

83. In a nutshell, the Board is in no reasonable danger of receiving a food product that it does not desire to purchase.

84. The Board's preliminary decision to reject all bids is not supported by facts or logic. Indeed, the Board's analysis of the situation failed to account for the Reconciliation Clause — a clearly relevant factor. When the Reconciliation Clause is considered, together with the rest of the evidence in the record, the following become clear: The ITB's specifications were clear and unambiguous. The competitive playing field was level. The Board will obtain the goods that it intended to purchase.

85. At bottom, the Board's decision here cannot be justified by any analysis that a reasonable person would use to reach a decision of similar importance. It is arbitrary.[11]

CONCLUSIONS OF LAW

VII. Jurisdiction

86. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida, and the parties have standing.

VIII. The Standard of Review

87. Section 120.57(3)(f), Florida Statutes, provides that the standard of review in a protest of an intended decision to reject all bids shall be whether the proposed agency action is illegal, arbitrary, dishonest or fraudulent.

88. In Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991), the First District Court of Appeal described the deference to be accorded an agency in connection with a competitive procurement:

> The Hearing Officer need not, in effect, second guess the members of the evaluation committee to determine whether he and/or other reasonable and well-informed persons might have reached a contrary result. Rather, a "public body has wide discretion" in the bidding process and "its discretion, when based on an honest exercise" of the discretion, should not be overturned "even if it may appear erroneous and even if reasonable persons may disagree."

(Citations omitted; emphasis in original).

89. In U.S. Foodservice, Inc. v. The School Board of Hillsborough County, 1998 WL 930094, *27, DOAH Case No. 98-3415BID (Recommended Order issued Nov. 17, 1998), the administrative law judge analyzed the review criteria applicable to the rejection of all bids subsequent to the 1997 legislative revision of the Administrative Procedures Act:

> [T]he . . . provisions of Section 120.57(3)(f) represent a Legislative reshaping of bid law, at least in cases in which an agency proposes to award a bid, as opposed to cases in which an agency proposes to reject all bids. When an agency rejects all bids, Section 120.57(3)(f) enacts the deferential standard of review previously stated in Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988).

> 179. By negative implication, the third sentence of Section 120.57(3)(f) also legislatively endorses the language in Groves-Watkins limiting the administrative law judge's "review" of the agency decision to reject all bids to something less than the typical de novo administrative hearing. In the typical de novo hearing, the administrative law judge does not merely review the agency decision.
>
> 180. . . . Logically, once the Legislature chose to distinguish, as it clearly has, between agency decisions to award a bid and agency decisions to reject all bids, the latter decision should receive greater deference. A decision to reject all bids does not directly favor one bidder,[12] and overturning such a decision is compelling the agency to spend money for goods, services, or property when it no longer wishes to do so.[13] The use in Section 120.57(3)(f) of "standard of proof" in award cases and "standard of review" in rejection cases is also consistent with the lesser deference required in award cases, which entitle the protester to a de novo hearing.
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> * * *
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> 182. The real question is exactly how much less deference is the Legislature mandating in award cases. The valid answer must lie somewhere between the unchanged level of relatively great deference for agency rejection decisions and the relatively little deference for agency action in the typical, nonbid de novo hearing.

90. In Gulf Real Properties, Inc. v. Department of Health and Rehabilitative Services, 687 So. 2d 1336, 1338 (Fla. 1st DCA 1997), the court upheld an agency's intended rejection of all bids, stating that "an agency's rejection of

all bids must stand, absent a showing that the "purpose or effect of the rejection is to defeat the object and integrity of competitive bidding." (Emphasis added).

91. In Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 914 (Fla. 1988), the Florida Supreme Court held that when an agency rejects all bids, no statutory right exists in any bidder to have its bid accepted and that the administrative law judge's "sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally or dishonestly."

92. Pursuant to Section 120.57(3)(f), Florida Statutes, the burden of proof rests with the party opposing the proposed agency action. See State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1998). School Food must sustain its burden of proof by a preponderance of the evidence. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

93. The review of an agency decision to reject all bids does not require or permit the administrative law judge to substitute his judgment for that of the agency as to the wisdom of the discretionary act. Rather, the applicable standard of review requires only a determination that the record contains a factual or logical basis upon which the

agency could have chosen to exercise its wide discretion to reject all bids. See Groves-Watkins, 530 So. 2d at 913.

94. An arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). Under the arbitrary and capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." Adam Smith Enterprises, Inc. v. State Department of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Still,

> the reviewing court must consider 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 each of these factors to its final decision.

Id.

95. The second district nicely framed the review standard in these terms: "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." Dravo Basic Materials Company, Inc. v. State Department of Transportation, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

As the court observed, this "is usually a fact-intensive determination." Id. at 634.

96. To summarize, in reviewing an agency's intended decision to reject all bids, the administrative law judge must give substantial deference to the agency's determination, owing to its wide discretion in procurement matters. There is an appreciable difference, however, between according the respect that deference entails and affixing the rubber stamp.

IX. Discussion

97. As set forth in the preceding Findings of Fact, the trier has determined as matter of ultimate fact that the Board's decision was arbitrary. These factual findings, however, were necessarily informed not only by the administrative law judge's application of the above legal principles but also his legal conclusions regarding the clarity of particular provisions of the ITB and the plain meaning of those provisions.

98. The terms and conditions of the ITB upon which fact findings were made were found to be unambiguous. Therefore, in his role as the trier of fact, the administrative law judge did not consider any extrinsic evidence regarding the meaning of these provisions. In addition, it was not necessary for the administrative law judge, as arbiter of the law, to resort to principles of interpretation to understand the ITB. To the

extent findings of fact regarding the Board's intent as plainly expressed in the unambiguous language of the ITB are deemed to be legal conclusions, they are hereby incorporated by reference as if set forth in this Conclusions of Law section of the Recommended Order and adopted as such.

99. A brief comment on a couple of the Board's legal contentions may shed additional light on the ultimate factual findings. The Board has taken pains to make the facts of this case seem to fit within the holding of Caber Systems, Inc. v. Department of General Services, 530 So. 2d 325 (Fla. 1st DCA 1988). There are some superficial similarities between the two cases. There, as here, the agency decided to reject all bids after a disappointed bidder had protested the intended award. Unlike this case, however, in Caber the administrative law judge found, as a matter of fact, that the invitation to bid was "seriously flawed in several respects." Id. at 331. Indeed, the bid specifications were so ambiguous, a finding of fact was made that the invitation to bid had failed clearly to reflect either the agency's or anyone else's intent. Id. The court held that, in view of the hopelessly ambiguous specifications, the agency's rejection of all bids was neither arbitrary nor capricious, even though the decision to pull the plug on the procurement had been made while the first protest remained pending. Id. at 336.

100. In stark contrast, the ITB here was not confusing, ambiguous, or flawed. Rather, it clearly and plainly stated the Board's intent. In fact, no reasonable bidder could have been flummoxed by the purported flaws in the specifications for the at-issue sequences. Caber, therefore, is distinguishable on this basis.[14]

101. The Board also relied heavily on U.S. Foodservice, Inc. v. The School Board of Hillsborough County, 1998 WL 930094, DOAH Case No. 98-3415BID (Recommended Order issued Nov. 17, 1998), in support of its position. There, another school district issued a bid for main-line foods involving 297 items of main-line food and 37 items of snack foods and beverages. All of the relevant bidders had included products in their bids that failed to meet specifications. In an attempt to salvage the procurement, the school district simply eliminated from the bids all items "mis-bid" by any bidder — i.e. items for which any bidder had proposed goods that failed to meet specifications — and then it re-tabulated the cost of each proposal to determine the low bidder. Calling this process clearly erroneous, contrary to competition, and arbitrary, see id. at *17, the administrative law judge issued a recommended order urging that the proposed award be set aside and the contract re-bid.

102. Nothing of the sort has occurred here, however, nor is any similar action contemplated under any reasonably foreseeable approach to proceeding with an award under this ITB. Simply put, none of the bidders deemed to have submitted responsive proposals mis-bid on any of the four items set forth in the sequences at issue. Rather, unlike U.S. Foodservice, they each quoted prices on conforming goods; it thus was not only possible fairly and reasonably to tabulate and compare the three responsive proposals without resort to the kind of tampering that went on in the U.S. Foodservice case, but also staff in fact did just that before Sysco's apparent loss of the contract and subsequent protest of the intended result triggered the rejection decision under review here. In short, U.S. Food Service is off-point and fails to justify the Board's decision to reject all bids.

X. General Conclusion

103. The evidence supports School Food's claim that the Board's intended rejection of all bids is arbitrary. The record establishes that the terms of Sequence Nos. 1009, 1036, 1037 and 2010 of the ITB were clear and unambiguous; the plain-language Reconciliation Clause resolved definitively any conflicts at those sequences between the approved branded products in Column 3 and their respective descriptions in Column 2. Letting authorities must be mindful that rejecting

all bids discourages competitive bidding and hence should be the exception in public procurement rather than the rule. Disregarding this maxim, the Board here acted precipitately and without sufficient justification in fact or logic when it decided to reject the bids received on this substantial contract.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board award the contract advertised in the subject ITB to the lowest responsive, responsible bidder, in accordance with the terms and conditions of the ITB. It is further recommended that the Board, pursuant to its own rules, return School Food's protest bond and, in the Final Order, award School Food the costs Petitioner has incurred in prosecuting this matter. If a dispute arises concerning the amount of such costs, the matter may be referred to the Division of Administrative Hearings for further proceedings.

DONE AND ENTERED this 31st day of May, 2001, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of May, 2001.

ENDNOTES

[1]/ The ITB provided that "[i]f no brand is listed in Column 3, then 'Distributor's Choice' shall equal or exceed the product description in Column 2." (ITB, Section 5.03.) Further, bidders were informed that "[t]he decision whether a product does or does not meet the requirements of Column 2 is at the discretion of [the Board]." Id.

[2]/ Bidders were told that "[w]henever an approved brand(s) is listed in the same box with 'Distributor's Choice,' the Distributor's Choice brand should be of equal or better quality than the approved brand(s) listed, as interpreted by [the Board]." (ITB, Section 5.03)(emphasis removed).

[3]/ In the Product Bid Sheets, "(F)" stood for "frozen," and "VPP" referred to a vegetable protein product.

[4]/ In fact, a "frankfurter" is, by definition, a "cured cooked sausage (as of beef or beef and pork) that may be skinless or stuffed in a casing." Merriam-Webster's OnLine Collegiate® Dictionary. The administrative law judge recognizes, however, that the terms "frankfurter" and "sausage," as used in ordinary discourse, commonly connote different foods. The former uniquely calls to mind the product frequently referred to as a "hot dog" or "wiener" which is typically served in a bun. The term "sausage," in

contrast, is commonly associated with a meat product that is spicier and more heavily seasoned than the ordinary frankfurter.

[5]/ The Reconciliation Clause unambiguously drew a sharp distinction between product codes that are in "conflict" with product descriptions, on the one hand, and those which are "obsolete" or "incorrect" on the other. The latter were addressed in Sections 1.13 and 5.03, which instructed bidders to enter the correct code when confronted with one that was obsolete or incorrect — meaning, clearly, a code that, because of a scrivener's error or having gone out of use, described an approved branded product that either never existed or was no longer available. As the Reconciliation Clause made clear, however, a product code would not be "incorrect" if it were in "conflict" with the product description, provided the code designated an actual, available product; to the contrary, an in- conflict product code, by operation of the Reconciliation Clause's plain language, would be correct.

In the instant case, each of the approved branded products that the Board now contends was "incorrect" is, in fact, an actual, available product. Therefore, none was designated with an "obsolete" or "incorrect" product code as Sections 1.13 and 5.03 of the ITB used those terms.

[6]/ The Board has argued that because it reserved the discretion to decide "whether a product meets the requirements of Column 2," (ITB, Section 5.03), and because "[a]ny item that does not meet the specifications shall be disqualified" (ITB, Section 1.03), thereby rendering a bid non-responsive, a bidder that dared to quote prices on either Nardone's 80MSA-100, Prestige 30215, Nardone's 100MA, or Leon's 28002 — all of which, remember, were approved branded products — did so at the risk of having its bid rejected. This is an unconvincing and illogical argument.

Plainly, in view of the Reconciliation Clause, the Board's right to disqualify an item — and with it, possibly, a bid — based on that item's failure to meet the requirements of Column 2 extends only to Distributor's Choice items and those for which brand-only approval was given. For those items (as many as 137) that required the bidder to choose brand, code, or both, the bidder clearly needed to "carefully consider each item for conformance to specifications." See ITB, Section 1.03. On at least 48 items, however, bidders were not

required to choose either brand or code but rather were instructed to bid on specific approved branded products. As the Reconciliation Clause made clear beyond peradventure, these items met the specifications even if there were a conflict between any of them and their respective descriptions in Column 2. To disqualify a bid for having quoted an approved branded product would be arbitrary and unacceptable.

[7]/ To be grounds for a rejection of all bids, a mistake or misrepresentation in the bid specifications must be material. See Capeletti Brothers, Inc. v. State Department of General Services, 432 So. 2d 1359, 1362-63 (Fla. 1st DCA 1983). Therefore, as an alternative finding of fact, the trier has concluded that the purported conflicts between the approved branded products on which School Food bid in response to the sequences at issue and their respective product descriptions do not constitute material misrepresentations or defects.

To see this, consider, as a thought experiment, what would happen if Sysco were given the benefit of School Food's lower bids on Sequence Nos. 1009, 1036, 1037, and 2010, while School Food was simultaneously burdened with Sysco's higher bids on those same items. The net effect of such a maneuver would bring these two proposals closer together by about $77,000 — not nearly enough to bridge the approximately $400,000 chasm that separates them.

The point of this exercise is not to suggest that the bids should be re-tabulated in this fashion — obviously they should not be. Rather, it is to demonstrate that, as a practical matter, neither the competition that this procurement entailed nor the outcome of the contest was affected in the least by the alleged flaws in the ITB. Indeed, the purported deficiencies in the specifications had no more effect on the competition and outcome than did Mr. High's improper communication with Sysco. See Paragraphs 38-39, supra. It would be folly to throw out the bids for such inconsequential "deficiencies." No fair-minded reasonable person would take such action.

Further highlighting the immateriality of the alleged deficiencies is School Food's representation, acknowledged by the Board, that it can deliver any of the approved branded products listed at the sequences in question for the same prices quoted in its bid.

[8]/ See Air Support Services International, Inc. v. Metropolitan Dade County, 614 So. 2d 583, 584 (Fla. 3d DCA 1993)(public bid requirements may not be materially altered after the submission of bids).

[9]/ This is how the agency proceeded in U.S. Foodservice, Inc. v. The School Board of Hillsborough County, 1998 WL 930094, DOAH Case No. 98-3415BID (Recommended Order issued Nov. 17, 1998), a distinguishable case upon which the Board relies that is discussed infra at Paragraphs 101-02.

[10]/ The Board has argued erroneously that it could not properly make such a decision during the period between the submission of bids and the contract award — a limitation nowhere mentioned in the ITB. In fact, provided there is no effect on the terms and conditions of the ITB under which the contract award is made, the timing of Board's decision to add or delete items is irrelevant. To be sure, it is possible to imagine a scenario in which the Board's exercise of its right to add or delete items might be an impermissible abuse of discretion. Suppose, for example, that the Board knowingly listed numerous items that it knew it did not want, with the intent that its favored bidder would benefit thereby, and then, after the award, it replaced the undesired items with products that an unsuccessful bidder could have delivered at lower cost than the contract recipient. In that case, a strong argument could be made that the bid specifications had been materially changed. But that hypothetical case, it hardly need be said, is not this one.

[11]/ School Food concedes, and the administrative law judge agrees, that Petitioner did not prove fraud or illegality on the Board's part. The administrative law judge rejects School Food's contention that the Board acted dishonestly; that allegation was not proved by competent substantial evidence either.

[12]/ Care must be taken not to read too much into this notion because, obviously, "it ain't necessarily so." Clearly, giving the disappointed bidders another chance to win the contract spares them from immediate defeat — and, in that sense at least, favors them. The result may or may not be the result of favoritism — that is, partiality or bias on the letting authority's part — but the effect on the putatively successful bidder is undeniably adverse either way. As Judge Booth explained, "[o]nce bids are opened and then rejected, a

favored bidder(s) is given the change to resubmit a low bid, and the original low bidder loses the advantage as well as the time and preparation costs for that bid. The power to reject all bids, and the threat of the use of that power, are potent weapons that can be misused to eliminate the fair, open competitive bidding procedures." Caber Systems, Inc. v. Department of General Services, 530 So. 2d 325, 340 (Fla. 1st DCA 1988)(Booth, J., concurring and dissenting)(footnote omitted).

[13]/ This latter point, which has logical appeal when the letting authority has decided to abandon the subject procurement, lacks persuasive force when, as here, the agency plans to proceed with an award of the contract in question.

[14]/ Because Caber is inapposite, it is not presently necessary to decide whether that decision needs to be revisited in light of subsequent statutory changes. Of particular interest, however, is that, some two years after Caber was decided, it became necessary to bring a specifications protest within 72 hours after receipt of the invitation to bid — or be deemed to have waived the right to do so. Legislation enacted in 1990 inserted the following sentence into Section 120.53(5)(b), Florida Statutes: "With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for proposals, and the formal written protest shall be filed within 10 days after the date the notice of protest is filed." Ch. 90-302, Laws of Florida. This language is currently found in Section 120.57(3)(b).

Given the requirement that specifications be protested immediately — which was not the law at the time of Caber — there is now reason to view with some suspicion an agency's decision to reject all bids on the basis of alleged problems with the specifications when, as happened here, the purported deficiencies have been brought to the agency's attention by the protest of a disappointed bidder. The concern, of course, is that the agency may have favored a preferred bidder by granting it relief on grounds which the bidder, having failed to bring a timely specifications protest, clearly had waived, and by doing so effectively have circumvented the deadline that Section 120.57(3)(b) imposes.

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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.