STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

E-BUILDER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-1581BID
	)	
MIAMI-DADE COUNTY SCHOOL BOARD,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
EMERGING SOLUTIONS d/b/a CONSTRUCTWARE, INC.,	)	
	)	
Intervenor.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on June 17 and 18, 2003, in Miami, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this bid protest are whether, in making a preliminary decision to award a public contract, Respondent acted contrary to a governing statute, rule, policy, or project specification; and, if so, for each such instance, whether the misstep was clearly erroneous, arbitrary or capricious, or contrary to competition.

PRELIMINARY STATEMENT

Petitioner E-Builder, Inc. ("E-Builder") has challenged a selection committee's recommendation to Respondent Miami-Dade County School Board (the "Board") that a contract be awarded to Intervenor Emerging Solutions d/b/a Constructware, Inc. ("Constructware"). The subject contract is for internet-based collaborative construction and claims reduction support services, which will facilitate the administration of the ongoing capital construction program in the Miami-Dade County Public School District (the "District").

Six vendors submitted proposals in response to Request for Proposals No. 026-CC10, which had been issued in the autumn of 2002. A selection committee reviewed the proposals and, in December 2002, voted to recommend that the contract be awarded

to Constructware. E-Builder protested, the Board referred the matter to the Division of Administrative Hearings ("DOAH"), Constructware was allowed to intervene, and the undersigned scheduled a final hearing, which took place on June 17 and 18, 2003.

At the final hearing, E-Builder presented Jonathan Antevy, one of its principals, together with four witnesses who were, at the time, employees of the District, namely Rose Barefield Cox, John Pennington, Barbara Jones, and Laurence White. E-Builder also offered 15 exhibits (Petitioner's Exhibits 4, 25-27, 30, 40, 49, 55, 56, 132, 133, and 143-46), which were received into evidence.

By agreement of the parties, the Board and Constructware conducted direct examinations, as desired, of the witnesses called during E-Builder's case. As well, exhibits numbered 2-12 were admitted as Respondent's Exhibits, and official recognition was taken of School Board Rule 6Gx13-8C-1.064, which was marked for identification as Respondent's Exhibit 1.

The final hearing transcript was filed with DOAH on September 8, 2003, and the parties timely filed their respective Proposed Recommended Orders before the established deadline, which was September 26, 2003.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2003 Florida Statutes.

FINDINGS OF FACT

I. The Request for Proposals

1. In the fall of 2002, the Board issued Request for Proposals No. 026-CC10 (the "RFP") to solicit offers on a contract for internet-based collaborative construction and claims reduction support services.

2. As stated in Section II at page 1, the purpose of the RFP was

> [t]o commission one or more firms to provide the Board with internet-based collaborative construction and claims reduction support services. It is intended that this technology be gradually phased into the construction program as new projects from the District's Capital Construction Five-year Work Plan come online. Miami-Dade County Public Schools is the fourth largest public school system in the nation and has a large-scale on-going capital construction program.

The deadline for submission of proposals in response to the RFP was November 26, 2002.

3. Section V of the RFP, which was titled "Required Information to be Submitted by Proposers," prefaced a list of ten specific items with the instruction that "[a]ll proposals shall contain the following information and shall be presented in the following format[.]" There is no dispute that material compliance with Section V was mandatory and that proposals could

be——and in fact were——disqualified from consideration for failure to include all of the required information.

4. Section VI of the RFP set forth the scope of work. It provided, in pertinent part:

> The proposer(s) shall provide Internet collaborative construction and claims reduction support services for use in connection with the [Board]'s capital construction program which should include but not be limited to, the following:
>
> A. The proposer should provide an off-the-shelf application product and application service provider services on a purely web-based system. Users will access and interface with the application via the internet using Internet Explorer™ browser software running on computer workstations under typical Windows™ operating system. Users should not have to purchase or have installed on their workstations any other applications in order to use the application service provider's application. The application service provider should host all applications and data and own and/or own the lease to their facility as well as all hardware and software. The application should include but not limited to the following:
>
> * * *
>
> 9. Custom web site documents folders and subfolders creation and organization and the ability to submit multiple documents or files (select, drag and drop) to the project web site electronically from authorized computer workstations. Project folders should be capable of storing, including but not limited to, all plans, drawings, specifications, contracts, general conditions, surveys, geo-technical photographs, reports and other documents

typically encountered in a multiple-large-project construction program.

* * *

11. Ability to submit documents to specific web site documents folders or attach them to specific forms using facsimile machines to allow non-computer users to interface with the system. Ability to electronically print documents directly to web site documents folders from other Windows™ applications. Ability to download documents from the project site and to resubmit them as new versions with all original maintained and accessible.

* * *

C. Furnish and install a zoom/tilt/pan web-camera and connect to a high speed Internet connection at each construction site. Proposers should provide web camera server equipment and ISP services necessary to support web camera functions such as automatic multiple daily view picture taking, picture archival and retrieval and time lapse playback of pictures.

5. Section VII of the RFP, which prescribed various "submittal requirements," stated in relevant part:

Proposers shall indicate in their submittal, the capabilities of their system regarding the above scope of work, as well as the following:

A. Initial set-up process, list Licenses requirements, state the software and hardware requirements for M-DCPS in order to use the web-based system (i.e. browser plug-ins, operating systems, etc).

* * *

> E. Describe the training program to train M-DCPS in use of the web-based system, on site, number of classes, number of students and hours of training proposed.
>
> * * *
>
> G. Describe travel distance from technical support to M-DCPS. Provide technical support in person at M-DCPS when required.

II. The Evaluation

6. On December 9, 2002, a group of individuals who had been appointed to serve on a committee (the "Evaluation Committee") whose task was to make a recommendation to the Board as to whom should be awarded the contract met to review the six proposals that were timely submitted in response to the RFP. The Evaluation Committee unanimously agreed that the proposals submitted by E-Builder, Constructware, and another vendor were responsive to the requirements of Sections V, VI, and VII; the other proposers were eliminated from further consideration. The Evaluation Committee decided to invite the three remaining contenders to make presentations to the Evaluation Committee at a later date.

7. The Evaluation Committee met again on December 16, 2002. At that time, the three proposers still in the competition were allowed one hour apiece to demonstrate, explain, and answer questions about their respective solutions. After the presentations, the Evaluation Committee voted for the

proposal which best met the needs of the District. When the votes were tallied, Constructware was the winner, with E-Builder in second place. Accordingly, the Evaluation Committee agreed to recommend that the contract be awarded to Constructware.

III. Relevant Details About Constructware's Proposal

8. Because the instant protest is based largely on E-Builder's contention that Constructware's proposal was materially nonresponsive to several provisions in Sections VI and VII of the RFP, the following is a brief look at the relevant aspects of Constructware's response to the RFP.

9. In its proposal, Constructware addressed the items contained in Section VI by interlining specific responses within the relevant language of the RFP, which language was reproduced in its entirety. For present purposes, given the reasons for the recommended disposition that follows, it is not necessary to quote Constructware's responses to Section VI, which are included in the evidentiary record in any event. Suffice it to say that Constructware's proposal was complete in the sense that for each item listed in Section VI, Constructware provided a response, offered a solution, or explained what it could do if awarded the contract.

10. Turning to Section VII, Constructware's proposal stated in pertinent part as follows:

[With reference to Section VII.A.,] Constructware is a true [Application Service Provider] requiring only a web-browser and a connection to the Internet. The System can function on a 56K connection, but faster bandwidth is recommended for maximum performance.

* * *

[With reference to Section VII.E.,] Constructware has established a team of individuals specifically geared to train and implement the application to M-DCPS' unique needs. The Solution Group is made up of professional Implementation Managers and Certified Constructware Trainers. In most cases, the Implementation Manager will meet with your executive team to understand the scope of the program / project(s) and the desired goal of using the application. With this information and direct feedback from your team, the Implementation Manager will develop a scope document to help guide the team through this rollout. This information will be shared with the Certified Constructware Trainers to develop a custom training plan to meet your goals. Throughout the rollout, the Implementation Managers will stay in contact with your executive team to provide status and update the rollout plan as the project progresses. The following is a list of the standard training and implementation options available:

1) Private Training – ½ day to 5 day per student depending on the amount of the product utilized and the type of user trained. Class sizes for private training are limited to 12 students.

2) Train the Trainer – 5 day course designed to train in-house individuals to act as your personal certified trainer.

3) Public Training – 3-day course in our Atlanta Headquarters covering the majority of the modules available.

4) Implementation Services

5) Orientation – Offered as part of the initial database setup, this orientation would assist your Constructware Supervisor on how to get started with the system. This orientation is done remotely utilizing Webex technology.

* * *

[With reference to Section VII.G.,] [b]ecause Constructware is an Internet-based application, technical support staffs have not been required to travel to a client's site to resolve issues. Constructware utilizes the Webex technology to review user browser settings in the event a user has any problems accessing the product. Clients wanting a true web-based system should exercise caution dealing with vendors offering on site technical support. This is a prime indicator of workstation setups and additional software loads not required on true web-based solutions.

Constructware's Solutions Group offers consultant visits to ensure proper connectivity and browser settings in the event clients lack the technical staff that would normally handle these procedures.

Constructware is headquartered near Atlanta, Georgia. All support staff and consultants are based in this office, but are accustom [sic] to traveling to client sites throughout the nation when required.

IV. E-Builder's Protest

11. By letter dated December 18, 2002, E-Builder was told that it would not be awarded the contract. The letter, however,

did not notify E-Builder, as it should have pursuant to Section 120.57(3)(a), Florida Statutes, that failure to file a formal protest within the time prescribed in Section 120.57(3) would constitute a waiver of proceedings under the Administrative Procedure Act ("APA").

12. To better understand what happened next, it is useful to know that the RFP, at page iii, set up an informal protest procedure as a nonexlusive alternative to formal administrative proceedings under the APA. According to this informal procedure,

> [p]roposers may file letters of protest no later than 48 hours prior to the Board Meeting for which the award is scheduled to be made. These letters of protest will be reviewed by Staff. Staff will offer the protesting proposer the opportunity for a meeting to discuss the protest. If the proposer is not satisfied with the response to the protest, he/she may request to address the School Board.

On January 13, 2003, E-Builder submitted an "Official Letter of Protest" that was timely under the above quoted provisions because the Board was scheduled to make the award at its meeting on January 15, 2003. As a result of E-Builder's informal protest, the item relating to the contract in question was removed from the Board's agenda for January 15.

13. By letter dated February 10, 2003, E-Builder was informed that the Board's staff had decided that the informal

protest was without merit and that E-Builder had "failed to demonstrate violation of any established procedures or misconduct on the part of the evaluation committee." E-Builder was further notified that it could "request to address the school board [at its next meeting on February 12, 2003, when the award was expected to be made], or invoke the provisions of § 120.569 Florida Statutes."

14. On February 12, 2003, within 72 hours after receiving the letter just discussed, E-Builder delivered to the Board a letter styled "Supplement to Official Letter of Protest." In this supplemental protest letter, E-Builder reiterated its desire to protest the intended award and expressed its intent to address the Board later that day. While there is room for debate, the undersigned finds and concludes that E-Builder's correspondence of February 12, 2003, constituted a "notice of protest" which was effective to commence the formal bid protest process pursuant to Section 120.57(3)(b), Florida Statutes.

15. At its meeting on February 12, 2003, the Board heard from E-Builder concerning the pending protest, and following that the recommendation to award Constructware the contract was tabled. (As of the date of the final hearing, the Board had taken no further action toward awarding the contract.)

16. On February 20, 2003, E-Builder filed with the Board a "Petition of Committee Recommendation Regarding Request for

Proposal No.: 026-CC10 and for Formal Administrative Hearing." The undersigned finds and concludes that this petition constituted a timely filed "formal written protest" as that term is used in Section 120.57(3)(b), Florida Statutes; as such, the February 20, 2003, petition is the operative pleading in this case.

17. As bases for relief, E-Builder asserted in its petition, among other things, that Constructware's proposal was materially nonresponsive for failure to comply with several of the RFP's allegedly mandatory requirements. E-Builder also alleged that the Evaluation Committee had failed to take into account total annual cost when weighing the merits of the respective proposals.[1]

CONCLUSIONS OF LAW

V. Jurisdiction

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

VI. The Burden of Proof

19. Pursuant to Section 120.57(3)(f), Florida Statutes, the burden of proof rests with the party opposing the proposed agency action, here E-Builder. See State Contracting and Engineering Corp. v. Department of Transp., 709 So. 2d 607, 609

(Fla. 1st DCA 1998). E-Builder must sustain its burden of proof by a preponderance of the evidence. Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

VII. The Rules of Decision in Bid Protests

A. The Standard of Conduct

20. Section 120.57(3)(f), Florida Statutes, spells out the rules of decision applicable in bid protests. In pertinent part, the statute provides:

> In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

21. The First District Court of Appeal has construed the term "de novo proceeding," as used in Section 120.57(3)(f), Florida Statutes, to "describe a form of intra-agency review.[2] The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." State Contracting and Engineering Corp. v. Department of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). In this, the court followed its earlier Intercontinental Properties, Inc. v. State Dept. of Health and

Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 1st DCA 1992), a decision which predates the present version of the bid protest statute, wherein the court had reasoned:

> Although the hearing before the hearing officer was a *de novo* proceeding, that simply means that there was an evidentiary hearing during which each party had a full and fair opportunity to develop an evidentiary record for administrative review purposes. It does not mean, as the hearing officer apparently thought, that the hearing officer sits as a substitute for the Department and makes a determination whether to award the bid *de novo.* Instead, the hearing officer sits in a review capacity, and must determine whether the bid review criteria set . . . have been satisfied.

22. In framing the ultimate issue to be decided in this de novo proceeding as being "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications," the statute effectively establishes a standard of conduct for the agency, which is that, in soliciting and accepting bids or proposals, the agency must obey its governing statutes, rules, and the project specifications. If the agency breaches this standard of conduct, its proposed action is subject to (recommended) reversal by the administrative law judge in a protest proceeding.

23. Consequently, the party protesting the intended award must identify and prove, by the greater weight of the evidence,

a specific instance or instances where the agency's conduct in taking its proposed action was either:

(a) contrary to the agency's governing statutes;

(b) contrary to the agency's rules or policies; or

(c) contrary to the bid or proposal specifications.

24. It is not sufficient, however, for the protester to prove merely that the agency violated the general standard of conduct. By virtue of the applicable standards of "proof," which are best understood as standards of review,[3] the protester additionally must establish that the agency's misstep was:

(a) clearly erroneous;

(b) contrary to competition; or

(c) an abuse of discretion.

25. The three review standards mentioned in the preceding paragraph are markedly different from one another. The abuse of discretion standard, for example, is more deferential (or narrower) than the clearly erroneous standard. The bid protest review process thus necessarily entails a decision or decisions regarding which of the several standards of review to use in evaluating a particular action. To do this requires that the meaning and applicability of each standard be carefully considered.

B. The Standards of Review

1. The Clearly Erroneous Standard

26. The clearly erroneous standard is generally applied in reviewing a lower tribunal's findings of fact. In Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74 (1985), the United States Supreme Court expounded on the meaning of the phrase "clearly erroneous," explaining:

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a [trial] court may be derived from our cases. The foremost of these principles . . . is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." . . . . This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a [trial] court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*" . . . . If the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the

> evidence, the factfinder's choice between them cannot be clearly erroneous. . . . .

(Citations omitted)(emphasis added).

27. The Florida Supreme Court has used somewhat different language to give this standard essentially the same meaning:

> A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law. A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion. . . . . When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous' and the appellate court will reverse because the trial court has 'failed to give legal effect to the evidence' in its entirety.

Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956)(citation omitted).

28. Because administrative law judges are the triers of fact charged with resolving disputed issues of material fact based upon the evidence presented at hearing, and because bid protests are fundamentally de novo proceedings, the undersigned is not required to defer to the letting authority in regard to

any findings of objective historical fact that might have been made in the run-up to preliminary agency action. It is exclusively the administrative law judge's job, as the trier of fact, to ascertain from the competent, substantial evidence in the record what actually happened in the past or what reality presently exists, as if no findings previously had been made.

29. If, however, the challenged agency action involves an ultimate factual determination——for example, an agency's conclusion that a proposal's departure from the project specifications was a minor irregularity as opposed to a material deviation——then some deference is in order, according to the clearly erroneous standard of review.[4] To prevail on an objection to an ultimate finding, therefore, the protester must substantially undermine the factual predicate for the agency's conclusion or convince the judge that a defect in the agency's logic led it unequivocally to commit a mistake.

30. There is another species of agency action that also is entitled to review under the clearly erroneous standard: interpretations of statutes for whose administration the agency is responsible, and interpretations of the agency's own rules. See State Contracting and Engineering Corp. v. Department of Transp., 709 So. 2d 607, 610 (Fla. 1st DCA 1998). In deference to the agency's expertise, such interpretations will not be overturned unless clearly erroneous. Id.[5]

31. This means that if the protester objects to the proposed agency action on the ground that it violates either a governing statute within the agency's substantive jurisdiction or the agency's own rule, and if, further, the validity of the objection turns on the meaning, which is in dispute, of the subject statute or rule, then the agency's interpretation should be accorded deference; the challenged action should stand unless the agency's interpretation is clearly erroneous (assuming the agency acted in accordance therewith).[6]

2. The Abuse of Discretion Standard

32. The statute requires that agency action (in violation of the applicable standard of conduct) which is "arbitrary, or capricious" be set aside. Earlier, the phrase "arbitrary, or capricious" was equated with the abuse of discretion standard, see endnote 3, supra, because the concepts are practically indistinguishable——and because use of the term "discretion" serves as a useful reminder regarding the kind of agency action reviewable under this highly deferential standard.

33. It has been observed that an arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chemical Co. v. State Dept. of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979). Thus, under the arbitrary or 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 Dept. of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Nevertheless,

> 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.

34. The second district framed the "arbitrary or capricious" 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 Co., Inc. v. State Dept. of Transp., 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.

35. Compare the foregoing "arbitrary or capricious" analysis with the test for reviewing discretionary decisions:

> "Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view

> adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980), quoting Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942). Further,

> [t]he trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.

Canakaris, 382 So. 2d at 1203

36. Whether the standard is called “arbitrary or capricious” or “abuse of discretion,” the scope of review, which demands maximum deference, is the same. Clearly, then, the narrow “arbitrary or capricious” standard of review cannot properly be applied in evaluating all agency actions that might be challenged in a bid protest; rather, this highly deferential standard appropriately applies only to those decisions which are committed to the agency’s discretion.

37. Therefore, where the protester objects to agency action that entails the exercise of discretion, but only in such

instances, the objection cannot be sustained unless the agency abused its discretion, i.e. acted arbitrarily or capriciously.

3. The Contrary to Competition Standard

38. The third standard of review articulated in Section 120.57(3)(f) is unique to bid protests. The "contrary to competition" test is a catch-all which applies to agency actions that do not turn on the interpretation of a statue or rule, do not involve the exercise of discretion, and do not depend upon (or amount to) a determination of ultimate fact.

39. Although the contrary to competition standard, being unique to bid protests, is less well defined than the other review standards, the undersigned concludes that the set of proscribed actions should include, at a minimum, those which: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent.

VIII. The Responsiveness of Constructware's Proposal

40. As its primary protest grounds, E-Builder contends that Constructware's response deviated materially in at least six respects from the project specifications as set forth in the RFP, and that, therefore, the Board breached the applicable standard of conduct by evaluating, rather than rejecting,

Constructware's allegedly nonconforming proposal. Four of the seven specific protest grounds are based on Constructware's alleged failure to comply strictly with the scope of work requirements set forth in Section VI of the RFP. E-Builder further alleges that Constructware's proposal deviated in two material instances from the provisions of Section VII of the RFP, which specifies the submittal requirements. These alleged irregularities will be addressed below.

A. Scope of Work

41. E-Builder's contentions regarding Constructware's alleged noncompliance with various parts of Section VI are all premised on the idea that the specifications contained therein were mandatory requirements. If instead the provisions of Section VI were merely precatory or directory, however, then E-Builder's position would be untenable, as its counsel all but conceded at final hearing. To prevail on its protest grounds relating to the scope of work, E-Builder must demonstrate that Section VI unambiguously imposed mandatory requirements, which is a question of law.[7] See Travelers Indem. Co. of Illinois v. Hutson, 847 So. 2d 1113, 1114 (Fla. 1st DCA 2003)("Whether ambiguity exists in a contract is . . . a question of law."); accord Specialty Restaurants Corp. v. City of Miami, 501 So. 2d 101, 103 (Fla. 3d DCA 1987).

42. E-Builder argues that the word "shall" in the sentence that introduces the scope of work specifications is determinative. The introductory sentence reads:

> The proposer(s) shall provide [the type of] services [sought under this RFP] which should include but not be limited to, the following [particular services, products, and benefits, as described below].

(Emphasis added). E-Builder interprets this sentence to mean, effectively, that the proposer(s) shall provide services including but not limited to the services specifically mentioned in Section VI.[8] E-Builder thus plays down the distinction, which this sentence draws, between (a) the relevant category of services and (b) the constituent services——that is, the many discrete services, products, and benefits that might constitute categorical services, where the relevant category of services is defined as "Internet[-based] collaborative construction and claims reduction support services for use in connection with the [Board]'s capital construction program."

43. The undersigned, however, considers the distinction just mentioned to be crucial to the meaning of the sentence in question. It is clear to the undersigned that the drafters of the RFP intended, first, to reiterate (perhaps redundantly) that the successful proposer should provide[9] a category of services labeled "Internet[-based] collaborative construction and claims reductions support services" and, next, to describe specific

services putatively falling within that category that the Board believed——but was not necessarily convinced——would meet its needs.

44. To explain further, as the undersigned reads the sentence, the mandate of "shall" stops at the relative clause beginning with "which"——and hence embraces only the category of services sought. In the relative clause, which modifies the referenced category of services by introducing a nonexclusive list of particular services that the Board perceived as being within such category, the word "should" was intended, through its unmistakable contrast with "shall," to soften the latter's mandatory connotation and convey instead advisability or suitability.[10] Put simply, the relative clause is directory rather than mandatory; it connotes strong desire, not decisive command.[11]

45. Accordingly, it is concluded, contrary to E-Builder's argument, that Section VI did not unambiguously mandate the inclusion of all the listed items. Rather, Section VI unambiguously advised prospective proposers that including the enumerated items would be prudent——while letting them know that alternative solutions had not been ruled out.

46. Moreover, the undersigned concludes that even if the above interpretation (which accords with the Board's) were not the only reasonable one, it is at least a reasonable

interpretation, and therefore, in any event, the first sentence of Section VI is ambiguous. Thus, the Board's interpretation, if not correct, at a minimum is not clearly erroneous and hence should be upheld in this proceeding.

47. Finally, because Constructware's proposal addressed all of the items listed in Section VI, though arguably without strictly conforming to each and every one,[12] the undersigned concludes that the Board's decision to evaluate Constructware's proposal rather than rejecting it as nonresponsive, which decision was taken in accordance with a permissible interpretation of Section VI, was not clearly erroneous and will not be disturbed.[13]

B. Submittal Requirements

48. E-Builder charges that Constructware's proposal failed to comply with Subsections A, E, and F of Section VII of the RFP. These provisions——together with Constructware's particular responses——are set forth above in the Findings of Fact.

49. The parties have not advanced competing interpretations of the relevant language of Section VII. The undersigned concludes that the provisions in question are reasonably clear and unambiguous, making parsing unnecessary. The dispositive question, therefore, is whether the Evaluation Committee's ultimate factual determination that Constructware's

proposal materially conformed to Section VII of the RFP is clearly erroneous.

50. In comparing Constructware's proposal to the RFP provisions at issue, the undersigned is not left with a definite and firm conviction that the Evaluation Committee made a mistake when it deemed Constructware's proposal to be in material compliance with Section VII. Thus, the undersigned cannot conclude that the Evaluation Committee's decision, when measured against the applicable standard of review, is clearly erroneous.

C. Other Factors

51. E-Builder alleges that the Board violated a governing statute, namely Section 287.057(2)(a), because, first, the RFP did not require the proposers to state "the price for each year the contract may be renewed" and, second, the Evaluation Committee failed to consider "the total cost for each year as submitted by the vendor[s]." See § 287.057(2)(a), FLA. STAT.

52. E-Builder's argument must be rejected because Section 287.057(2)(a), which is located in Part I of Chapter 287, Florida Statutes, does not apply to constitutional entities such as school boards. See Dunbar Elec. Supply, Inc. v. School Bd. of Dade County, 690 So. 2d 1339, 1340 (Fla. 3d DCA 1997). This limitation on the chapter's reach stems from the definition of the term "agency" as set forth in Section 287.012(1),[14] which

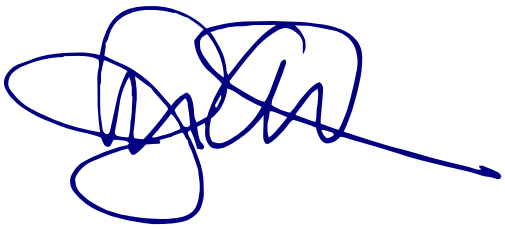
operates to draw into Chapter 287, Part I, only the executive branch of state government. Id.[15]

53. Because Section 287.057(2)(a) is not a statute that governs the Board, the Board was not required to comply with it in order to meet the standard of conduct prescribed in Section 120.57(3)(f).[16] No further analysis is necessary to conclude that these protest grounds are without merit.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board enter a Final Order declaring E-Builder's protest to be without substantial merit and authorizing the award of the subject contract to Constructware.

DONE AND ENTERED this 10th day of October, 2003, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of October, 2003.

ENDNOTES

[1]/ Allegations that were not raised at the final hearing or argued in E-Builder's Proposed Recommended Order have been rejected as unpersuasive and will not be discussed herein.

[2]/ Because DOAH is always independent of the letting authority, see § 120.65(1), Florida Statutes, it might be preferable to label bid protests before DOAH a form of inter-agency review or, alternatively, intra-branch review; however, because the letting authority itself ultimately renders the final order, the first district's nomenclature is not incorrect.

[3]/ The term "standard of proof" as used in § 120.57(3)(f) reasonably may be interpreted to reference standards of review. This is because, while the "standard of proof" sentence fails to mention any common standards of proof, it does articulate two accepted standards of review: (1) the "clearly erroneous" standard and (2) the abuse of discretion (= "arbitrary, or capricious") standard. (The "contrary to competition" standard——whether it be a standard of proof or standard of review——is unique to bid protests.)

[4]/ An ultimate factual determination is a conclusion derived by reasoning from objective facts; it frequently involves the application of a legal principle or rule to historical facts: e.g. the driver failed to use reasonable care under the circumstances and therefore was negligent; and it may be infused with policy considerations. Reaching an ultimate factual finding requires that judgment calls be made which are unlike those that attend the pure fact finding functions of weighing evidence and choosing between conflicting but permissible views of reality.

[5]/ From the general principle of deference follows the more specific rule that an agency's interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of permissible interpretations. State Bd. of Optometry v. Florida Soc. of Ophthalmology, 538 So. 2d 878, 885 (Fla. 1st DCA 1988); see also Suddath Van Lines, Inc. v. State Dept. of Environmental Protection, 668 So. 2d 209,

212 (Fla. 1st DCA 1996). However, "[t]he deference granted an agency's interpretation is not absolute." Department of Natural Resources v. Wingfield Development Co., 581 So. 2d 193, 197 (Fla. 1st DCA 1991). Obviously, an agency cannot implement any conceivable construction of a statute or rule no matter how strained, stilted, or fanciful it might be. Id. Rather, "only a permissible construction" will be upheld by the courts. Florida Soc. of Ophthalmology, 538 So. 2d at 885. Accordingly, "[w]hen the agency's construction clearly contradicts the unambiguous language of the rule, the construction is clearly erroneous and cannot stand." Woodley v. Department of Health and Rehabilitative Services, 505 So. 2d 676, 678 (Fla. 1st DCA 1987); see also Legal Environmental Assistance Foundation v. Board of County Com'rs of Brevard County, 642 So. 2d 1081, 1083-84 (Fla. 1994)("unreasonable interpretation" will not be sustained).

[6]/ The same standard of review also applies, in a protest following the announcement of an intended award, with regard to preliminary agency action taken upon the agency's interpretation of the project specifications——but perhaps for a reason other than deference to agency expertise. Section 120.57(3)(b), Florida Statutes, provides a remedy for badly-written or ambiguous specifications: they may be protested within 72 hours after the posting of the specifications. The failure to avail oneself of this remedy effects a waiver of the right to complain about the specifications per se. Consequently, if the dispute in a protest challenging a proposed award turns on the interpretation of an ambiguous, vague, or unreasonable specification, which could have been corrected or clarified prior to acceptance of the bids or proposals had a timely specifications protest been brought, and if the agency has acted thereafter in accordance with a permissible interpretation of the specification (i.e. one that is not clearly erroneous), then the agency's intended action should be upheld——not necessarily out of deference to agency expertise, but as a result of the protester's waiver of the right to seek relief based on a faulty specification. If, however, the agency has acted contrary to the plain language of a lawful specification, then its action should probably be corrected, for in that event the preliminary agency action likely would be clearly erroneous or contrary to competition; in that situation, there should be no waiver, because a reasonable person would not protest an unambiguous specification that facially conforms to Florida procurement law.

[7]/ If Section VI were found to be ambiguous as a matter of law, then the Board's preliminary action would be upheld, provided the Board acted in accordance with a permissible interpretation of the specifications at issue. See endnote 6, supra, and accompanying text.

[8]/ If "should" were intended to mean "shall" in the subject sentence, as E-Builder urges, then Section VI would contain both a mandate to provide the listed services and a prohibitory command not to provide only those services. Under E-Builder's construction, in other words, the successful proposer would be required to provide the enumerated services——and then some.

[9]/ Here, the word "should" is used in its capacity as the past tense of "shall." Note, in contrast, that "should" was not used as the past tense of "shall" in the first sentence of Section VI.

[10]/ Because the word "should," like many words in the English language, can have different shades of meaning depending on the context, judicial interpretations of the term "should" as used in other situations are of relatively limited value. Indeed, although the parties have found some cases in which "should" was given a mandatory connotation, and others wherein "should" was deemed directory or permissive, none is on point. Compare United States v. Anderson, 798 F.2d 919, 923-24 (7th Cir. 1986)(holding that, where the relevant ethical canon provides that a judge "should not" engage in ex parte communications, jury properly may be instructed that the Code of Judicial Conduct requires the presence of both sides in judicial proceedings because the word "should" is commonly interpreted to mean "shall"), with State of Florida v. Thomas, 528 So. 2d 1274, 1275-76 (Fla. 3d DCA 1988)(procedural rule specifying that "statutory maximum sentence should be imposed" in a particular situation left room for exercise of judicial discretion because, read in context, the term "should" was directory rather than mandatory). In this case, in arriving at what is considered to be the plain and natural meaning of Section VI, the undersigned has relied less on previous appellate decisions than on common sense and a practical understanding of modern usage.

[11]/ The undersigned views the relative clause, in this context, as being somewhat stronger than precatory; the word "should" here, it seems, is not so much expressing a wish as forcefully instructing would-be proposers that the enumerated items had better be included——or equivalent or superior services offered

in their stead. Thus, while the relative clause was not meant to be mandatory, the Evaluation Committee nevertheless was justified in rejecting one of the proposals as inadequate for failing to include a sufficient number of the enumerated items without offering acceptable alternative solutions.

[12]/ As used in the accompanying text, the words "arguably" and "strictly" should be emphasized, for the undersigned is not persuaded that Constructware's proposal was materially deficient even if Section VI were construed to impose mandatory requirements. Although it is not necessary to explore this subject in detail, the undersigned believes that Constructware's proposal is in substantial compliance, at least, with Section VI, and he would be hard-pressed to declare that any of the alleged deviations were material deviations. In this regard, the undersigned is mindful that while "a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. [A deviation] is material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. State Dept. of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986). "The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders." Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

[13]/ The Board's decision that Constructware's proposal materially complied with Section VI was an ultimate factual determination and therefore is entitled to some deference in this proceeding. See endnote 4, supra, and accompanying text.

[14]/ § 287.012(1) provides that:

> "Agency" means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. "Agency" does not include the university and college boards of trustees or the state universities and colleges.

[15]/ As the court noted in Dunbar, there is one exception to this general statement regarding the chapter's scope. The

Consultants' Competitive Negotiation Act, which is codified in § 287.055, employs a special definition of "agency" that specifically includes school boards. See § 287.055(2)(b)("'Agency' means the state, a state agency, a municipality, a political subdivision, a school district, or a school board."). As a result, school boards must comply with § 287.055 when they purchase "professional services" as defined in § 287.055(2)(a). In this case, however, the Board is not seeking to acquire "professional services" within the meaning of § 287.055(2)(a). Thus, the Consultants' Competitive Negotiation Act is not presently relevant.

[16]/ In R. N. Expertise, Inc. v. Miami-Dade County School Board, et al., DOAH Case No. 01-2663BID, 2002 WL 185217 (Fla.Div.Admin.Hrgs. 2002), the undersigned entered a Recommended Order, which the Board later adopted in toto, wherein it was urged that the Board's preliminary decision to award a contract for drug screening services be rescinded——in part because the award would have been contrary to Section 287.057(2) and other provisions of Chapter 287, Part I. In that case, however, the Board did not timely bring the Dunbar decision to the undersigned's attention, or otherwise suggest that the provisions of Chapter 287 not be applied as governing statutes, as was done here. (Moreover, as it happened, any error in the application of Chapter 287 in R. N. Expertise was harmless, because the outcome would have been the same regardless.) To the limited extent that R. N. Expertise is in conflict with Dunbar, the undersigned must recede from the former in favor of the latter.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 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.