

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EXPERIOR ASSESSMENTS, LLC,)
)
 Petitioner,)
)
vs.) Case No. 03-1722BID
)
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
 Respondent,)
)
and)
)
PROMISSOR, INC., and)
PSYCHOLOGICAL SERVICES, INC.,)
)
 Intervenors.)

)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal proceeding and hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted on June 9, 2003, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Wendy Russell Weiner, Esquire
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Tallahassee, Florida 32301

For Respondent: Joseph M. Helton, Jr., Esquire
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Department of Business and
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For Intervenor: Paul R. Ezatoff, Esquire
Promissor, Inc. Katz, Kutter, Alderman & Bryant, P.A.
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301

For Intervenor: Michael P. Donaldson, Esquire
Psychological Carlton Fields Law Firm
Services, Inc. 215 South Monroe Street, Suite 500
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issues to be resolved in this proceeding are delineated with particularity in the Joint Pre-hearing Stipulation executed by all parties; however, the issues generally are as follows:

1. Whether Experior has standing to challenge the RFP Process.
2. Whether Promissor was a qualified or responsive proposer.
3. Whether Experior's cost proposal was entitled to the maximum points if Promissor's proposal is determined to be unqualified or non-responsive.
4. Whether the scoring of the proposals by Evaluator three was affected by his bias or was so aberrant as to be unsupportable or illogical or in violation of the RFP.
5. Whether DBPR's award of MBE/WBE preference points to Experior and PSI was inappropriate and should be eliminated.

6. Whether Experior suffered an unfair competitive disadvantage.

PRELIMINARY STATEMENT

This is a contract award protest filed by the Petitioner, Experior Assessments, LLC, (Experior). That entity challenges a proposed award of a contract for computer-based testing services to the Intervenor, Promissor, Inc. (Promissor) by the Department of Business and Profession Regulation (Department).

Promissor and Psychological Services, Inc. (PSI) filed Motions to Intervene which were granted by the undersigned. Prior to the hearing, the Department filed a Motion to Dismiss and a Motion in Limine. Promissor also filed a Motion to Dismiss Experior's Petition for Formal Administrative Hearing or Motion to Strike Impertinent Allegations. Both sets of motions challenged standing by Experior to bring this action. The motions challenged the viability of many allegations raised in the formal protest. The motions were denied without prejudice to the issues represented by them being raised at trial.

Immediately prior to the hearing, the parties submitted a Joint Prehearing Stipulation (Stipulation) and nine joint exhibits.

The cause came on for hearing as noticed. Experior presented the testimony of two witnesses and submitted 11 exhibits at the Final Hearing. Experior's Exhibit two was not identified or offered at hearing. Promissor offered the testimony of one witness and submitted 11 exhibits which were admitted into evidence. The Department did not call any witnesses or present any exhibits. The Intervenor, PSI,

presented no witnesses and offered no exhibits. Upon conclusion of the proceedings, the parties requested a transcript thereof and availed themselves of the right to submit proposed recommended orders. Those proposed recommended orders have been timely filed and have been considered in the rendition of this Recommended Order. All citations are to Florida Statutes (2002) unless otherwise indicated.

FINDINGS OF FACT

1. The Department first decided to seek proposals for computer-based testing (CBT) services on March 29, 2002, when it issued RFP 01-02-001. General Condition Number Seventeen of that RFP stated that any material submitted in response to the Request for Proposal will become a public document pursuant to Section 119.07, including any material which a responding proposer might consider confidential or a trade secret. Any claim of confidentiality was waived upon submission. Experior never protested that General Condition Number Seventeen in that first RFP. The cost proposals submitted by all proposers in response to that first RFP became public record after the Department posted the notice of intent to award the contract to Experior on September 17, 2002. Promissor and PSI filed notices of intent to protest and formal written protests. In response to those protests, however, the Department decided to reject all proposals. Experior then challenged the rejection of all proposals by filing a notice of intent to protest on October 24, 2002, but ultimately withdrew that protest on October 31, 2002.

2. Thereafter on January 13, 2003, the Department issued requests for proposal RFP 02-03-005 (the RFP), seeking proposals for the provision of computer-based testing services for several professions regulated by the Department. That is the RFP with which this case is concerned.

3. Questions arose by potential vendors at a Pre-Proposal Conference, which was held on January 21, 2003. Representatives of the Department, Experior, Promissor, and PSI attended. Amendment One to the RFP grew out of that conference and was issued on February 3, 2003. This amendment contained the written questions and the Department's answers and the minutes of the Pre-Proposal Conference.

4. The Department appointed certain employees to serve on the evaluation committee. The employees who were appointed were Karen Campbell-Everett; Steven Allen; Mollie Shepard; Alan Lewis; Milan Chepko (alternate) and Joe Muffoletto (alternate). Additionally, Department employee Valerie Highsmith was appointed to evaluate proposer references. Ultimately, alternate evaluator Joe Muffoletto replaced evaluator Steven Allen due to the death of Mr. Allen's father. Amendment One to the RFP then identified the evaluators and informed all proposers that the educational and professional background of each evaluator could be obtained by making a public records request.

5. The protest filed by Experior alleges that evaluator Joe Muffoletto was not appropriately qualified. Experior did not file a challenge to the evaluators within 72 hours after they were identified in RFP Amendment One. Realistically this would

have been difficult to do unless they already knew what the objections to qualifications might be, since Amendment One, in identifying the evaluators, informed the proposers that they would need to make a public records request to obtain the educational and professional background of each evaluator.

6. In any event, preponderant evidence shows that Mr. Muffoletto's experience is sufficient to constitute "experience and knowledge in program areas and service requirements" for the CBT contract within the meaning of Section 287.057(17)(a) (which only requires that evaluators "collectively" have such experience). Mr. Muffoletto has a bachelor's degree, with a major in English and a minor in psychology. He holds a master of science degree in education and master of arts degree in multi-disciplinary studies and has completed the graduate level course called "assessment of learning outcomes" at Florida State University. Before working for DBPR, in 1996, he was a junior high and high school English teacher for 30 years. He has worked as a computer trainer for students taking the New York State Regents Competency Exam. In 1996-1997 he was an OPS test editor with DBPR and from 1997 to 1999 worked for the Florida Department of Education as a coordinator of test development, where he trained consultants on how to write test items, review test items, and amend test content outlines and blue prints. While in that position, he also wrote an RFP and developed a set of exams. Since 1999 he has been a psychometrician with DBPR and currently develops computed-based examinations for landscape architects and auctioneers and regular examinations for electrical contractors.

7. Promissor, Experior and PSI each submitted responses to the second RFP. The technical proposals were distributed to members of the evaluation committee for review sometime after a standardization session for evaluators was conducted on February 11, 2003. The members of the evaluation committee separately conducted an analysis of each proposal and awarded points based on their review. Each evaluator submitted his or her completed technical evaluation guides or score sheets to Lyra Erath, who then forwarded the score sheets to the lead evaluator, Molly Shepard. The evaluation of the proposer references was completed by Valerie Highsmith and her score sheets for such evaluations were submitted to Bobby Paulk.

8. On February 27, 2003, the Department opened the cost proposals, which reflected the following prices proposed per hour: Promissor: \$9.00; Experior: \$10.50; PSI: \$11.35; and NCS Pearson: \$14.75. The score for each cost proposal was calculated in accordance with a mathematical formula set out in the RFP. Promissor proposed the lowest cost and thus received the maximum cost score of 175 points. Experior received 150 points, PSI 138.77 points, and NCS Pearson 106.79 points. Upon concluding the evaluation process established by the RFP, Promissor's proposal was ranked first with 490.08 points out of a maximum available 555 points. PSI was second place, being awarded 461.40; Experior was awarded 440.03 points and NCS Pearson, 305.16 points.

9. The bid/proposal tabulation was posted by the Department on March 12, 2003. Therein it indicated its intent to award the

contract for CBT Services to Promissor. On March 17, 2003, Experior and PSI filed notices of intent to protest the intended award to Promissor. Experior thereafter timely filed a formal written protest, although PSI did not.

ISSUES TO BE RESOLVED

The Time Period for Contract Implementation

10. Experior's protest alleges that the time period for contract implementation was allegedly "too aggressive" (short). The RFP however, repeatedly notified all proposers that they would waive any protest of the terms and specifications of the RFP unless they filed such protest within 72 hours of receiving notice of the specifications, as provided in Section 120.57(3). Similarly, RFP Amendment One informed the proposers that the RFP was amended to include "changes and additions" and that failure to file a protest within the time specified in Section 120.57(3) would constitute a waiver of Chapter 120 proceedings.

11. RFP Section V, states "A. DBPR estimates that the contract for the RFP will be effective on or about March 17, 2003, and the testing services begin May 19, 2003." The 30-day periods the protest claims were "too aggressive" (i.e. too short) were specifically disclosed in RFP Section X concerning "scope of services." The time period of which Experior now complains was apparent on the face of the RFP. Indeed, when Experior's personnel first read the RFP, they had a concern that the time period might give Promissor a competitive advantage. At the Pre-Proposal Conference on January 21, 2003, Mark Caulfield of Experior even expressed concern that the 60 days allowed for

implementation was a very aggressive schedule and asked the Department to reconsider that time period. The concern over the implementation schedule was documented in written questions which DBPR answered in Amendment One, telling all proposers that the implementation schedule was fair, in its view, and would not be changed.

12. Experior did not protest the RFP's implementation time period within 72 hours of first reading the RFP and never filed a protest to any term, condition or specification of RFP Amendment One, including the Department's notice that it felt that the implementation schedule was fair and that it would not be amended. Thus, any challenge to the implementation schedule was waived.

13. Even had Experior not waived its challenge to the implementation schedule, there is no persuasive evidence that the schedule would give Promissor an unfair competitive advantage over Experior and PSI. The DBPR tests are already finalized and would simply have been transferred to a new vendor if a new vendor had been awarded the CBT Services Contract. Experior failed to adduce persuasive evidence to show that any proposer was advantaged or disadvantaged by the implementation schedule which applied to all proposers.

Evaluation of the MWBE Submittals

14. RFP Section XIV.Q. encouraged minority and women-owned businesses (MWBE) to provide work goods, or services associated with services contemplated by the RFP. Proposers were to be awarded additional points for committing to use MWBEs, based on

the percentage of the business under the contract the MWBE would perform.

15. Experior, Promissor and PSI each proposed to use MWBEs to supply goods or services needed to perform the CBT contract. Promissor indicated that it would use one MWBE for 30 percent of the contract value. Resultingly, the Department awarded Promissor 16.5 MWBE preference points (30 percent x 55 maximum points).

16. Experior presented no persuasive evidence showing how the Department interpreted and applied the MWBE provisions of the RFP or showing that the Department acted in excess of its authority in determining the award of MWBE points, as described in Amendment One. Experior offered no evidence concerning whether the Department considered or applied the "two subcontractor" limitation in RFP Section VI.5 ("no more than two subcontractors may be used") when it evaluated the Experior and PSI MWBE proposals, nor how it applied that limitation.

17. Experior and PSI both indicated they would use three MWBE vendors. Experior proposed to use JR Printers (Printing Services); Colamco, Inc. (computer equipment for testing centers); and Workplace Solutions, Inc. (furniture for testing centers). (Furniture is a commodity, not a service.) PSI proposed to use Victoria and Associates (staffing services); Franklin's Printing (printing/ mailing services); and National Relocation Services, Inc. (furniture, computers, delivery and installation [commodities, not services]). Based on the proposals, the Department awarded Experior 7.15 points and

awarded PSI 17.48 points.

18. Although Experior claims that it and PSI each exceeded the two subcontractor limitation by proposing to use three MWBEs, RFP Section XIV.Q. did not specifically require that proposed MWBEs be subcontractors, but rather only required that MWBEs be utilized by the primary vendor (contractor) to provide work, goods or services. Thus a vendor of goods or a supplier of services could qualify as an MWBE (and, implicitly, not necessarily be a subcontractor). Experior did not prove that any of the MWBEs proposed by PSI or Experior were actually subcontractors on an ongoing basis. The parties stipulated that the companies that each proposed to use were vendors. Moreover, when questioned about the provisions of Section VI regarding subcontracting of services under the RFP, Jerome Andrews, chief of purchasing and human resources, differentiated the purchase of services from the purchase of commodities as being defined by statute. (See Sections 287.012(4) and 287.012(7).)

19. Experior did not explain or offer persuasive evidence relating to its allegation that PSI's proposal for MWBE services was misleading. Experior did not show that PSI's MWBE proposal did not conform to the RFP requirements or, if there were a defect, how many points, if any, should be subtracted from PSI's total. Moreover, to the extent that Experior claims that the proposal was defective because PSI's proposed suppliers would not provide services over the course of the entire contract, Experior's proposal suffers the same defect, as Experior's proposal admits that "[c]omputer equipment and furniture services

will be performed during the implementation phase of the contract." Thus, if PSI's MWBE point award had to be reduced, so would Experior's. Experior fail to carry its burden to show any error in the scoring of the PSI MWBE proposal. It did not establish that these vendors were subcontractors and thus did not establish that the relevant vendors were of a number to exceed the subcontractor limitation in the RFP. It did not persuasively establish that such would have been a material defect, if it had been exceeded.

Completion of Evaluation Sheets

20. Some of the RFP's evaluation criteria identified the number of points available and state that such points would be "awarded as a whole and not broken down by sub-sections." In contrast, the remainder of the evaluation criteria simply stated that a specific number of points was available for each specified criterion. In each instance where the evaluation criteria stated that points are "awarded as a whole and not broken down by subsections," the corresponding section of the RFP was broken down into two or more subsections. In each instance where the evaluation criteria simply listed the number of points available, the corresponding section of the RFP was not broken down into subsections.

21. Experior alleged that the evaluators did not properly score Experior's proposal in instances where the evaluation sheet indicated "points are to be awarded as a whole and not broken down by subsections." Experior offered no proof regarding how the Department interpreted that provision or the manner in which

the scoring was actually conducted, however. The score sheets reflect that the evaluators actually did award points "as a whole," not broken down by subsections, for those evaluation criteria where that was required. The record does not support any finding that the Department or its evaluators violated the requirements of the RFP, Department policy or controlling law and rules in this regard.

Issue of Bias on the Part of Evaluator Three

22. Experior contends that Evaluator Three, Mr. Muffoletto, was biased against Experior. The persuasive evidence does not support that allegation. During his employment with the Department, Mr. Muffoletto interacted with Experior on one occasion regarding reciprocity of an out-of-state examination. This experience left him with the impression that Experior was "proprietary" because it was protective of the content of its examinations. The evidence did not show he had any other impressions, positive or negative, concerning Experior or misgivings about Experior being selected in the first RFP.

23. The mere fact that his total score for Experior was lower than those awarded by other evaluators does not establish bias or irrationality in scoring. The evidence shows that Mr. Muffoletto scored the proposals in a rational manner. He appeared to evaluate criteria comparatively and gave a proposer more points if that proposer was more convincing than another on a particular criteria or point of evaluation. He gave lower scores when the proposer simply copied the text of the RFP and then stated that the proposer would meet or exceed the criteria;

in accordance with instructions that evaluators could give lower scores in such cases, so long as the scoring was consistent between proposals. Mr. Muffoletto gave higher scores when the proposers gave more individualized responses, provided more thorough statistics and ways to interpret those statistics, gave numerous specific examples and had a more attractive presentation.

24. Even if Mr. Muffoletto had been biased, it has not been persuasively shown that such would have a material impact on the outcome of the evaluation. If the scores of Evaluator Three were completely eliminated for both PSI and Experior, which is not justified, PSI's point total would be 459.12 and Experior's point total would be 453.54. If Evaluator Three were deemed to give Experior scores equivalent to the highest scores awarded to Experior by any other evaluator, PSI's total would be 461.42 and Experior's point total would be 458.87. Even if Evaluator Three had given Experior the maximum points for each criterion, PSI's point total would have been 461.42 and Experior's point total would have 461.12.

Issue of Prior Knowledge of Experior's Prior Cost Proposal

25. Experior contends that Promissor's knowledge of Experior's cost proposal submitted in response to the first RFP in 2002 gave Promissor an unfair competitive advantage. Experior waived that challenge, however, when it withdrew its protest to the rejection of all bids submitted in response to the first RFP. Experior knew when it filed and withdrew its protest to the first RFP decision that all cost proposals had become public record and

so it was incumbent on Experior to have challenged the issuance of a second RFP, if it had a legal and factual basis to do so. At the latest, Experior should have challenged the second RFP specifications when issued (within 72 hours) as Experior had already obtained the other proposers' cost proposals and so it knew then that the prior cost proposals were available to all for review.

26. Even if Experior had not waived that challenge, the evidence does not support a finding that Promissor gained any competitive advantage. Although Experior attempted to show, through the testimony of Mark Caulfield, that Promissor could not perform the CBT Services Contract at a profit at the \$9.00 per hour price it proposed, Mr. Caulfield actually testified that it would be possible for a company to perform the services for \$9.00 per hour, and he did not know what Promissor's actual costs were. Moreover, there is no persuasive evidence that Experior's prior cost proposal played any role in Promissor's determination of its bid for the second RFP or, if it did, that such consideration would have violated any provision of the RFP, governing statutes or rules or Department policies, under the prevailing circumstances, if it had occurred.

Alleged Improper Scoring of Experior's Proposal with Respect to Criterion VII.A.

27. Experior alleged that Evaluator One should have awarded 15 points instead 11 points for Experior's proposal format, criterion VII.A., but Experior did not offer the testimony of Evaluator One or any other evidence supporting that allegation.

Experior failed to carry its burden of showing that the award of 11 points to Experior for criterion VII.A., was irrational or violated the requirements of the RFP or controlling policies, law or rules of the Department. Even if Evaluator One had awarded 15 points for that criterion, Experior admitted it would have no material impact on the outcome of the procurement, given the more than 21 point advantage PSI enjoyed over Experior.

Responsiveness and Qualification

28. The preponderant evidence does not establish that Experior was entitled to but did not receive the additional 21.38 points that it would have to earn to score higher than PSI and move into second place. Experior did not establish error in the evaluation or scoring of its proposal or PSI's proposal that alone, or collectively, would be sufficient for Experior to overtake PSI. As a result, Experior could only prove its standing ahead of PSI by having the Promissor proposal disqualified, which would move it to the first-ranked position because of accession of the full 175 points for having what, in that event, would be the lowest cost proposal.

29. Experior's objection to the Promissor proposal is not meritorious. Its protest alleges that "because Promissor will [allegedly] subcontract for services representing more than 33 percent of contract value, Promissor is disqualified from submitting its proposal and its proposal must be stricken from consideration." Experior did not allege any error in the scoring of Promissor's proposal and so Promissor's highest score cannot be changed. Indeed, even if Experior were awarded the maximum

technical score of 325 points, Experior's score would be 482.15 points, still less than Promissor's score of 490.08 points. Experior, as a practical matter, cannot earn enough points because of the disparity in final cost proposal scores to overtake Promissor, unless it can prove Promissor should be disqualified.

30. Experior's proof did not amount to preponderant, persuasive evidence that the Department erred in determining that Promissor's proposal was responsive and that Promissor was a qualified proposer. The Department did an initial review of the proposals to determine if they were responsive to all mandatory requirements, and any proposer determined non-responsive would have been excluded at that point. Promissor's proposal contained all required information in the required format and was deemed responsive. The preponderant evidence shows that the Department's determination that Promissor was responsive and qualified comported with the requirements of the RFP and controlling policy, rules and law. Promissor expressly stated that it would comply with the RFP's subcontracting guidelines upon performing the contract wherein it stated "Promissor agrees and commits to meet the requirement of the RFP." Promissor's proposal stated its intent to subcontract less than 33 percent of the contract value, and that was all that was required for the proposal to be responsive. There is nothing in the Promissor proposal that indicated that Promissor would not comply with the subcontracting guidelines.

31. Experior's entire challenge to the Promissor proposal

is based on the contention that Promissor intended to use a subcontractor to provide call center services under the Florida contract but did not say so in its proposal. The Promissor proposal actually stated that Promissor would use its "proprietary scheduling system" or "proprietary reservation system" to service the Department's contract as it was currently doing, not that it would use any particular call center. These representations appear to be true, as Promissor's "scheduling system" or "reservation system" (the proprietary software Promissor uses to take reservations) that it said it would use for the new Florida contract is the same system used under the prior contact with the Department.

32. Ordinarily, whether or not Promissor would actually comply with the subcontractor guidelines could not be determined until Promissor actually performs the contract. It is an issue of contract compliance and not responsiveness or qualification. Here the evidence shows that Promissor was in compliance with the 33 percent maximum subcontracting requirement before the originally scheduled contract implementation date. Since Promissor wished to obtain the maximum points for minority participation, Promissor decided to subcontract to the maximum possible extent with an MWBE. In doing so, Promissor wanted to assure that the use of Thompson Direct, Inc., for call center services did not make it exceed the 33 percent subcontractor standard. Thus, Promissor decided, before it submitted its proposal, to perform the call center services from one of its three regional centers and this decision was communicated

internally before Promissor prepared its proposal.

33. Promissor initially intended to perform the call center services from its regional offices in Atlanta, Georgia. In order to implement that decision, senior executives of Promissor, including its president, toured that office in early March, before the Department posted its notice of intent to award to Promissor. After the notice of award was posted on March 12, 2003, Promissor promptly posted an employment advertisement on its website seeking persons to act as call center representatives to service the Florida contract from the Atlanta office. That advertisement was posted on March 14, 2003, a day before Experior filed its notice of intent to protest.

34. In early to mid-April, the manager of the Georgia regional office prepared a project plan that revealed that the Georgia regional office might not be ready to perform call center services by the May 20th contract implementation date. Promissor then decided to use its Maryland regional office to perform the call center services.

35. Regardless of the location of the call center, the scheduling system used by Promissor would be the same as under the prior contract and the same as Promissor promised in its proposal. The Scranton call center and the three regional offices use the same proprietary scheduling system provided by Promissor and run from servers located at Promissor's headquarters in Bala Cynwyd, Pennsylvania. Even at the Scranton call center that was previously used, Promissor trained all of the employees, who handle calls only for Promissor, wrote the

scripts for their use and provided the proprietary scheduling software.

36. The Maryland call center was actually accepting all calls for the Florida programs to be serviced pursuant to the RFP by May 19th, before the May 20th contract implementation date. Since the call center services were actually being provided by Promissor's Maryland regional office before the contract implementation date, Experior's claim that Promissor would provide those services through a subcontractor is not supported by preponderant evidence.

Allegations that Promissor Made Misrepresentations Regarding Subcontractors

37. In light of Promissor's actual provision of call center services from its regional office before the contract implementation date, Experior's contention that alleged misrepresentations occurred in the Promissor proposal are without merit. Even if Promissor had not actually performed, however, Experior failed to prove that Promissor made any misrepresentations or was unqualified.

38. In support of its claim that Promissor was unqualified, Experior introduced into evidence three proposals that Promissor or ASI (a corporate predecessor to Promissor) had submitted to agencies in other states in the past three years. Experior argues that Promissor/ASI made misrepresentations in the other proposals and, therefore, Promissor made misrepresentations in the proposal at issue in this proceeding. Its basis for alleging that Promissor made misrepresentations in the Florida proposal at

issue is its contention that Promissor/ASI made misrepresentations in other proposals to other states.

39. No evidence was offered that Promissor had made a misrepresentation to the Department as to this RFP, however. In light of Promissor's actual performance in accordance with its proposal and the RFP requirements, the proposals from the other states have little relevance. Experior did not prove that Promissor made misrepresentations in the other proposals, particularly when considering the timing of those proposals and Promissor's corporate history.

40. Promissor's corporate history must be considered in evaluating the claim of misrepresentation to the other state agencies in other states. In 1995, Assessment Systems, Inc., or "ASI," was acquired by Harcourt Brace Publishers. In June of 2001, ASI was sold with a number of other Harcourt companies, including a company called Harcourt Learning Direct, to the Thompson corporation. Harcourt Learning Direct was re-named Thompson Education Direct. Soon after, the federal government required, for anti-trust reasons, that Thompson divest itself of ASI. Accordingly, ASI was acquired by Houghton Mifflin Publishers in December 2001, and its name was later changed to Promissor. Up until December 2001, the entity now known as Promissor and the entity now known as Thompson Education Direct were corporate affiliates under the same corporate umbrella.

The Kansas Proposal

41. Experior's Exhibit five was ASI's Proposal for Agent Licensing Examination Services for the Kansas Insurance

Department dated May 8, 2000. A letter that accompanied the proposal stated that ASI would not engage a subcontractor for examination development or administration services. Mark Caulfield testified that he did not know whether or not what was said in this letter was true on the date it was written. He testified that he did not know if ASI was using any subcontractors or any outside contractors for any purpose in May of 2000. In fact, as of May 2000, ASI did not subcontract for any call center services; at the time that the letter was written, all of the representations in the letter were true.

42. ASI was awarded the Kansas contract and Experior did not protest. Experior did not offer any evidence related to the requirements in the Kansas RFP and is not aware of any issues between Kansas and Promissor regarding the contract. There is no evidence that the Kansas request for proposals had any subcontracting limitations in it.

43. The proposal that ASI submitted to Kansas in May 2000 listed a phone number for ASI's call center. In preparation for the hearing, witness Mark Caulfield called that phone number and claimed that a person answered the phone "Promissor," and said she was located in Scranton, Pennsylvania. Experior did not show that the person that answered the phone was an employee of Promissor. Whether or not the person who answered the phone in that example was or was not an employee of Promissor and could or could not bind Promissor with any statement as a party admission, is beside the point that it has not been shown who would have answered the phone in May 2000, or where they would have been

located, as to whether or not that person was the employee of Promissor or its immediate corporate predecessor in interest or whether that person was employed by some subcontractor. That is immaterial, however, in the face of the fact that it has not been proven that the Kansas request for proposals had any subcontracting limitations in the first place and, therefore, no misrepresentation in the Kansas situation has been proven on the part of Promissor.

The Maine Proposal

44. Experior's Exhibit seven is ASI's proposal to provide real estate examination administration and related services for the Maine Department of Professional Regulation and is dated August 1, 2001. As of August 1, 2001, ASI did not subcontract for call center services. On pages 2-10 of the Maine proposal, there is a reference to ASI having an extensive network of program-specific, toll-free telephone lines and program-dedicated customer care representatives. This statement was shown to be accurate and was an accurate statement when made on August 1, 2001. The statement refers to the monitoring of the reservation process done by ASI management. Experior admitted that it had no reason to believe that in August of 2001, ASI did not have an extensive network or program-specific toll-free telephone lines and program-dedicated customer care representatives, and Experior did not prove that to be currently untrue.

45. Experior's Exhibit eight is Promissor's Real Estate Candidate handbook regarding the Maine procurement dated April 2003. As of April 2003, the statements made in the handbook were

accurate and correct. The handbook listed on page 11 a customer care phone number of 877-543-5220. Experior provided no evidence as to the location where that phone number rang in April of 2003. Experior did not show persuasive evidence regarding the requirements in the Maine RFP and there is no evidence that the Maine RFP had any subcontracting limitations as are in question in the instant case.

The Oklahoma Proposal

46. Experior's Exhibit nine was Promissor's response to Bid No. N031354 for License Testing Services for the Oklahoma Insurance Department. It is dated December 18, 2002. Promissor did not state in the proposal that it would not use subcontractors. There is no need to reference subcontractors in the Oklahoma proposal as the Oklahoma RFP did not contain subcontracting limitations. Oklahoma has approved the manner in which Promissor is performing under that contract and Experior did not establish that the statements in Promissor's proposal were false when made or now.

The Texas Proposal

47. Experior's Exhibit twelve is Promissor's press release titled "Texas Selects Promissor as Exclusive Provider for Insurance License Testing," dated October 1, 2002, in which Promissor referred to "the Promissor Call Center." Experior did not establish that Texas was not served by a Promissor call center or that Promissor was not performing in the manner its Texas proposal promised. In fact, Texas has approved Promissor's performance under the Texas contract.

48. Even if the proposals Promissor offered had stated that Promissor would provide call center services through a specified entity (which they did not do), and then Promissor later performed such services through another entity, such evidence would be insufficient to prove that Promissor would not comply with the Florida RFP's subcontracting guidelines, especially given Promissor's actual performance in accordance with its proposal.

49. Experior did not establish with preponderant evidence a "routine business practice" of Promissor to make misleading or false promises in proposals to evade subcontracting guidelines. There is no evidence in any of the four states concerning which Experior provided evidence, that they had any subcontracting limitation in their RFPs. The evidence showed that the statements in each of these proposals were undoubtedly accurate at the time they were made; to the extent that the provision of call center services differs from what was promised (although the evidence does not establish that), such difference is explained by the changes in corporate structures that have occurred since the proposals were submitted. Additionally, the evidence established that Promissor has submitted between 70 and 120 proposals since the beginning of 2000 across the nation. The documents relating only to other proposals to other states that were not even proved to have requirements similar to Florida's are insufficient to establish that Promissor had a "routine" practice of making misleading promises about its call center services. Accordingly, the Petitioner has not offered

preponderant, persuasive evidence that Promissor is unqualified as a proposer.

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Section 120.569, 120.57(1) and 120.57(3). Procurement of CBT services is governed by the provisions of Section 287.

51. Promissor and PSI, respectively, were the first- and second-ranked proposers in the Department's evaluation consideration in arriving at its initial decision on awarding of the contract. Thus, both Promissor and PSI have standing to intervene in this proceeding.

Scope of the Proceeding

52. Experior, as the party challenging the Department's award of the contract to Promissor, must bear the burden of demonstrating by preponderant evidence that the award of the contract to Promissor was contrary to the terms of the RFP, Department policy and governing statutes and rules, to such an extent as to be clearly erroneous, contrary to competition, arbitrary or capricious. See Section 120.57(3)(f); *Florida Department of Transportation v. J.W.C., Inc.*, 396 So. 2d 778, 788 (Fla. 1st DCA 1981) (burden of proof is on the party asserting affirmative of the issue).

53. In resolving that issue, the administrative law judge conducts a de novo evidentiary hearing to determine if the agency's actions were "contrary to governing statutes, agency

rules or policies, or the bid or proposal specifications." Section 120.57(3)(f). The First District Court of Appeal has construed the term "de novo proceeding" as used in Section 120.57(3)(f) to "describe a form of intra-agency review. The judge may receive evidence, as with any formal hearing under Section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." *State Contracting and Engineering Corporation v. Department of Transportation*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

54. The ultimate issue in this bid protest is whether the agency's proposed action is contrary to the governing statutes, rules or polices or the bid or proposal specifications. In soliciting and accepting proposals, the Department must obey its statutes, rules and the requirements of the RFP. If it breaches that duty, the action is subject to being reversed if its conduct was "clearly erroneous, contrary to competition, arbitrary, or capricious." Section 120.57(3)(f).

55. Experior has the burden of proving by preponderant evidence that the agency's conduct was contrary to the elements of law that apply and/or the RFP specifications and that that conduct violated the standards of Section 120.57(3)(f). See *Syslogic Technology Services, Inc. v. South Florida Water Management District*, DOAH Case No. 01-4385BID (Final Order entered April 12, 2002), app. Dismissed, 819 So. 2d 771 (Fla. 2nd DCA 2002).

Experior's Standing

56. A losing bidder, in protesting a bid, must establish

that it has a substantial interest in the outcome of the protest. *Preston Carroll Co., v. Fla. Keys Aqueduct Authority*, 400 So. 2d 524, 525 (Fla. 3d DCA 1981). A losing bidder must prove that, but for the award to the winning bidder, the losing bidder would have secured the contract. *Id.* See *Brasfiled & Gorrie General Contractors, Inc. v. Ajax Construction Company of Tallahassee*, 627 so. 2d 1200, 1202-03 (Fla. 1st DCA 1993). Generally, the third lowest bidder does not have standing to file a bid protest unless it can prove that the second lowest bidder must also be disqualified. *Metcalf & Eddy, Inc. v. Florida Department of Transportation*, DOAH Case No. 00-0494BID, 2001 WL 872084 (July 30, 2001); See *Preston Carroll Co. v. Florida Keys Aqueduct Authority*, supra. ("Preston Carroll, as third low bidder, was unable to demonstrate that it was substantially affected; it therefore lacked standing to protest the award of the contract to another bidder").

57. Experior, as third-ranked proposer, would have standing only if it proved that there were errors in the evaluation and scoring process by which it would have overtaken the second- and first-ranked proposers. It contends that it should overtake both Promissor and PSI and receive the highest score by disqualifying Promissor and, therefore, earning the highest score for what, in that event, would be Experior's lowest cost proposal. It would thus establish its standing and first place ranking in one motion, so to speak. Experior did not meet that burden.

58. Experior would have standing to challenge the highest-ranked proposer (and earn first rank status) if it could show

that it should have received a higher score than the second-ranked proposer (PSI with 461.40 points) or that the second-ranked proposer should be disqualified. Experior alleged that it would be higher ranked than PSI only if it received additional cost proposal points based on Promissor first being disqualified (at which point Experior would have the lowest cost proposal remaining and the highest number of points). Because Experior did not prove that there were errors in the evaluation and scoring process sufficient to move Experior into at least the second place position, and failed to prove its basis for disqualifying Promissor and thus earning first place status, it failed to prove its standing to challenge the award to Promissor.

Specification Protest Issue

59. In accordance with Section 120.57(3)(b), an entity that fails to timely protest a specification in an RFP waives its right to administrative proceedings under Section 120. The purpose of this provision is to ensure that all questions about RFP specifications are resolved before the agency and the prospective respondents incur the time and expense of preparing a proposal. The Court stated in *Advocacy Center For Persons With Disabilities v. Department of Children and Family Services*, 721 So. 2d 753, 755 (Fla. 1st DCA 1998), "[t]he purpose of the bid solicitation protest provision is to allow an agency, in order to save expense to the bidders and to assure fair competition among them, to correct or clarify plans and specifications prior to accepting bids." (quoting *Capeletti Brothers, Inc. v. Department of Transportation*, 499 So. 2d 855, 857 (Fla. 1st DCA 1986)).

60. Consistent with statutory requirements, the agency repeatedly notified all proposers that protests of RFP terms and conditions would be waived unless filed within 72 hours. The parties stipulated that the so-called "aggressive time frame," of which Experior complains, was set forth in the RFP and that Experior was concerned about it when it first read the RFP. Experior voiced its concern about that schedule at the Pre-Proposal Conference, and DBPR refused, in Amendment One to the RFP, to alter that schedule and also notified the proposers of the need to protest items in Amendment One within 72 hours. Having failed to timely protest the time period at issue, that was set forth in the RFP, Experior waived its right to challenge or object to terms and specifications of the RFP. *See Optiplan, Inc. v. School Board of Broward County*, 1995 WL 1053236 (Fla. DOAH 1995) (adopted in toto 1996), affirmed in part and reversed in part, 710 So. 2d 569 (Fla. 4th DCA 1998) (affirming on the issue of waiver).

61. Experior also waived its challenge or objection to each proposer's knowledge of the other proposers' prior cost proposals. First, Experior admitted that the first RFP expressly provided that all submissions would become public records, but it did not challenge that term of that RFP. Thus, Experior knew when the proposals submitted in response to the first RFP were rejected that they would be available for review by the other proposers (and, in fact, Experior, Promissor, and PSI each obtained each other's prior cost proposals). Secondly, although Experior filed a protest of the rejection of all proposals at

which it could have asserted this issue, it later dismissed that protest. Finally, Experior knew when it received the second RFP that the prior cost proposals were available for review, but it still did not file a protest. Experior had more than one opportunity to protest regarding this issue and failed to do so and has thus waived it, based upon the authority cited above.

62. In point of fact, apparently Experior has candidly abandoned this element of its protest in its Proposed Recommended Order.

Promissor's Qualification

63. Experior has contented that Promissor is unqualified. Although not defined by statute, rule or the RFP, it would seem that the term "qualified proposer" means essentially "responsible vendor," which Section 287.012(24), defines as a "vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance."

64. Experior did not establish by preponderant, persuasive evidence that Promissor is not a qualified or responsible vendor. The allegation in the Petition that Promissor did not meet the requirement for no more than 33 percent subcontractor work at the time it submitted its proposal does not directly

relate to whether Promissor is actually qualified or a responsible vendor.

65. Promissor's proposal did not reference Thompson Direct as a subcontractor and it indicated that Promissor would adhere

to the 33 percent subcontractor requirement. Promissor demonstrated at hearing that its statements in the proposal were true. The preponderant evidence showed that at the time Promissor submitted its proposal, it was aware of the subcontracting guidelines, decided it would not use Thompson Direct Corporation for call center services and had already determined that it would provide call center services in-house if it was awarded the contract. Upon award of the contract, the evidence shows that Promissor commenced establishment of an in-house call center, hiring personnel and renting a facility and, in fact, Promissor was providing call center services from its own Maryland regional center before the date the contract was originally scheduled to commence.

66. In an attempt to demonstrate that Promissor was not a qualified proposer, Experior relied upon three other proposals Promissor or its predecessors submitted to three other states. ASI's year 2000 proposal to Kansas for Agent Licensing Examination Services; ASI's year 2001 proposal to Maine to provide Real Estate Examination Administration and Related Services; and Promissor's year 2002 response to Oklahoma Bid No. N031354 for Licensing Testing Services (the other proposals). Nothing in those proposals was proved to be a misrepresentation, however, and they are irrelevant inasmuch as Promissor was in actual compliance with the Florida RFP and its proposal before the contract implementation date. Promissor was actually providing call center services for those programs from its Maryland regional office by May 20, 2003.

67. Promissor never represented in the other proposals that it would not use Thompson Direct for call center services, and none of the RFPs in those instances had a limitation on the use of subcontractors. In fact, at the time the earliest of the two proposals was submitted, Thompson Direct was a corporate affiliate of Promissor's predecessor company, ASI, and so no subcontracting relationship would have existed. In any event, Promissor's past conduct is not established to be probative of Promissor's future conduct. Under Section 90.404(2)(a), similar fact evidence is only admissible when relevant to prove a material fact in issue, "but it is inadmissible when the evidence is relevant solely to prove bad character or propensity." In essence, Experior is maintaining that because Promissor allegedly conducted its business in a certain manner on three other occasions, it has a propensity to conduct its business in the same manner with regard to the contract at issue (and, therefore, is not responsible and capable of complying with the subcontractor requirement in the RFP). Similar fact evidence, however, as a matter of law, cannot be used to prove propensity.

68. Additionally, the other proposals are not relevant to prove a material fact in issue because they are not similar enough to the proposals and RFP currently at issue to be relevant. *See Metropolitan Dade County v. Zapata*, 601 So. 2d 239, 243 (Fla. 3d DCA 1992). Concerning the contention that the evidence as to the other proposals in the other state show a "routine practice" of Promissor in the manner in which it handled client calls, those examples of corporate conduct are not

sufficient to establish existence of a corporate "routine." Under Section 90.406, Florida Statutes, "[e]vidence of the routine practice of an organization . . . is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice." However, in the instant situation evidence of "corporate routine" of misconduct (misrepresenting excessive use of subcontractors) by evidence that relating to the RFP at issue is not established such alleged misconduct may have occurred on three prior occasions in states over a three year period, especially since Promissor submitted approximately 100 proposals during that period, and no misrepresentation was alleged as to these other proposals. It was not persuasively established that the RFPs in the exemplar stated contained a prohibition or restriction on subcontracting client call services in any event.

69. Further, to the extent that Experior is suggesting that Promissor's proposal was not responsive, that challenge must fail. "Responsive bid," "responsive proposal," is defined as a bid or proposal submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation. See Section 287.012(25). "Responsive vendor" is a vendor that submits a bid, proposal or reply that conforms in all material respects to a solicitation. Section 287.012(26).

"'[R]esponsive refers only to matters of form. A responsive bid means that a bid is submitted on the correct forms, and contains all required information, signatures, and notarizations."

Intercontinental Properties, Inc. v. Department of Health and

Rehabilitative Services, 606 So. 2d 381 (Fla. 3d DCA 1992). The persuasive evidence showed that Promissor's proposal conformed to this standard and it was not demonstrated that the proposal failed to conform to the RFP. Experior alleged that Promissor agreed to subcontract with an MWBE for 30 percent of the contract value, which is within the 33 percent subcontractor guideline established by the RFP. No other provision in Promissor's proposal indicated that Promissor would use subcontractors. While Experior alleged "on information and belief" that Promissor "will subcontract for services representing more than 33 percent of the total contract value," there is no preponderant, persuasive evidence to support such a finding.

70. Experior's protest to Promissor's qualifications in this regard raises an issue of contract compliance and not of qualifications or responsiveness. Because the RFP only required that a proposer indicate its intent to comply with applicable requirements at the time of contract performance, a proposal would be responsive even if the proposer was not in compliance when it submitted its proposal. See State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1978).

Competitive Disadvantage Issue

71. Experior maintains that it was competitively disadvantaged because the proposers had knowledge of each others' cost proposal submissions for the first RFP, in 2002, which was withdrawn by the Department after Promissor and PSI filed formal protests to the award of the contract to Experior. All proposers

knew of each others' prior cost proposals and had the opportunity to use that knowledge in determining their cost proposals for this second RFP. Similarly, all proposers were required to meet the same implementation schedule. Experior also alleges that the RFP's 60-day implementation schedule favored Promissor. As discussed above, however, Experior waived both of these challenges by failing to file protests within the time permitted by statute and the RFP.

72. Moreover, competitive advantage or disadvantage may occur when one or more proposers are treated differently than the other proposers. Competitive advantage or disadvantage is not present when all proposers must follow the same guidelines, meet the same requirements, go through the same evaluation process or possess the same knowledge prior to preparing their proposals. See Correctional Services v. Department of Juvenile Justice, DOAH Case Nos. 02-2966BID/02-2967BID, 2002 WL 31431391 (October 29, 2002) (adopted in toto 2002).

Award of MBE/WBE Preference Points Issue

73. Experior's protest contends that both it and PSI listed three MWBE subcontractors, allegedly in violation of the RFP's two subcontractor limitation. Experior proposed as a remedy elimination of both its and PSI's MWBE preference points.

74. Experior did not prove that either it or PSI proposed use of three MWBE subcontractors. The parties stipulated that Experior and PSI proposed the use of MWBE vendors, and the evidence supports that stipulation. Experior and PSI each proposed the use of at least one furniture vendor, which could

not reasonably be considered a subcontractor, but rather a purveyor or vendor of a commodity. Thus, Experior did not prove that it or PSI violated the RFP's two subcontractor limitation.

75. In referring to the subcontractor limitation, the RFP references it in conjunction with the provision of services by subcontractor. Section 287.012(4) defines "commodity" and Section 287.012(7) defines "contractual service." It is clear that the provision of office furniture and equipment is a provision of commodities. Thus, vendors providing such commodities or goods can be MBE or WBE vendors without being service contractors. See Section XIV, Q of the RFP. Specifically, subparagraph four clearly allows for work, goods or services to be provided by MBE/WBE providers.

76. Thus Experior and PSI have identified vendors from whom office furniture and equipment will be obtained. While the purchase of office furniture and equipment is participation in the overall contract, the above statutory authority shows that furniture and equipment are not services provided under the contract but rather commodities. Moreover, it was not shown that the purveyors of these commodities, Work Place Solutions, Inc., and National Relocation Services, Inc., are or would be service subcontractors. The Department's interpretation of these provisions of the RFP is both consistent with the goal of encouraging minority- and woman-owned business participation and is consistent with the definitions of "commodity" and "contractual services" contained in Section 287.012. Therefore, the Department did not contravene any statute, rule or provision

of Section VI of the RFP and allowing the use of three vendors by Experior and PSI in their MBE/WBE participation plans is not clearly erroneous.

Issue Concerning Misconduct or Scoring Errors

77. The standard for reviewing scoring of an evaluation committee in bid protest proceedings is set forth in *Scientific Games, Inc. v. Dittler Brothers, Inc.*, 586 So. 2d 1128 (Fla. 1st DCA 1991), as follows:

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 decision, when based on an honest exercise' of that discretion, should not be overturned 'even if it may appear erroneous and even if reasonable persons may disagree.' Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988) (quoting *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982) (emphasis in original. '[T]he hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.' *Groves-Watkins*, 530 So. 2d at 914.

Id. at 1131. There was no evidence showing that Mr. Muffoletto was biased and prejudiced against Experior or that he entered the evaluation process with an opinion about Experior that made him unable to fairly evaluate Experior's technical proposal or that of any other proposer.

78. Experior did not establish by preponderant, persuasive evidence that Mr. Muffoletto gave any score to Experior or any other proposal that was not based on a fair and honest judgment as to how well the proposal met with the RFP's evaluation

criteria. Mr. Muffoletto was shown to have relied on his experience and knowledge regarding matters addressed in the RFP and the proposals in deciding what scores to award. If evaluation committee members are required to be experienced and knowledgeable, they must be allowed to rely on that experience and knowledge in evaluating proposals. See *Old Tampa Bay Enterprises v. Department of Transportation*, DOAH Case No. 98-5225BID, 1999 WL 1486402 (May 27, 1999).

79. Since it has not been demonstrated by preponderant, persuasive evidence that Mr. Muffoletto discharged his duties in an unfair, dishonest, irrational, or unreasonable manner, his scoring of the Experior proposal should not be disturbed. See, e.g., *Morall and Carey v. Department of Revenue*, 1995 WL 1053186 (August 31, 1995) where it was held that the inevitable pre-existing relationship between knowledgeable evaluators and incumbent providers does not transform an honest exercise of a evaluator's discretion into arbitrary, fraudulent, dishonest, or illegal exercise of agency discretion.

80. The evaluators' scoring in instances where the evaluation sheet indicated that "points are to be awarded as a whole and not broken down by subsections" was in accordance with the requirements of the RFP. Although Experior contends that criteria stating, for example, "5 points are available. They are awarded as a whole and are not broken down by subsection" to mean that the evaluators could award either 0 points or 5 points but could not award 1, 2, 3, or 4 points, a plain reading shows that the phrase "they are awarded as a whole and are not broken down

by subsections" has a different meaning. The evaluation sheet references specific sections of the RFP. All of the RFP sections for which points were to be awarded as a whole and not be broken down by subsections were comprised of several subsections (for example, Section X.B.5. has subsections a through f). The instruction that "points are not broken down by subsections" merely means that the total points for the section as a whole could not be apportioned by subsection; evaluators could not take the number of subsections, divide it by the total points available for that section, and then award points for each subsection. Instead, the evaluators were directed to view the proposer's response to the section as a whole and award points based on the overall response. Even if that interpretation were within the range of permissible interpretations, Experior did not prove that it was treated differently than other proposers or that revision of the scores would have resulted in any net gain for Experior.

81. In summary, Experior has not carried its burden of proof on any of the issues raised in its protest. The preponderant, persuasive evidence of record does not support finding or conclusions that the Department's evaluation of this RFP was contrary to the governing statutes, rules or specifications of the RFP itself. The preponderant, persuasive evidence does not indicate that Experior's score should be higher than that of PSI, nor higher than that of Promissor. Experior has not established that it should receive the award of the contract or that it has standing to bring the protest in light of

the above findings and conclusions. Accordingly, there is no basis to conclude that the Department's actions are clearly erroneous, contrary to competition, arbitrary, or capricious.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Business and Professional Regulation denying the Petition and approving the intended award of the contract to Promissor, Inc.

DONE AND ENTERED this 22nd day of August, 2003, in Tallahassee, Leon County, Florida.

S

P. MICHAEL RUFF
Administrative Law Judge
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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.