5-25-04

STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES
STATE TECHNOLOGY OFFICE

FILED
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DIVISION OF ADMINISTRATIVE HEARINGS

M/A-COM, INC,

Petitioner,

AP

v.

DEPARTMENT OF MANAGEMENT SERVICES, STATE TECHNOLOGY OFFICE,

Respondent,

and

MOTOROLA, INC.,

Intervenor.
_____/

Final Order No. DMS-04-033

DOAH Case No. 04-1091-BID
STO No. 03-STO-ITN-009

DWD-CLS

FINAL ORDER

This matter is before the undersigned for the purpose of issuing a final order in accordance with sections 120.569 and 120.57, Florida Statutes. After being formally notified of the State Technology Office's intent to award a contract for services to Intervenor, Motorola, Inc., Petitioner, M/A-COM timely filed a Formal Written Protest requesting a hearing. This case was then referred to the Division of Administrative Hearings.

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Don W. Davis, held a formal hearing in this matter on April 26 and 27, 2004, in Tallahassee, Florida.

Subsequent to hearing each party filed a proposed recommended order. A transcript of the proceedings was filed also. Judge Davis issued his recommended order on May 25, 2004,

which is incorporated by reference into this Final Order. On June 4, 2004, Petitioner filed its Exceptions to Recommended Order. On June 14, 2004, Intervenor filed its Responses to Petitioner's Exceptions to Recommended Order.

STATEMENT OF THE ISSUE

Whether the State of Florida, Department of Management Services, State Technology Office (STO), issued a Notice of Intent to Award a contract pursuant to an Invitation to Negotiate to Intervenor, Motorola, Inc., which was contrary to STO's governing statutes, rules, policies, or any applicable bid or proposal specification.

STANDARD OF REVIEW

Subsection 120.57(1)(l), Florida Statutes, provides that an agency reviewing a Division of Administrative Hearings recommended order may not reject or modify the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Florida law defines "competent substantial evidence" as "such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1975). When determining whether to reject or modify findings of fact in a recommended order, an agency may not re-weigh the evidence, judge the credibility of witnesses or interpret the evidence to fit its ultimate conclusions. Heifetz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985). Furthermore, an agency may not create or add to findings of fact because an agency is not the trier of fact. See: Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345, 1347, 1348 (Fla. 1st DCA 1987).

Subsection 120.57(1)(l), Florida Statutes also provides that an agency may reject or modify an administrative law judge's conclusions of law and interpretations of statutes and administrative rules "over which it has substantive jurisdiction" whenever the agency's interpretations are "as or more reasonable" than the interpretation made by the ALJ. Florida courts have consistently applied this subsection's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the ALJ's application of legal concepts such as collateral estoppel and hearsay; but not from reviewing conclusions of law containing the ALJ's interpretation of a statute or rule over which the Legislature has provided the agency administrative authority. See Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001); Barfield v. Department of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001).

RULINGS ON EXCEPTIONS

Petitioner's First Exception

Petitioner excepts to Finding of Fact No. 6 of the Recommended Order on the ground that it is not supported by competent and substantial evidence. Finding of Fact No. 6 provides:

> On November 19, 2003, Respondent posted the initial ranking of vendors selected for further consideration. Petitioner, Intervenor, and Unisys were selected to make presentations regarding their proposed solutions. Petitioner filed a protest with regard to the ranking, pursuant to provisions of Section 120.57(3), Florida Statutes, but subsequently withdrew that protest.

Petitioner first argues in its exception that it did not file a formal "protest," rather the record reflects that it filed a "Notice of Intent to Protest." Petitioner then argues that the filing of its protest was not done "with regard to the ranking." Instead it was "an exception to the terms proposed by Intervenor regarding non-negotiable terms." Petitioner further argues that these exceptions are relevant because the ALJ relies upon these findings "to reach an erroneous

conclusion that Petitioner's challenge to the evaluation process and criteria utilized by the STO prior to negotiations was rendered moot by withdrawal of its protest following STO's posting of November 19, 2003." As a result, the ALJ improperly excluded "relevant evidence and testimony at the final hearing that would have demonstrated that the award to Intervenor was based upon an improper bid evaluation process."

With respect to whether Petitioner filed a formal written protest or simply a notice of protest, Respondent and Intervenor's Joint Exhibit 49, accepted into evidence, reflects that Petitioner did, in fact, file a "notice of protest." Intervenor concedes as much in its Response to Petitioner's Exceptions. To this extent the first part of Petitioner's exception is **ACCEPTED.** The ALJ's finding of fact is modified to reflect that Petitioner filed a "Notice of Protest."

As for the second part of Petitioner's exception, whether Petitioner filed its notice of protest "with regard to the ranking" or because of the Intervenor's qualifications to the solicitation's non-negotiable terms, a review of Respondent and Intervenor's Joint Exhibit 49 - Petitioner's Notice of Protest - and Joint Exhibit 50 - Petitioner's Withdrawal of Notice of Protest - both accepted into evidence, demonstrates that there is an apparent conflict between Exhibit 49 which references Petitioner's filing of its "Notice of Protest of STO's. . .posting of its Initial Rankings" and Exhibit 50 which references Petitioner's "understanding that it is DMS's position that it finds [Intervenor's] exception to the non-negotiable terms to be extraneous language which will not be considered..." As such, the ALJ could reasonably infer from Respondent and Intervenor's Joint Exhibit 49 that Petitioner was filing a notice of protest "with regard to the ranking."

It is an ALJ's function to consider and resolve such conflicts. Boyd v. Dept. of Revenue, 682 So. 2d 1117 (Fla. 4th DCA 1996)("It is the [ALJ]'s function to consider all evidence

presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact."). Assuming arguendo that the undersigned was inclined to accommodate Petitioner's position, when evidence is presented that supports two inconsistent findings, it is the ALJ's role, not the Agency's role, to decide the issue. Boyd, supra; Heifetz v. Dept. of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Accordingly, the second part of Petitioner's exception is **REJECTED**.

As for the remainder of its first exception, Petitioner speculates that the "ALJ's misplaced reliance" upon Finding of Fact No. 6 resulted in the "improper exclusion of relevant evidence and testimony that would tend to show that the award to the Intervenor was based upon an improper bid evaluation process." The Agency has no substantive jurisdiction over the propriety of the introduction or exclusion of evidence during an administrative hearing. Barfield v. Department of Health, 805 So. 2d 1005 (Fla. 1st DCA 2002). Such is within the exclusive purview of the ALJ. Petitioner's speculation is legal argument unrelated to whether there is competent, substantial evidence to support the ALJ's Finding of Fact No. 6. Because there is competent substantial evidence in the record to support the ALJ's finding, Heifetz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985); section 120.057(1)(l), Florida Statutes; the remainder of Petitioner's First Exception is **REJECTED**.

Petitioner's Second Exception

Petitioner excepts to Finding of Fact No. 8 of the Recommended Order on the ground that it is not supported by competent and substantial evidence. Finding of Fact No. 8 provides:

> Respondent formed a team of four negotiators, assisted by a technical subject matter expert, to negotiate with the three finalists. Numerous meetings of the negotiators were convened to make a determination as to which proposed solution constituted the "best value to the state." During that time, Respondent's negotiators engaged in a discussion of vendor replies; face to face negotiating

sessions with vendors; discussion of technical issues with the parties and technical experts; and discussions among themselves as a group.

Petitioner argues that the ALJ's finding infers that negotiators collectively reached a "Best Value" determination when the evidence shows that the negotiators independently arrived at a determination to rank the vendors' proposals and that their determinations were not objectively based. Petitioner also argues that the ALJ's finding that the negotiators discussed technical issues with the technical expert is unsubstantiated and that there is no competent and substantial evidence to support the ALJ's finding that "numerous meetings of the negotiators were convened to make a determination as to which proposed solution constituted the "Best Value for the State."

Petitioner's first point with respect to what may be inferred from Finding of Fact No. 8 is not relevant to whether the finding of fact is supported by competent substantial evidence. Section 120.57(1)(l), Florida Statutes. Accordingly, the first part of Petitioner's exception is **REJECTED**.

Petitioner also argues that the record reflects there is no competent, substantial evidence to support the ALJ's finding that the negotiators discussed technical issues with the technical expert. A review of the record, however, demonstrates that there is competent, substantial evidence to support this portion of the ALJ's finding. See Testimony of John Ford, T. 156; Deposition of Carlton Wells, Jr., Joint Ex. 37, pp.58-59. Accordingly, this portion of Petitioner's Second Exception is **REJECTED**.

With respect to Petitioner's exception that there is no competent, substantial evidence to support a finding that "numerous meetings of the negotiators were convened..." The record reflects that Linda Fuchs, a negotiation team member, testified "we had extensive discussions about each proposal" and "we sent to the vendors information for them to use about the project

and information that we wanted back in return from them, and we did that on two separate occasions." (T. 221, 239). Jonathan Yeaton testified that "we organized days for each of the three vendors to come in so we can literally ask them questions, find their weaknesses, their strong points, after which score them and find out who's the strongest. (T. 264). From this evidence the ALJ could reasonably infer that the negotiators met several times. Because there is competent, substantial evidence to support the ALJ's findings, the remainder of Petitioner's Second Exception is **REJECTED**.

Petitioner's Third Exception

Petitioner excepts to Finding of Fact No. 13 of the Recommended Order on the ground that it is not supported by competent and substantial evidence. Finding of Fact No. 13 provides:

> Petitioner alleges that Respondent used criteria and an evaluation process that was inconsistent with the criteria, evaluation and process set forth in the ITN. Paragraph 4.11 of the ITN is entitled "Evaluation Criteria" and outlines a broad evaluation criteria to obtain "best value for the state" that reads in relevant part as follows:
>
> > Technical Solution (50%): Criteria for this part of the evaluation will be taken from Tabs B and C including system design, local system modifications, functionality, security, standards, and ease of use. This also includes implementation, system support and administration, and training.
> >
> > Implementation, Support and Company Qualifications (20%): Criteria for this part of the evaluation will be taken from Tab D.
> >
> > Cost (30%): Criteria for this part of the evaluation will be taken from Tab E.

Petitioner argues that the ALJ exceeded his discretion by not considering several disputed issues of fact and by excluding issues without justification raised by Petitioner. Petitioner's exception as stated is not an exception to a finding of fact. Rather it is argument that the ALJ abused his discretion by excluding material deemed irrelevant by him over Petitioner's objection.

The Agency has no substantive jurisdiction over the propriety of the introduction or exclusion of evidence during an administrative hearing. Barfield v. Department of Health, 805 So. 2d 1005 (Fla. 1st DCA 2002). Such is within the exclusive purview of the ALJ.

A review of the record demonstrates that Section 4.11 of the ITN is entitled "Evaluation Criteria." (Jt. Ex. 1, p. 042). There is not a detailed description of the evaluation criteria or scoring forms and points for each criterion in Section 4.11, rather there is a broad outline of the evaluation criteria as stated in Finding of Fact No. 13. Section 4.11 also indicates that the goal behind the evaluation is "to obtain the best value for the State." Because there is competent, substantial evidence in the record to support the ALJ's finding of fact, Petitioner's Third Exception is **REJECTED**.

Petitioner's Fourth Exception

Petitioner excepts to Finding of Fact No. 14 of the Recommended Order on the ground that it is not supported by competent and substantial evidence. Finding of Fact No. 14 provides:

> During the first phase of the negotiation, the five evaluation teams were permitted to score responses of vendors by using information from anywhere in a vendor's reply. Nothing in paragraph 4.11 of the ITN specifies that Respondent score every criterion in Tabs B, C, and D.

Petitioner argues there is no evidence to show that there were "phases in the negotiation process...According to the evidence, the five evaluation teams participated in the first phase of the procurement process, the evaluation of written replies." Secondly, Petitioner argues that the ALJ's "finding that nothing in section 4.11 specifies that Respondent score every criterion in Tabs B, C, and D fails to take into account all of the evidence presented as well as the provisions of Chapter 287 governing procurements utilizing an ITN document." By failing to do so Petitioner argues that the ALJ has incorrectly interpreted the law and abused his discretion.

With respect to Petitioner's first argument, it is clear from Findings of Fact Nos. 14 and 15 the ALJ was referring to the "evaluation team" not the "negotiation team" in Finding of Fact No. 14. Accordingly, the first portion of Petitioner's exception is **REJECTED**.

As for the remainder of Petitioner's exception, a review of Section 4.11 (Jt. Ex. 1 p. 043) demonstrates that, in fact, "nothing in paragraph 4.11 of the ITN specifies that Respondent score every criterion in Tabs B, C, and D." Accordingly, because there is competent, substantial evidence in the record to support the ALJ's finding, the remainder of Petitioner's exception is **REJECTED**.

Petitioner's Fifth Exception

Petitioner excepts to Finding of Fact No. 15 of the Recommended Order on the ground that it is not supported by competent and substantial evidence. Finding of Fact No. 15 provides:

> Respondent's negotiation team had extensive discussions on each proposal. Team members reviewed design, implementation, and technology of each vendor's solution to insure that vendors had a full understanding of what was being proposed. Although negotiation team members discussed many of the same criteria used by the evaluation teams, the score sheets of the evaluators were not in front of the negotiators.

Petitioner argues that there is no competent and substantial evidence supporting a finding that the negotiation team had "extensive discussions on each proposal and that the negotiation team members acted to insure that vendors had a full understanding of what was being proposed" or that the negotiation team "discussed many of the same criteria used by the evaluation teams."

The record reflects that Linda Fuchs, a negotiation team member, testified "we had extensive discussions about each proposal. Those discussions would have touched on many of the aspects that were in the scoring sheets, but we do not have scoring sheets." (Testimony of Linda Fuchs T. 221). Petitioner argues however that the procurement officer and technical

expert testified that the only thing discussed by the negotiation team was cost; that Requests for Additional Information Sets One and Two were tailored to issues relating to cost; and the procurement officer stated that the negotiators did have the prior score sheets throughout the duration of the negotiations.

Ms. Fuchs also testified "we went through all of the proposals, which is going through the design, the implementation, the technology of each of the proposals to make sure we all had a full understanding of everything that was proposed, and a gain the relative merits of each one." (Testimony of Linda Fuchs T. 222). As previously noted it is an ALJ's function to consider all evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact. Boyd v. Dept. of Revenue, 682 So. 2d 1117 (Fla. 4th DCA 1996). Further, when evidence is presented that supports two inconsistent findings, it is the ALJ's role to decide the issue. A reviewing Agency cannot overturn the ALJ's findings based on disputed issues of fact. Boyd, supra; Heifetz v. Dept. of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). There is nothing in the record to demonstrate that the ALJ erred in weighing the evidence, crediting testimony or in making his findings of fact. There is also competent substantial evidence in the record, in the form of Ms. Fuchs's testimony, to support the ALJ's findings of fact. Accordingly, Petitioner's Fifth Exception is **REJECTED**.

Petitioner's Sixth Exception

Petitioner excepts to Finding of Fact No. 19 of the Recommended Order on the ground that it is not supported by competent and substantial evidence. Finding of Fact No. 19 provides:

> No evidence was provided that scores from the reply and presentation phases had any impact on the process beyond qualifying vendors to participate in negotiations.

Petitioner argues there is no competent, substantial evidence to support the ALJ's finding that the prior evaluation scores had no impact on Respondent's decision to award a contract to Intervenor. The record reflects that Respondent's negotiation team viewed the scoring and rankings from the prior phases only as an indication that the three remaining vendors were qualified to deliver the services sought by Respondent. (Testimony of John Ford T. 129; Testimony of Christie Hutchinson T. 257-258; Testimony of Jonathan Yeaton T. 269). The negotiating team did not themselves rank the vendors until the very end of the process, after reviewing all information and after receiving Best and Final Offers. (Testimony of Linda Fuchs T. 232; Testimony of Jonathan Yeaton T. 268). Respondent's negotiation team did not use the scores from the prior evaluation phase to determine the rankings. Instead, after determining the rankings based on best value to the state, the negotiation team used the prior scores as a check or validation of the team's independent ranking. For example, John Ford testified:

> the negotiation team determined best value and the winner in the process was Motorola. We then took a numeric score and used it basically as validation of process. So the negotiation team selected Motorola as the number-one respondent adding best value. After that decision was made, numbers were put on the board to say...is there a verification, if you will. So you had a unanimous decision of the negotiations team that Motorola was the winner, and a validation of that process, but the numbers that came up in that validation were not the deciding factor in the winner. The deciding factor was four negotiators working in a process to determine best value. (T. 156-157)

Ms. Fuchs testified similarly. (Testimony of Linda Fuchs T. 217, 234). Accordingly, there is substantial, competent evidence in the record from which the ALJ could draw his finding of fact. Petitioner's Sixth Exception is, therefore, **REJECTED**.

Petitioner's Seventh Exception

Petitioner excepts to Conclusion of Law No. 27 of the Recommended Order on the ground that the standard of proof adopted by the ALJ was based upon an incorrect interpretation of law. Conclusion of Law No. 27 provides:

> Petitioner has the burden of showing that Respondent's intent to negotiate a contract for the Interoperability Network with Intervenor is contrary to the agency's governing statutes, rules or policies, or the ITN specifications. The proposed award will not be overturned so long as the decision is based on an honest exercise of discretion. Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991).

Petitioner argues that the ALJ applied a different standard of proof when he added the Scientific Games, Inc. citation to his conclusion of law. Instead, Petitioner argues the ALJ erroneously interpreted the legal standard to be applied by failing to recognize that "while a public authority has wide discretion in award of contracts for public works on competitive bids, such discretion must be exercised based upon clearly defined criteria, and may not be exercised arbitrarily or capriciously" citing City of Sweetwater v. Solo Construction Corp., 823 So. 2d 798, 802 (Fla. 3rd DCA 2002). City of Sweetwater interprets Chapter 255, Florida Statutes, which governs local or municipal procurement. It also involved a circuit court challenge to a vendor response to an Invitation to Bid. The instant case involves Chapter 287, Florida Statutes, which governs state procurement and involves a Chapter 120, Florida Statutes, administrative challenge to an Invitation to Negotiate. As such, City of Sweetwater is of little value here.

The ALJ properly noted in Conclusions of Law Nos. 25 and 26 that Petitioner, as the party challenging Respondent's proposed award of the contract to Motorola, has the burden of proof in this proceeding. The ALJ further noted that section 120.57(3)(f), Florida Statutes, provides in relevant part:

> In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or 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.

The record reflects that the ALJ conducted a de novo hearing in this matter Petitioner had an opportunity to create the evidentiary record. The ALJ applied the evidentiary record and determined that Petitioner failed to meet its burden.

Section 120.57(1)(l), Florida Statutes, provides that an agency may reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" whenever the agency's interpretations are "as or more reasonable" than the interpretation made by the ALJ. See Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001); Barfield v. Department of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001). Because the ALJ's conclusion is reasonable in light of the record and applicable statutes and because the State Technology Office does not have substantive jurisdiction over either Chapter 120, Florida Statutes, or Chapter 287, Florida Statutes, the undersigned declines to reject or modify the ALJ's conclusion of law. Accordingly, Petitioner's Seventh Exception is **REJECTED**.

Petitioner's Eighth Exception

Petitioner excepts to Conclusion of Law No. 29 of the Recommended Order on the ground that it is based upon an incorrect interpretation of law based upon facts not supported by competent and substantial evidence. Conclusion of Law No. 29 provides:

> Petitioner's argument is unpersuasive. Respondent made three postings in this procurement. Petitioner did not maintain any protest to the first posting and withdrew its' protest to the second posting. Both first and second postings by Respondent provided all parties a notice advising substantially affected parties of

a point of entry. Further, Petitioner's withdrawal of its protest following the posting by Respondent of ranking on November 19, 2003, rendered moot any further consideration of this issue.

Petitioner's argument which flows throughout all of its exceptions is that it with regard to the first phase of the solicitation - the evaluation phase - Respondent failed to score all of the individual items in Tabs B and D of the ITN, thereby increasing the relative weighting of the items in Tab C. Petitioner argues that the ALJ abused his discretion by not recognizing this fact.

The record reflects that all three postings by Respondent contained a notice advising substantially affected parties of a point of entry pursuant to section 120.57(3), Florida Statutes. Petitioner filed a notice of protest in response to Respondent's first posting on November 19, 2003, which Petitioner withdrew or dismissed on November 25, 2003. The ALJ has transposed the order of the protests in his conclusion, but such is not material to the analysis herein.

Section 120.57(3)(b), Florida Statutes, provides that:

> Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision. With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation...Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter.

The record supports the factual references in the ALJ's conclusion of law. Additionally, his conclusion that a challenge to the evaluations phase is moot is well founded. By filing its initial notice of protest Petitioner fully understood that it had the right and opportunity to protest Respondent's proposed action at the evaluation stage of the procurement. Essentially, Petitioner seeks to challenge at the third stage of the process - negotiations - what actually occurred at the initial stage - evaluations. By withdrawing its notice of protest, however, Petitioner waived any

further challenges with respect to the evaluation phase of the solicitation. Section 120.57(3), Florida Statutes. Accordingly, Petitioner's Eight Exception is **REJECTED**.

Petitioner's Ninth Exception

Petitioner excepts to Conclusion of Law No. 32 of the Recommended Order on the ground that it is based upon an incorrect interpretation of law. Conclusion of Law No. 32 provides:

> Petitioner has also argued that Respondent used scores from the previous rankings in determining who was first, second, or third in order for negotiation and that; accordingly, the scores should be examined to determine their correctness. The evidence is abundantly clear that Respondent's negotiators simply added the scores to the ranking process following their unanimous and individual agreement that the Intervenor was their first choice; Unisys was their second choice; and Petitioner was their third choice. Absent a showing that Respondent was not engaged in an honest exercise to obtain the best value for the state, Respondent was free to use whatever criteria in the negotiation phase that it chose. See Scientific Games, 586 So. 2d at 1131.

In its exception Petitioner continues to argue that the ALJ erroneously interpreted the appropriate legal standard in this case by failing to recognize that while a public authority has wide discretion in award of contracts for public works on competitive bids, such discretion must be exercised based upon clearly defined criteria and may not be exercised arbitrarily or capriciously. Petitioner further argues that the ALJ ignores the purpose of competitive procurement laws in this State.

Petitioner's argument is a restatement of the argument in its Seventh Exception. Petitioner continues to ignore the difference between a Request for Proposals and an Invitation to Negotiate. ITN solicitation is a more flexible process for state agencies to procure goods and services. At the evaluation stage, an ITN somewhat resembles an RFP - objective criteria stated in the solicitation document are used to evaluate vendors. The negotiation phase, however, is

necessarily a less rigid, more subjective process. A state agency cannot "negotiate" to obtain best value if it is bound by predetermined criteria and inflexible procedures. The very nature of a negotiation involves give and take and the ability to makes changes in order to make the best possible deal. Once an Agency has selected vendors for the negotiation phase of the procurement, its charge is to determine which vendor's proposed solution provided the best value to the state. Section 287.057(3)(b), Florida Statutes. Section 287.012(4), Florida Statutes, defines "best value" as "the highest overall value to the state based on objective factors that include, but are not limited to, price, quality, design, and workmanship." Section 287.057(3) draws a clear distinction between the use of "evaluation criteria" in the ITN to select vendors for negotiations, and the use of "best value" during the negotiation phase to determine contract award. There is no requirement for an agency to specify criteria in an ITN for determining best value. By its very nature, an ITN is more flexible than an RFP and allows an agency greater latitude to determine what is in the State's best interest. At the negotiation stage, the agency is free to use whatever factors it deems important to determine best value: the same factors stated in the ITN for evaluation of replies, some variation on those factors, or new factors altogether. Presumably, after proceeding through the evaluation of replies, vendor presentations, written questions and answers with the vendors, and face-to-face negotiations with the vendors, an agency is better educated and in a better position than it was when the ITN was written to determine what constitutes best value to the state. It is only rational that at that stage, the agency may determine that some factors have gained in importance and some have lessened.

Applying the foregoing to the instant case even if Respondent did use factors at the negotiation phase different from those specified in the ITN, it was free to do so, so long as the agency was engaged in an honest exercise to obtain the best value to the state. There is no

evidence in the record to support a conclusion that Respondent did not treat all vendors equally in the negotiation phase, or that the negotiation procedures used by Respondent provided any advantage to one vendor at the expense of the other vendors. Accordingly, Petitioner's Ninth Exception is **REJECTED**.

CONCLUSIONS

Based on the foregoing:

1. The Department of Management Services, State Technology Office, accepts the ALJ's Findings of Fact as set forth in the Recommended Order except as modified herein.

2. The Department of Management Services, State Technology Office, accepts the ALJ's Conclusions of Law.

3. The Department of Management Services, State Technology Office, accepts ~~accepted~~ the ALJ's recommended disposition of this case

Accordingly, it is hereby **ORDERED** that:

1. Petitioner's March 29, 2004, Formal Written Protest is **DISMISSED**.

2. This Final Order shall become effective on the date of filing with the Agency Clerk of the Department of Management Services.

DONE and **ORDERED** this 25th day of June 2004.

Simone Marstiller

Simone Marstiller, Chief Information Officer
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NOTICE OF RIGHT TO APPEAL

Unless expressly waived by a party such as in a stipulation or in other similar forms of settlement, any party substantially affected by this final order may seek judicial review by filing an original Notice of Appeal accompanied by the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal and a copy of the notice with the Clerk of the Department of Management Services within thirty (30) days of rendition of this order, in accordance with Rule 9.110, Fla. R. App. P., and section 120.68, Florida Statutes.

Certificate of Clerk:

Filed in the office of the
Clerk of the Department of
Management Services on this
25th day of June 2004.

Agency Clerk