STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAGNUM CONSTRUCTION MANAGEMENT CORPORATION, d/b/a MCM CORP.,	)	
Petitioner,	)	
vs.	)	Case No. 04-4252BID
BROWARD COUNTY SCHOOL BOARD,	)	
Respondent,	)	
and	)	
JAMES B. PIRTLE CONSTRUCTION COMPANY, INC.,	)	
Intervenor.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on January 19 and 20, 2005, in Fort Lauderdale, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

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

PRELIMINARY STATEMENT

Respondent Broward County School Board issued Request for Proposals 2021-24-01 on May 18, 2004, for the procurement of Design/Build services in connection with the construction of a middle school. Responses to the RFP were received from six proposers and opened on August 31, 2004. Each proposer was a team comprised of a building contractor and a design professional.

The proposals were reviewed and short-listed by a Consultant's Review Committee in accordance with the Request for Proposals' specifications. The committee recommended that one of the six proposals be rejected as nonresponsive. The remaining five proposals were then forwarded to the board, which was responsible for conducting its own evaluation and making the

award. The short-listed proposals included those of Petitioner Magnum Construction Management Corporation and Intervenor James B. Pirtle Construction Company, Inc.

Respondent held a special meeting on October 12, 2004, whereat the proposers made presentations to the board and participated in a question-and-answer session, following which each board member scored every responsive proposal. Pursuant to the Request for Proposals, the proposer receiving the most points from a board member would be considered that member's first choice. The Request for Proposals provided for the award to be made, if at all, to the proposer receiving a majority of the first choice votes. When the votes were counted, Intervenor received a plurality of four first choices, and the board voted to award Intervenor the contract.

Petitioner filed a formal written protest of the intended award on October 25, 2004. At Petitioner's request, its formal written protest was referred to the Florida Division of Administrative Hearings ("DOAH"), which held a formal hearing in the matter on January 19 and 20, 2005, as scheduled.

The parties stipulated to a number of facts. The stipulated facts were memorialized in the record and taken as established without need of further proof. Additionally, Joint Exhibits 1-39 were admitted into evidence without objection.

In its case, Petitioner elicited testimony from Fernando Munilla; Stephanie Arma Kraft; Lois Wexler; Judie S. Budnick; Marty Rubinstein; Darla L. Carter; Benjamin J. Williams; Adolfo Cotilla; Dr. Robert D. Parks; and Beverly A. Gallagher.[1] Respondent presented the testimony of Michelle Bryant Wilcox and Denis Herrmann. Intervenor called one witness, Paul Carty.

The parties stipulated to the filing of proposed recommended orders within 20 days after the filing of the transcript of the formal hearing. The transcript was filed with DOAH on February 9, 2005, making the proposed recommended orders due on March 1, 2005. All parties timely filed proposed recommended orders containing proposed findings of fact and conclusions of law. The parties' proposed recommended orders have been carefully considered during the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2004 Florida Statutes.

FINDINGS OF FACT

1. On May 18, 2004, Respondent School Board of Broward County ("School Board" or "SBBC")[2] issued Request for Proposals No. 2021-24-01 (the "RFP") to solicit offers on a contract for the design and construction of a middle school (the "Project").

2. Proposals were submitted by Petitioner Magnum Construction Management Corporation, d/b/a MCM Corp. ("MCM");

Intervenor James P. Pirtle Construction Company, Inc. ("Pirtle"); Seawood Builders, a Division of Catalfumo Construction, LLC ("Seawood"); Stiles Construction Co. ("Stiles"); James A. Cummings, Inc. ("Cummings"); and Skanska USA Building, Inc. ("Skanska"). SBBC opened these six proposals on August 31, 2004.

3. In accordance with the evaluation procedure set forth in the RFP, the proposals were reviewed by a Consultant's Review Committee ("CRC"), whose task was to evaluate the proposals and prepare a "short list" of between three and six firms for the School Board, which would make the final determination. At its first meeting on September 14, 2004, the CRC rejected Skanska's proposal as nonresponsive for failing to submit an original bid bond. On September 30, 2004, the CRC met again and, after deliberating, decided to place the five remaining proposers on the "short list."

4. Following the CRC's review, the evaluation proceeded pursuant to Section 1.21 of the RFP, which states:

> A. The Facilities and Construction Management Division will forward to the Superintendent of Schools the completed short-list of the Proposer's Submittal. The Superintendent will then forward the Short-List to The School Board of Broward County, Florida for its use in the interview and final selection of the successful Proposer(s). The short list of [sic] will be forwarded to the School Board of Broward County, Florida unranked.

B. The short-listed firms shall present their design solutions to The School Board of Broward County, Florida. Short-listed firms will be notified of the time and place for their respective presentations. Proposer may utilize any media for their presentations, but shall restrict their presentations to 30 minutes total (5 minutes for set-up, 10 minutes for presentation, and 15 minutes for questions and answers).

C. At the conclusion of the Proposer's presentation to the Board, Board Members may ask questions concerning the presentation, the Proposer's assembled Design/Build team, and the Design Criteria Professional's assessment of the Proposer's submittal or topic of the Board Member's choice [sic] preliminary design concept for the project, including means and methods.

D. At the conclusion of the presentation and interview of all short-listed firms, The School Board of Broward County, Florida will deliberate and utilize the short-listing evaluation criteria and point schedule to finalize a selection of the successful Proposer. The Board reserves the right to award a contract for the project or award no contract (reject all submittals).

E. During and at the conclusion of the presentation and interview of all short-listed firms, the School Board of Broward County, Florida will assign points to each Proposer utilizing the above evaluation criteria and rank them according to their scores. The firm receiving the most points by a Board Member will be considered the first choice of that Board member. The firm that receives a majority of the first choice votes may be awarded the contract.[3] In the event of a tie, a voice vote will be taken until the tie is broken. The Board reserves the right to award a contract for the project or award no contract.

5. The "evaluation criteria and point schedule" referred to in Section 1.21(D) and (E) are found in Section 1.20, which provides as follows:

> A. The School Board of Broward County, Florida's final selection will be based on the Selection Criteria Score Sheet.
>
> | Evaluation Criteria | Maximum Points |
> |---|---|
> | Profile & Qualifications of Proposer's Team | 6 |
> | Proposed Project Scheduling | 7 |
> | Past Work Performance and References | 10 |
> | Site Design | 7 |
> | Building Design | 23 |
> | Cost proposal | 25 |
> | S.I.T. Award | 15 |
> | MBE Participation | 7 |
> | Total Points Possible | 100 |
>
> B. The School Board of Broward County, Florida will award points up to a maximum, for evaluation criteria numbers listed above as based upon an evaluation of the Proposer's submittal and presentation.

6. On October 12, 2004, the School Board held a special meeting to discuss the procurement with staff, hear the presentations of the short-listed proposers, and grade the proposals. Eight board members participated.[4]

7. One subject that generated considerable discussion was the "S.I.T. Award," an evaluation criterion worth 15 points. The S.I.T. Award (the acronym stands for School Infrastructure Thrift) was based on a mathematical calculation that left no room for discretion. Points were awarded on a predetermined scale according to the percentage by which a proposer's base proposal amount fell below, or exceeded, the Project's established budget as a function of cost per student station. Because the allowable cost per student station is $15,390 and the Project calls for 1,998 student stations, the budget, for purposes of the S.I.T. Award, is $30,749,200.

8. As the School Board's staff had determined before the special board meeting on October 12, 2004, MCM's base proposal amount is 15.48 percent below the S.I.T budget. The cost of Cummings' proposal is 11.36 percent below the budget, Pirtle's about three percent below $30.7 million, Seawood's roughly equal to the budget, and Stiles' proposal 12 percent above the established budget. On these percentages, using the scoring scale prescribed in the RFP, MCM and Cummings were entitled to 15 points apiece in the S.I.T. Award category, Pirtle seven points, Seawood six points, and Stiles zero points. The School Board was informed of these scores before its members graded the proposals on the seven remaining criteria.

9. After the proposers had made their presentations, the board members individually assigned points to the proposals. MCM received the highest aggregate score (713), followed by Pirtle (705), Cummings (698), Seawood (668), and Stiles (541). Pirtle, however, received the most first choice votes of any proposer——four. Cummings received two first choice votes, and MCM and Seawood were each ranked first by one member.

10. The following table depicts the rankings by member:

	Budnick	**Carter**	**Gallagher**	**Kraft**	**Parks**	**Rubinstein**	**Wexler**	**Williams**
1	Seawood	MCM	Pirtle	Pirtle	Cummings	Pirtle	Cummings	Pirtle
2	MCM (-1)	Cummings	MCM/Seawood (-4)	Seawood	MCM (-2)	MCM (-1)	MCM (-1)	Cummings
3	Cummings	Pirtle		Cummings	Pirtle	Cummings	Pirtle/Seawood	MCM
4	Pirtle	Seawood	Cummings	MCM	Seawood	Seawood		Seawood
5	Stiles	Stiles	Stiles	Stiles	Stiles	Stiles	Stiles	Stiles

The parenthetic numbers in the second row show by how many points MCM trailed the first choice.

11. Although Pirtle did not receive a majority of the first choice votes, the School Board nevertheless voted to award the contract to Pirtle.[5]

12. Pirtle has argued that MCM lacks standing to maintain this protest because MCM came in tied (with Seawood) for third——behind Pirtle and Cummings, respectively——according to the number of first choice votes each proposal received. While the RFP does not specify a procedure for ranking the proposals behind the number one choice, the method suggested by Pirtle is

inconsistent with the RFP's plain language, which is clearly intended to ensure that the contract is awarded to the first choice of a majority of the board members. To determine second place, the proper question is not, Who had the most first choice votes after Pirtle? but rather, Who would be the first choice of a majority if Pirtle were unavailable?

13. To begin to answer the relevant question, Pirtle must be removed from the rankings of the respective members, and each proposer below Pirtle moved up a spot. When this is done, the rankings look like this:

	Budnick	**Carter**	**Gallagher**	**Kraft**	**Parks**	**Rubinstein**	**Wexler**	**Williams**
1	Seawood	MCM	MCM/Seawood	Seawood	Cummings	MCM	Cummings	Cummings
2	MCM	Cummings		Cummings	MCM	Cummings	MCM	MCM
3	Cummings	Seawood	Cummings	MCM	Seawood	Seawood	Seawood	Seawood
4	Stiles	Stiles	Stiles	Stiles	Stiles	Stiles	Stiles	Stiles
5								

14. What the foregoing table shows is that without Pirtle, there is no clear favorite, but essentially a three-way tie between Seawood, MCM, and Cummings. Under the RFP, the School Board would need to take a voice vote until one of the three commanded majority support. That, of course, did not occur in the event. Therefore, it is impossible to determine, on the instant record, which proposer was the School Board's second choice (or third or fourth choice, for that matter).

15. On October 15, 2004, MCM timely filed a notice of intent to protest the School Board's preliminary decision to award Pirtle the contract. MCM followed its notice of intent with a formal written protest, which was timely filed on October 25, 2004.

16. MCM's protest rests on two pillars. The first is a contention that the School Board employed an unstated evaluation criterion, namely a preference for builders who had previously done work for SBBC. The second is an argument that Pirtle's proposal is materially nonresponsive for failing to comply with the RFP's directives on M/WBE participation.[6] The findings that follow are pertinent to MCM's specific protest grounds.

17. Regarding the alleged unstated evaluation criterion, it is undisputed that the RFP does not expressly disclose that past work for SBBC will or might count for more than similar work for another school district. The RFP does, however, contain a clear and unambiguous statement of experiential preferences, in Section 1.1(E), which states:

> The School Board of Broward County would prefer to select a Design/Builder with proven successful experience in the Design and Construction of 3 school projects completed within the past 5 years in the State of Florida.

18. This sentence enumerates five discrete experience-related preferences, which are that, (1) in the past five years,

the builder should have (2) designed and built school projects (3) on three occasions, (4) in the State of Florida, (5) each of which was a proven success.

19. The list of experiential preferences in Section 1.1(E) is clearly exclusive, meaning that it does not purport to include other similar or related preferences, but rather is intended to identify all such preferences. This is demonstrated by the absence of any language, such as "including but not limited to" or "among other things," manifesting an intention to include other matters that are ejusdem generis[7] with the items listed.

20. Notice, too, that of the five experiential preferences, three are purely objective. Specifically, preference nos. 1, 3, and 4 (as numbered herein) are simply matters of historical fact that either happened or did not happen, for reasons wholly extrinsic to the mind of any School Board member. Moreover, the satisfaction of these three experience-related preferences is not a matter of degree: the desired quality is either objectively present, or it is absent; there is no discretionary middle ground. The upshot is that, as between two proposers who, as a matter of fact, have experience satisfying preference nos. 1, 3, and 4, no qualitative distinction can rationally be drawn as to those particulars.

21. The other two experiential preferences, in contrast, are infused, in varying degrees, with elements of subjectivity. Thus, preference no. 2 allows the individual evaluator some discretion to determine what constitutes a "school project" and, more important, to distinguish qualitatively between one "school project" and another. Preference no. 5 is even more subjective, for "success," like beauty, is in the eye of the beholder. Rational distinctions could be drawn, therefore, between one proposer and another, based on personal (i.e. subjective) assessments of the relative "success" of the respective builders' prior "school projects."[8]

22. In evaluating the five short-listed proposals, seven of the eight participating board members[9] did, in fact, award more points (on some criteria) to proposers that previously have built schools for SBBC (namely Pirtle, Cummings, and Seawood), while deducting or withholding points (on some criteria) from proposers who have not previously done work for SBBC (MCM and Stiles), based on each proposer's status as a former SBBC-contract holder or a newcomer to SBBC contracting.[10] This strong parochial preference most dramatically affected the scoring of the Past Work Performance and References criterion, although some board members also considered a proposer's past work for SBBC (or lack thereof) in scoring Profile & Qualifications of Proposer's Team and even Proposed Project Scheduling.[11]

23. The preference for builders having previous business experience with SBBC had a palpable impact on the scoring and was likely decisive. Although it is impossible to quantify precisely the effect of the parochial preference, its influence can easily be seen in a comparison of the scores awarded, on the criterion of Past Work Performance and References, by the seven board members who favored SBBC-experienced builders:

	MCM	Cummings	Pirtle	Stiles	Seawood
Budnick	7	10	10	3	8
Gallagher	3	5	10	6	8
Kraft	7	9	10	9	9
Parks	9	10	10	9	10
Rubinstein	5	10	10	8	6
Wexler	7	10	10	8	8
Williams	5	9	10	5	5

24. As the table shows, Pirtle, who has performed the most work for SBBC of any of the five competitors, received the maximum score from all seven of the board members who employed the parochial preference. Cummings, whose previous work for SBBC is significant but less extensive than Pirtle's, received an average score of 9 in the past work category. Seawood, which has performed some construction work for SBBC in the past, but not as much as either Pirtle or Cummings, received an average score of 7.71. Stiles and MCM, neither of which has done construction work for SBBC, received average scores of 6.86 and 6.14, respectively. At bottom, MCM and Stiles received, in the past work category, at least a point less, on average, than the

lowest-ranked of the three builders having previous experience with SBBC. Given that three board members (Budnick, Rubinstein, and Wexler) ranked MCM just one point below their respective first choices, the parochial preference could well have determined the result even if its application produced only a small scoring discrepancy in a single evaluative category.

25. One aspect of the preference for SBBC-experienced builders needs to be repeated for emphasis. The preference was manifested not only as an advantage conferred on builders having such experience, but also as a disadvantage imposed on builders lacking previous experience with SBBC. Builders having worked for SBBC received more points, for that reason, than they would have been awarded, had their previous projects been performed for owners other than SBBC, whereas builders who had not worked for SBBC received fewer points than they would have received, if their previous projects had been built for SBBC. The parochial preference, in other words, operated as a two-edged handicap, making it doubly powerful.

26. In fact, the preference was so strong that SBBC experience was not, for seven evaluators out of eight, simply a factor to be considered in evaluating a builder's past work; it was effectively a condition of, or a prerequisite to, receiving the total possible points of 100. That is, the effect of the preference was such that unless a builder had previous

experience with SBBC, the builder could not receive 10 points in the past work category from most of the board members, regardless of how extensive——and how successful——its experience in building schools for others had been.

27. In sum, it is determined that the School Board used an undisclosed preference for builders having experience with SBBC in scoring and ranking the proposals, and that the use of this preference had a material effect on the evaluation——probably even deciding the outcome. Indeed, but for the use of this undisclosed preference, there is a good chance (though it is not certain) that MCM would have been the first choice of a majority of the board members. Whether the School Board's conduct in this regard requires that the proposed award to Pirtle be set aside will be taken up in the Conclusions of Law below.

28. Turning to MCM's other principal contention, it is alleged that Pirtle's proposal deviated materially from the RFP's specifications because Pirtle allegedly failed to comply with the minimum requirements for minority participation in the Project.

29. On the subject of minority participation, the RFP states, in relevant part:

> The School Board of Broward County, Florida is committed to affirmatively ensuring a substantial increase in the awarding of construction subcontracts to Minority Businesses. Design/Build firms selected to

> participate in this RFP must . . . have M/WBE subcontracting goals[,] and [the successful firm must] fully participate in the MBE Program.
>
> The M/WBE Contract Goal Range for this project is 20-22 percent.
>
> The Proposer should attempt to fulfill the goal with the following ethnic distributions:
>
> A. African American 6-8 percent
> B. Hispanic: 4-5 percent
> C. White Female 4-6 percent
> D. Other 0-3 percent
>
> The School Board encourages the use of minority subcontractors in excess of the minimum goal ranges established for this project.

Section 00030, page 2.

30. In addition, Section 1.13 requires that the following M/WBE-related information be submitted with a proposal:

> G. Document 00466 – Statement of Commitment [containing the proposer's pledge to comply with the M/WBE program]
> H. Document 00470 – Letter of Intent: M/WBE Subcontractor Participation [from each certified minority business that has agreed to participate in the Project, describing the subject of the subcontract and the dollar amount thereof]
>
> 1. Separate Section with a sub tab: M/WBE Participation
>
> (a) Briefly discuss how the Proposer will address the M/WBE participation goals. Identify proposed M/WBE team members, their role, and their anticipated percentage of participation. Include past experience with the team.

> (b) Proposers shall submit evidence of dollar ($) participation for the past two (2) years, both internal and agency documentation of its M/WBE utilization, and, evidence of any M/WBE outreach, internship, and apprenticeship programs it conducts.
>
> (c) Proposers, if awarded a contract, shall submit monthly M/WBE Utilization reports on forms provided by The School Board of Broward County, Florida, M/WBE Compliance Office, with each request for payment. Such reports shall also include evidence of dollar participation for the past 2 years, both internal and agency documentation of its M/WBE utilization, and evidence of any M/WBE outreach, internship, and apprenticeship programs it conducts.

The foregoing language, which is contained in an addendum to the RFP that was issued on June 16, 2004, supplanted provisions in the first release of the RFP that would have required proposers to submit even more information relating to the satisfaction of M/WBE goals.

31. Pirtle's proposal clearly complied with Sections 1.13(G) and 1.13(H)(1)(a)-(c) of the RFP. Where Pirtle fell short, according to MCM, was on the requirement to submit letters of intent from minority subcontractors. Pirtle did, in fact, attach a couple of letters of intent to its proposal——but these showed minimal minority participation, far below the prescribed range of 20-22 percent. MCM contends that proposers were required to submit letters of intent documenting minority participation meeting the M/WBE goals for the Project. Put

another way, it is MCM's position each proposer needed to line up most or all of its minority subcontractors before submitting a proposal.

32. The School Board asserts that proposers were not required to submit all of their letters of intent, but merely some letters as the fruit of good faith efforts to reach the mandated M/WBE goals.[12] The evidence supports the School Board's contention that this was indeed the operative interpretation and understanding of Sections 1.13(G) and 1.13(H). Under this interpretation, a proposal such as Pirtle's that included some letters of intent would be deemed responsive; a paucity or plethora of letters of intent would then be a factor for the evaluators to consider in scoring MBE Participation, a selection criterion worth seven points.

33. Whether the plain meaning of Section 1.13(H) supports MCM's or the School Board's position, or alternatively whether the School Board's interpretation is clearly erroneous, is a legal question that will be addressed below.

CONCLUSIONS OF LAW

34. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, 120.57(1), and 120.57(3), Florida Statutes, and the parties have standing.

35. Pursuant to Section 120.57(3)(f), Florida Statutes, the burden of proof rests with the party opposing the proposed

agency action, here MCM. See State Contracting and Engineering Corp. v. Department of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). MCM must sustain its burden of proof by a preponderance of the evidence. Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

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

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

37. The First District Court of Appeal has construed the term "de novo proceeding," as used in Section 120.57(3)(f), Florida Statutes, to "describe a form of intra-agency review.[13] 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, 709 So. 2d at 609. In this, the court followed its earlier Intercontinental Properties, Inc. v. State Dept. of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 1st DCA

1992), a decision which predates the present version of the bid protest statute, wherein the court had reasoned:

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

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

39. Consequently, the party protesting the intended award must identify and prove, by the greater weight of the evidence, a specific instance or instances where the agency's conduct in

taking its proposed action was either: (a) contrary to the agency's governing statutes; (b) contrary to the agency's rules or policies; or (c) contrary to the bid or proposal specifications.

40. It is not sufficient, however, for the protester to prove merely that the agency violated the general standard of conduct. By virtue of the applicable standards of "proof," which are best understood as standards of review,[14] the protester additionally must establish that the agency's misstep was: (a) clearly erroneous; (b) contrary to competition; or (c) an abuse of discretion.

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

42. The clearly erroneous standard is generally applied in reviewing a lower tribunal's findings of fact. In Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74 (1985), the

United States Supreme Court expounded on the meaning of the phrase "clearly erroneous," explaining:

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

(Citations omitted)(emphasis added).

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

> A finding of fact by the trial court in a non-jury case will not be set aside on

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

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

44. Because administrative law judges are the triers of fact charged with resolving disputed issues of material fact based upon the evidence presented at hearing, and because bid protests are fundamentally de novo proceedings, the undersigned is not required to defer to the letting authority in regard to any findings of objective historical fact that might have been made in the run-up to preliminary agency action. It is exclusively the administrative law judge's job, as the trier of fact, to ascertain from the competent, substantial evidence in

the record what actually happened in the past or what reality presently exists, as if no findings previously had been made.

45. If, however, the challenged agency action involves an ultimate factual determination——for example, an agency's conclusion that a proposal's departure from the project specifications was a minor irregularity as opposed to a material deviation——then some deference is in order, according to the clearly erroneous standard of review.[15] To prevail on an objection to an ultimate finding, therefore, the protester must substantially undermine the factual predicate for the agency's conclusion or convince the judge that a defect in the agency's logic led it unequivocally to commit a mistake.

46. There is another species of agency action that also is entitled to review under the clearly erroneous standard: interpretations of statutes for whose administration the agency is responsible, and interpretations of the agency's own rules. See State Contracting and Engineering Corp. v. Department of Transp., 709 So. 2d 607, 610 (Fla. 1st DCA 1998). In deference to the agency's expertise, such interpretations will not be overturned unless clearly erroneous. Id.[16]

47. This means that if the protester objects to the proposed agency action on the ground that it violates either a governing statute within the agency's substantive jurisdiction or the agency's own rule, and if, further, the validity of the

objection turns on the meaning, which is in dispute, of the subject statute or rule, then the agency's interpretation should be accorded deference; the challenged action should stand unless the agency's interpretation is clearly erroneous (assuming the agency acted in accordance therewith).[17]

48. The statute requires that agency action (in violation of the applicable standard of conduct) which is "arbitrary, or capricious" be set aside. Earlier, the phrase "arbitrary, or capricious" was equated with the abuse of discretion standard, see endnote 14, supra, because the concepts are practically indistinguishable——and because use of the term "discretion" serves as a useful reminder regarding the kind of agency action reviewable under this highly deferential standard.

49. It has been observed that an arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chemical Co. v. State Dept. of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979). Thus, under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." Adam Smith Enterprises, Inc. v. State Dept. of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Nevertheless,

> the reviewing court must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of each of these factors to its final decision.

Id.

50. The second district framed the "arbitrary or capricious" review standard in these terms: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious." Dravo Basic Materials Co., Inc. v. State Dept. of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992). As the court observed, this "is usually a fact-intensive determination." Id. at 634.

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

> "Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

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

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

Canakaris, 382 So. 2d at 1203

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

53. Therefore, where the protester objects to agency action that entails the exercise of discretion, but only in such instances, the objection cannot be sustained unless the agency abused its discretion, i.e. acted arbitrarily or capriciously.

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

55. Although the contrary to competition standard, being unique to bid protests, is less well defined than the other review standards, the undersigned concludes that the set of proscribed actions should include, at a minimum, those which: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. See, e.g., R. N. Expertise, Inc. v. Miami-Dade County School Bd., et al., Case No. 01-2663BID, 2002 WL 185217, *21-*22 (Fla.Div.Admin.Hrgs. Feb. 4, 2002); see also E-Builder v. Miami-Dade County School Bd. et al., Case No. 03-1581BID, 2003 WL 22347989, *10 (Fla.Div.Admin.Hrgs. Oct. 10, 2003)

56. Moving on to the merits of the case, as discussed in the Findings of Fact, MCM has proved its charge that the School Board scored the proposals using an undisclosed preference for SBBC-experienced builders. Whether this violated the standard

of conduct depends on the meaning of certain provisions of the RFP.

57. The School Board takes the position that previous experience with SBBC brings added value and hence was a factor that could fairly be considered in scoring the proposals, especially with respect to the Past Work Performance and References criterion, and perhaps also in connection with criterion, Profile & Qualifications of Proposer's Team.

58. The School Board's position, however, conflates two distinct evaluative processes: (a) evaluating past performance qua past performance and (b) handicapping a proposal based solely on the fact that the proposer had or had not previously worked for SBBC. The former is a merit-based exercise, while the latter is status-based. It is important to separate the two analytically, because there is no dispute that the RFP authorizes (and indeed requires) the evaluators to consider a proposer's relevant past work for SBBC, if any, as part of the proposer's experience. (Such experience, of course, might be advantageous or disadvantageous to the proposer, depending on, among other things, whether SBBC was impressed with its work.) But relevant past work, whether for SBBC or not, can be evaluated as experience without also adding or subtracting points merely because SBBC was or wasn't the owner, which latter is what happened here, and what MCM is complaining about.

59. It is concluded that giving more points to former SBBC-contract holders and fewer points to other proposers based on their respective statuses in this regard, being a discrete scoring phenomenon, cannot be justified as a function of considering SBBC-specific experience, as experience, in scoring the experience-related evaluation criteria. The question before us, therefore, is not, Is experience building schools for SBBC a relevant factor to consider in scoring past performance? That query practically gives its own affirmative answer. Instead, we must ask: Is it permissible independently to reward (or penalize) a proposer for having (or not having) experience building schools for SBBC, irrespective of the facts surrounding the proposer's past school projects and how well (or how poorly) it designed and built them.

60. The School Board has conceded that the RFP does not expressly authorize the use of a scoring preference for SBBC-experienced builders; its defense of the preference, to the extent grounded in the language of the RFP, seems to rest on the premises that the RFP does not prohibit the practice, and the broadly worded selection criteria provide a sufficient warrant for the evaluators' actions.

61. The School Board's argument fails to take account of Section 1.1(E) of the RFP, which lists five specific experiential preferences. See paragraphs 17-21, supra.

Repeating them here for convenience, the preferences, as paraphrased, are that (1) in the past five years, the builder should have (2) designed and built school projects (3) on three occasions, (4) in the State of Florida, (5) each of which was a proven success.

62. These experience-related preferences concern the same subjects as the evaluation criteria, Past Work Performance and References, and Profile & Qualifications of Proposer's Team. Being in pari materia in this regard, Section 1.1(E) and the experience-related evaluation criteria must be construed jointly so as to further the common goal of choosing a suitably qualified and experienced builder. See, e.g., Mehl v. State, 632 So. 2d 593, 595 (Fla. 1993)(separate statutory provisions that are in pari materia should be construed to express a unified legislative purpose); Lincoln v. Florida Parole Com'n, 643 So. 2d 668, 671 (Fla. 1st DCA 1994)(statutes on same subject and having same general purpose should be construed in pari materia). That is to say, Section 1.1(E) must be read together with the evaluative criteria, which latter it informs and circumscribes.

63. In practical terms, this means that in scoring proposals, the evaluators must apply the stated experiential preferences——a point that should not be controversial. Whether

evaluators can rely upon other experiential preferences not mentioned depends on the wording of Section 1.1(E).

64. As explained, the undersigned considers Section 1.1(E) to be unambiguously exclusive, manifesting an intention to identify all applicable experiential preferences. The list of preferred qualities, further, is quite specific. Consequently, the undersigned concludes that the exegetic maxim expressio unius est exclusio alterius provides controlling guidance in interpreting Section 1.1(E). This rule holds that if "one subject is specifically named [in a contract], or if several subjects of a large class are specifically enumerated, and there are no general words to show that other subjects of that class are included, it may reasonably be inferred that the subjects not specifically named were intended to be excluded." Espinosa v. State, 688 So. 2d 1016, 1017 (Fla. 3d DCA 1997)(internal quotation marks omitted); see also, e.g., Gay v. Singletary, 700 So. 2d 1220, 1221 (Fla. 1997)("[W]hen a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded.")

65. Here, Section 1.1(E) lists several specific subjects within the larger class of experiential preferences, and there are no general words to show that other specific preferences within that class are included. It is therefore concluded that

the subjects (i.e. particular experiential preferences) not specifically named were intended to be excluded.[18]

66. From the foregoing conclusion it follows that the preference for SBBC-experienced builders was not merely "unstated"; it was excluded or rejected. This is because the specific and exclusive geographic-experiential preference was for prior similar work done "in the State of Florida." Section 1.1(E) clearly and unambiguously puts relevant work completed anywhere in Florida on an equal footing with other such work done elsewhere in the state, with all such in-state work occupying a favored position vis-à-vis work done in other states. And plainly, work done anywhere in Florida comprises work done for every school district in the state——which means that work done for one such district (e.g. Miami-Dade County Public Schools) is no less preferred than work done for another such district (e.g. SBBC).

67. Accordingly, the undersigned concludes that the evaluators' preference for builders having previous experience with SBBC, which was expressed in the form of a scoring handicap, was contrary to Section 1.1(E) of the RFP[19] and hence violated the applicable standard of conduct.[20]

68. The next question is whether this violation constitutes reversible error under the applicable standard of

review, which is, the undersigned concludes, the contrary to competition standard.[21]

69. As an initial observation, a scoring preference for former contract holders, pursuant to which evaluators reward proposers with whom the agency has done business in the past and penalize the other proposers, is suspect on its face. Such a preference undeniably creates the appearance of favoritism and may provide opportunities therefor; favoring those with whom business has been done might also be, depending on the circumstances, unreasonably anticompetitive. This is not to say that a parochial preference can never be valid; but it should usually raise eyebrows.

70. With that in mind, the undersigned is convinced that to ensure a fair competition, the letting authority should always clearly disclose such a preference in the procurement document. That way, would-be proposers who stand to suffer as a result of the preference at least can attempt to level the playing field before the contest begins by bringing a specifications challenge. That said, however, the undersigned need not conclude here that nondisclosure of a parochial preference is necessarily contrary to competition.

71. What happened in this case was worse than "mere" nondisclosure, for the RFP informed potential proposers that relevant work completed in one area of Florida would be afforded

the same preference as relevant work completed in another area of the state. Thus, not only did potential proposers have no reason to suspect that SBBC's former contract holders would have an advantage; they reasonably should have concluded that SBBC's former contract holders would have no advantage (simply on the basis of having previously done work for SBBC) over proposers who had built schools in Florida for other owners. It almost goes without saying that proposers such as MCM had no reason to bring a specifications protest to object to a preference that the RFP excludes.

72. In sum, it is concluded that a status-based scoring preference for former contract holders, implemented via giving additional points to favored proposers while taking points away from disfavored proposers, is contrary to competition where, as here, the RFP contains an unambiguous, exclusive list of other specific experiential preferences, manifesting an intention to exclude the very preference utilized.

73. MCM's contention that Pirtle's proposal was nonresponsive to the RFP turns on a disputed interpretation of Section 1.13(H), raising the question whether that provision required proposers to submit some letters of intent (as the School Board maintains) or, alternatively, enough such letters to document that the M/WBE goals for the Project would be met (as MCM insists).

74. The undersigned concludes that Section 1.13(H) is ambiguous in this regard, for it is effectively silent on the subject of how many letters of intent must be included with a proposal.[22] MCM argues persuasively that the requirement of including letters of intent makes little sense if a proposer can comply by attaching documents showing de minimis minority participation. On the other hand, Section 1.13(H)(1)(a) requires a forward-looking statement describing how the M/WBE participation goals will be met——a statement that arguably would be superfluous if letters of intent coinciding with the minority goals were also supposed to be attached to the proposal. As well, the information required under Section 1.13(H)(1)(b), which asks for evidence of the proposer's historical use of minority subcontractors, would seem to be irrelevant, if proposers were otherwise obligated to document sufficient arrangements for minority participation in the instant Project to meet the prescribed goals. Consequently, the School Board's interpretation is reasonable, too.

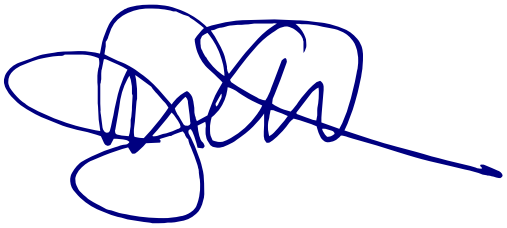
75. It is concluded, therefore, that the School Board's interpretation of Section 1.13(H), while not necessarily the best reading of the text, is at least a permissible one and thus not clearly erroneous. That being the case, it cannot be said, in this proceeding, that Pirtle's proposal deviated materially from the RFP specifications.

76. Finally, MCM has complained about other sundry "scoring anomalies," which the undersigned has declined to detail herein. Suffice it to say that MCM has pointed to several discrete scoring decisions that reasonable people could second-guess. However, given the wide latitude that evaluators are afforded under the RFP to assign the points allotted to the various evaluation criteria, the undersigned concludes that none of these alleged "anomalies" constituted an abuse of discretion.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered that rescinds the proposed award to Pirtle. In addition, while recognizing that the choice of remedies for invalid procurement actions is within the agency's discretion, it is nevertheless recommended that a meeting be convened for the purposes of reassigning points to each proposer using the published selection criteria, re-ranking each proposer according to its respective scores, and awarding the contract to the firm that receives a majority of the first choice votes.

DONE AND ENTERED this 21st day of March, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
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ENDNOTES

[1]/ With the exception of Messrs. Munilla and Cotilla, Petitioner's witnesses were the board members who had evaluated the proposals and voted to award the contract to Intervenor. (At the time of the final hearing, Ms. Wexler and Ms. Budnick were no longer board members.) Given the role that these individuals played in the events giving rise to this protest, the testimony of the board members was critical to the case; indeed, the undersigned relied heavily on this testimony in making the findings of fact herein. A nontrivial question therefore arises as to whether a substitute agency head should be appointed to review this Recommended Order and issue the Final Order. See Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So. 2d 322, 324 (Fla. 1990)(when agency head testifies to material fact in administrative hearing, due process requires that review of the recommended order be undertaken by neutral, disinterested third party); see also § 120.665, Fla. Stat. (disqualification of agency head for bias, prejudice, or interest); but see Optiplan, Inc. v. School Bd. of Broward County, 710 So. 2d 569, 572 (Fla. 4th DCA 1998)(fact

that two board members testified in bid protest hearing did not require disqualification of entire board). To be sure, there are grounds for arguing that Ridgewood, on the one hand, or Optiplan on the other, is distinguishable from the instant case, and the undersigned expresses no opinion herein on the merits of the constitutional issue. It is recommended, however, that the matter be addressed in the first instance at the agency level.

[2]/ The term "School Board" will be used herein when reference to the nine-member collegial body that governs the Broward County district school system is intended. The term "SBBC" will be used when referring generally to the district school system as an institution or entity; hence, as used herein, "SBBC" is meant to denote not only the members of the School Board, but also any of the employees and agents of the Broward County School District through whom the district acted.

[3]/ This sentence echoes Section 1.1(B) of the RFP, which states: "The School Board of Broward County, Florida intends to award a design/build contract to the design/build firm receiving the majority of School Board Members first choice votes based upon point scores in the selection process . . . ."

[4]/ School Board Member Carole Andrews was not present.

[5]/ The RFP clearly and unambiguously provides that the contract will be awarded, if at all, to the proposer receiving the majority of the first choice votes. In the context of vote counting, the term "majority" is commonly understood to mean more than half. Pirtle received four votes out of eight, which constitutes a plurality, not a majority. It is highly doubtful, moreover, that the RFP contemplates awarding the contract to the recipient of a mere plurality of first choice votes. Imagine, for example, that all nine board members had voted, and the result was three first choice votes for one proposer (say, Pirtle), with two first choice votes apiece for three other proposers. In that situation, Pirtle would have a plurality of the first choice votes but would not be the first choice of a majority of the members. To award the contract to Pirtle in such a situation would defy the plain language of the RFP, which was designed to prevent the School Board from awarding the contract to a builder whom the majority had found less suitable than other candidates. As in the hypothetical, Pirtle in fact had a plurality of first choice votes but was not the first choice of a majority of members and thus at least arguably should not have been chosen for the award unless and until it

picked up another first choice vote——which could have proved difficult, since none of the four members whose first choice was not Pirtle had ranked that builder higher than third. Fortunately for SBBC, MCM failed to object to the proposed award on this ground and hence waived the issue. Still, the School Board might want to take note of the problem for future reference.

[6]/ "M/WBE," which is sometimes also rendered "MBE," is an acronym for Minority and Women Business Enterprises.

[7]/ See generally Green v. State, 604 So. 2d 471, 473 (Fla. 1992)("Under the doctrine of ejusdem generis, where an enumeration of specific things is followed by some more general word, the general word will usually be construed to refer to things of the same kind or species as those specifically enumerated."); see also Robbie v. Robbie, 788 So. 2d 290, 293 n.7 (Fla. 4th DCA 2000)(When, in implementing a non-exhaustive statutory listing, the use of an unenumerated criterion is indicated, "that ad hoc factor will have to bear a close affinity with those enumerated in the statute——i.e., the factor employed must be ejusdem generis with the enumerated ones.").

[8]/ An evaluator's subjective judgments on preference nos. 2 or 5 could affect objective preference no. 3, if it were determined that some particular past work of a proposer was not a "school project" or was unsuccessful.

[9]/ Board Member Darla Carter evidently saw no substantial differences between the proposals, for she awarded the maximum points in every category to all the proposers, except that she awarded Seawood only six (out of seven) points on the criterion, MBE Participation. This had the effect of making the S.I.T. Award——which was determined mathematically by staff——decisive in her ranking of the proposals. Because MCM and Cummings were each awarded 15 points (the maximum) on the S.I.T. Award, Ms. Carter had them tied at 100 points apiece. Breaking the tie, Ms. Carter awarded her first choice vote to MCM.

[10]/ Board Member Judie Budnick added a unique twist to the preference for SBBC-experienced builders. She testified candidly that a proposer could not get the maximum points from her in connection with the experience-related evaluative criteria unless the proposer had "paid its dues" by making charitable contributions for the benefit of, or otherwise doing good works for, the children of Broward County.

[11]/ The use of a particular consideration to "double-dip" (or "triple-dip") across the lines of evaluation criteria was not limited to the parochial preference. A number of board members, for example, cited the fact that MCM had not previously worked as a team with its designated architectural firm as a reason for deducting points from MCM's score in the Profile & Qualifications of Proposer's Team category as well as from its score on Past Work Performance and References. Such double-dipping is problematic because it tends to subvert the relative weight of the evaluation criteria as published in the RFP, arbitrarily magnifying the importance of the cross-criterion consideration. Because MCM did not object to the practice, however, it will not be further addressed.

[12]/ The School Board's position is consistent with, if not directly supported by, Section 1.28(B) of the RFP, which requires the successful proposer to submit to SBBC, within 10 consecutive calendar days after receiving notice of the contract award, a list of all subcontractors for principal portions of the Project, on a prescribed form known as Document 00433.

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

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

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

evidence and choosing between conflicting but permissible views of reality.

[16]/ From the general principle of deference follows the more specific rule that an agency's interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of permissible interpretations. State Bd. of Optometry v. Florida Soc. of Ophthalmology, 538 So. 2d 878, 885 (Fla. 1st DCA 1988); see also Suddath Van Lines, Inc. v. State Dept. of Environmental Protection, 668 So. 2d 209, 212 (Fla. 1st DCA 1996). However, "[t]he deference granted an agency's interpretation is not absolute." Department of Natural Resources v. Wingfield Development Co., 581 So. 2d 193, 197 (Fla. 1st DCA 1991). Obviously, an agency cannot implement any conceivable construction of a statute or rule no matter how strained, stilted, or fanciful it might be. Id. Rather, "only a permissible construction" will be upheld by the courts. Florida Soc. of Ophthalmology, 538 So. 2d at 885. Accordingly, "[w]hen the agency's construction clearly contradicts the unambiguous language of the rule, the construction is clearly erroneous and cannot stand." Woodley v. Department of Health and Rehabilitative Services, 505 So. 2d 676, 678 (Fla. 1st DCA 1987); see also Legal Environmental Assistance Foundation v. Board of County Com'rs of Brevard County, 642 So. 2d 1081, 1083-84 (Fla. 1994)("unreasonable interpretation" will not be sustained).

[17]/ The same standard of review also applies, in a protest following the announcement of an intended award, with regard to preliminary agency action taken upon the agency's interpretation of the project specifications——but perhaps for a reason other than deference to agency expertise. Section 120.57(3)(b), Florida Statutes, provides a remedy for badly written or ambiguous specifications: they may be protested within 72 hours after the posting of the specifications. The failure to avail oneself of this remedy effects a waiver of the right to complain about the specifications per se. Consequently, if the dispute in a protest challenging a proposed award turns on the interpretation of an ambiguous, vague, or unreasonable specification, which could have been corrected or clarified prior to acceptance of the bids or proposals had a timely specifications protest been brought, and if the agency has acted thereafter in accordance with a permissible interpretation of the specification (i.e. one that is not clearly erroneous), then the agency's intended action should be upheld——not necessarily out of deference to agency expertise, but as a result of the

protester's waiver of the right to seek relief based on a faulty specification. If, however, the agency has acted contrary to the plain language of a lawful specification, then its action should probably be corrected, for in that event the preliminary agency action likely would be clearly erroneous or contrary to competition; in that situation, there should be no waiver, because a reasonable person would not protest an unambiguous specification that facially conforms to Florida procurement law.

[18]/ The School Board has not advanced a contrary interpretation of Section 1.1(E), and there is no evidence that the evaluators construed this section as authority for giving or withholding points based on whether a proposer previously had done work for SBBC. In any event, the undersigned concludes as a matter of law that Section 1.1(E) is not ambiguous, and alternatively, if it were, construing the pertinent provisions of the RFP to authorize the parochial preference would be clearly erroneous.

[19]/ The preference, as applied, also ran afoul of Section 1.20(B), which states that points will be awarded, "up to a maximum, for evaluation criteria listed [in Section 1.20(A).]" In fact, due to the preference, only builders who had previously done work for SBBC could receive the maximum points on the experience-related evaluative criteria, because builders without such experience automatically had points taken away for that reason.

[20]/ Board Member Budnick's singular preference for meritorious works in favor of Broward's children finds no support in the stated evaluation criteria and cannot be grounded in Section 1.1(E) or any other provision of the RFP. Consequently, awarding or withholding points based on a proposer's charitable contributions, as Ms. Budnick admittedly did, was ultra vires and contrary to the RFP.

[21]/ There are no ultimate factual determinations or agency interpretations to review under the clearly erroneous standard, and evaluators do not have discretion to apply scoring preferences in contravention of the RFP.

[22]/ The provision refers only to a letter of intent (singular) and hence, read literally, would require only <u>one</u> such letter. Such a construction, however, while perhaps plausible, seems a bit mechanical, and in any event is not the interpretation put forward by the School Board.

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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.