

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COMPASS ENVIRONMENTAL, INC.,)
and SHAW ENVIRONMENTAL, INC.,)
)
Petitioners,)
)
vs.)
) Case Nos. 05-0007BID
DEPARTMENT OF ENVIRONMENTAL) 05-0008BID
PROTECTION,)
)
Respondent,)
)
and)
)
CDM CONSTRUCTORS, INC.,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

This matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on February 2, 3, 4, and 7, 2005, in Tallahassee, Florida.

APPEARANCES

For Petitioner: J. Andrew Bertron, Jr., Esquire
(Compass) Amy W. Schrader, Esquire
Huey, Guilday, Tucker, Schwartz
& Williams, P.A.
Post Office Box 12500
Tallahassee, Florida 32317-2500

For Petitioner: Seann M. Frazier, Esquire
(Shaw) John K. Londot, Esquire
Greenberg Traurig, P.A.
Post Office Box 1838
Tallahassee, Florida 32302-1838

Dorn C. McGrath, III, Esquire
Greenberg Traurig, P.A.
1750 Tysons Boulevard, Suite 1200
McLean, Virginia 22102-4208

For Respondent: Thomas M. Beason, Esquire
Marshall G. Wiseheart, Esquire
Francine M. Ffolkes, Esquire
Brian J. Cross, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

For Intervenor: A. Kenneth Levine, Esquire
Christopher J. Karo, Esquire
Tew Cardenas, LLP
215 South Monroe Street, Suite 702
Tallahassee, Florida 32301-1839

STATEMENT OF THE ISSUE

The issue is whether the Department of Environmental Protection's (Department's) proposed award of a contract to Intervenor, CDM Constructors, Inc. (CDM), is contrary to the Department's governing statutes, rules or policies, or the solicitation's specifications.

PRELIMINARY STATEMENT

This matter began on December 7, 2004, when the Department advised all vendors who had filed proposals that it intended to award a contract for Solicitation Number 2005002C to CDM. The contract calls for CDM to assist the Department in the

management and closure of the Piney Point Phosphates Phosphogypsum Stack System (Piney Point) in Manatee County, Florida.

On December 9, 2004, Petitioners, Compass Environmental, Inc. (Compass) and Shaw Environmental, Inc. (Shaw), who had also participated in the solicitation process, gave timely notice that they intended to file a formal written protest to the proposed award. Formal written protests were filed by both Petitioners on December 20, 2004. In its protest, Compass contended that the negotiation process was flawed because a member of the Department's evaluation committee (Dr. Fuliehan) had an actual or apparent conflict of interest because one of his consulting firm's clients was a subcontractor listed in CDM's proposal. In its protest, Shaw raised the same conflict of interest issue, and further contended that the proposals of CDM and Compass were non-responsive, that the evaluations were not conducted in the "sunshine," as required by Florida law, and that the scoring of the responses was arbitrary, capricious, and contrary to competition.

The matter was referred by the Department to the Division of Administrative Hearings on January 3, 2005, with a request that an Administrative Law Judge be assigned to conduct a hearing. Compass's protest was assigned Case No. 05-0007BID,

while Shaw's protest was assigned Case No. 05-0008BID. On January 14, 2005, CDM's Petition to Intervene was granted.

By Notice of Hearing dated January 6, 2005, a final hearing was scheduled on February 2 and 3, 2005, in Tallahassee, Florida. Continued hearings were held on February 4 and 7, 2005.

On January 28, 2005, Shaw filed a Petition for Review of Non-Final Agency Action and Motion to Stay with the First District Court of Appeal seeking to stay the Department's decision to continue contract negotiations with CDM until this protest is resolved. The Motion to Stay was denied on March 2, 2005; a decision on the merits of the case remains pending. See Shaw Environmental, Inc. v. State, Department of Environmental Protection et al., Case No. 1D05-407.

On January 28, 2005, the Department's Motion for Protective Order was denied in part and Petitioners were allowed to depose Theresa L. Mussetto, a Department attorney serving as the Department's Ethics Officer, regarding certain ethical issues. At the outset of the final hearing, the Department's Motion in Limine and to Strike Portions of Petitioners' Petitions for Hearing was denied. A ruling on a similar Motion by CDM filed the morning of the final hearing was reserved. The Motion is hereby denied.

On January 31, 2005, the parties consented to the entry of an Agreed Confidentiality Order, which allowed the parties to review, under specified conditions, certain documents and other information that Ardaman & Associates, Inc. (Ardaman), an outside consulting firm used by the Department, asserted were confidential and constituted trade secrets. That information is found in Shaw Exhibit 64 and has been sealed to protect its confidentiality. In addition, during the course of the hearing, certain confidential information was discussed, and that portion of the record has been transcribed in a separate volume of the Transcript and sealed to protect its confidentiality.

At the final hearing, Compass presented the testimony of Tom McSweeney, its vice-president; and Charles E. Icenogle, a consultant. Also, it offered Compass Exhibits 12, 21, 24, 32, 56, and 61, which were received in evidence. Exhibit 56 is the deposition testimony of William Perpich, an employee of U.S. Filter, which operates a reverse osmosis system at Piney Point. Shaw presented the testimony of Gwenn D. Godfrey, Department Procurement Administrator; Phil Coram, Chief of the Department's Bureau of Mine Reclamation; Dr. Nadim F. Fuleihan, a consultant; Earl Black, an attorney at the Department of Revenue; Ivan Nance, a Project Manager at the Piney Point facility; Bruce Scott, a Project Manager at the Piney Point facility; James E. Fendley, Vice-President of Commercial Construction; and Barbara

F. Phillips, a Procurement Analyst at the Department of Revenue. Also, it offered Shaw Exhibits 21, 54, 61, and 64, which were received in evidence. Exhibit 54 is the deposition of Theresa L. Mussetto, a Department attorney. The Department presented the testimony of Phil Coram, Chief of the Department's Bureau of Mine Reclamation; Dr. Nadim F. Fuleihan, a consultant and accepted as an expert; Robert H. Brown, a Senior Environmental Administrator with Manatee County; Gwenn D. Godfrey, Department Procurement Administrator and accepted as an expert; Sam Zamani, Department Administrator of the Phosphate Management Program; John Wright, a Department professional engineer; Earl Black, a Department of Revenue attorney; Barbara F. Phillips, a Procurement Analyst at the Department of Revenue; and Jon Alden, a Department attorney. Also it offered Department Exhibits 1, 2, 4-6, 8, 9, 14, 16, 17, 23, 27, and 43. Exhibits 16 and 17 were not admitted while a ruling was reserved on Exhibit 43. All other exhibits were received. Exhibit 43 is also received in evidence. CDM presented the testimony of Michael Edgar, a Client Officer; Dr. Vaughn Astley, a consultant and accepted as an expert; and Craig A. Kovach, a consultant and accepted as an expert. Also, it offered CDM Exhibit 1, which was received in evidence. Finally, the parties offered Joint Exhibits 1, 4-11, 13, 16, 22, 23, 26-28, 34-36, 38, 39, and 41, which were received in evidence.

The Transcript of the hearing (eight volumes) was filed on February 16, 2005. Proposed Findings of Fact and Conclusions of Law were filed by the parties on February 28, 2005, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on all of the evidence, the following findings of fact are made:

a. Background

1. Piney Point is an abandoned fertilizer manufacturing plant adjacent to Port Manatee in Manatee County. In the fertilizer manufacturing process, phosphate rock is converted into soluble phosphorus by adding sulfuric acid to the phosphate rock to produce phosphoric acid. A by-product of this activity is phosphogypsum. For every ton of phosphoric acid produced, approximately five tons of phosphogypsum are produced. The phosphogypsum is stored in stacks like the ones at Piney Point.

2. Federal and state regulations require that the phosphogypsum be managed in stack systems. (Stack systems are large impoundments containing contaminated water that has come into contact with the phosphogypsum.) This is accomplished by using process water to "slurry" the phosphogypsum to the stacks where the phosphogypsum settles out.

3. The process water becomes extremely polluted as a result of the manufacturing activities and is typically very acidic. It contains heavy metals, such as arsenic, cadmium, chromium, and fluoride, in addition to high levels of nutrients, nitrogen, and total dissolved solids. It is also slightly radioactive. The process water is stored in impoundments surrounded by the phosphogypsum stacks, in cooling ponds, and in the seepage ditches around the stacks.

4. The Piney Point site is located south of Tampa, approximately one mile inland from Bishops Harbor, which is a portion of Tampa Bay. The site encompasses a total of approximately six hundred acres. There are two phosphogypsum stacks located at Piney Point; each of these is divided into two compartments or ponds. Today, the old gypsum stack rises to a height of eighty feet. The site previously held around 1.4 billion gallons of process water with 800 million gallons stored in the various ponds and 600 million gallons stored in the pores of the gypsum stacks as pore water. The site is currently estimated to have 500 to 550 million gallons of process water of which about 350 million gallons is pore water. All of this water must be treated and removed in order to close and remediate the site.

5. To close one of these phosphogypsum stack systems, all of the water must be removed from the ponds. The surface is

allowed to dry and is then graded. A polyethylene liner is placed over the surface and then a soil cover is placed on top of the liner. The liner prevents any additional rainfall from infiltrating into the gypsum stack and creating additional process water. The pore water underneath the liner is then allowed to drain from the stack and is collected in seepage ditches, where the water will ultimately be treated. A thick layer of grass is grown on the steep slopes of the gypsum stacks to help prevent infiltration of rainwater back into the stacks. The ultimate goal is to convert this site into a freshwater reservoir for the residents of Manatee County.

6. Until early 2001, Piney Point Phosphates, Inc., which was a subsidiary of Mulberry Phosphate Company (Mulberry), owned and operated a fertilizer manufacturing complex at Piney Point. (Mulberry also operated another fertilizer manufacturing complex in Mulberry, Florida). In February 2001, Mulberry filed a petition for protection from creditors in the United States Bankruptcy Court in Tampa, Florida. At the same time, Mulberry notified the Department that it did not have the resources to maintain the site. (The Department was also advised by Mulberry that it did not have the resources to maintain the stack system at the Mulberry site.)

7. Because there existed the potential for release of the contaminated waters from Piney Point into Tampa Bay, the

Department immediately assumed financial responsibility for Piney Point and in May 2001, a state court appointed a Receiver for Piney Point to take "all reasonable steps and action to preserve the Property's environmental integrity and its compliance with environmental regulations." To execute these duties, the Receiver entered into a contract with the Department. Pursuant to that contract, it retained the services of Ardaman, an international engineering consulting firm in Orlando, Florida, as its engineer of record to design a plan to close Piney Point and to ensure that the plan was properly implemented. At about the same time, the Receiver contracted with IT Corporation, the predecessor to Shaw, to begin some of the site closure work on an emergency basis. Since that time, the Department has spent \$63 million at Piney Point, with Shaw receiving a majority of that amount.

8. Based on the Department's experience at the Mulberry site, it believed that it could realize a significant savings to the State through the Invitation to Negotiate (ITN) process and the use of a lump sum contract, rather than continuing to contract out the work for Piney Point on a time and materials basis. Further, the Department's Inspector General had recommended a lump sum contract as an incentive to the contractor selected to conduct the closure work.

b. The ITN

9. Under Section 403.4154(3)(a), Florida Statutes (2004),¹ "[t]he department may take action to abate or substantially reduce any imminent hazard caused by the physical condition, maintenance, operation, or closure of a phosphogypsum stack system." Pursuant to this provision, on July 16, 2004, the Department issued ITN No. 2005002C (the ITN) entitled "Closure of the Piney Point Phosphogypsum Stack System." The contract called for a contractor to provide services at the Piney Point site in three primary areas: continued operation and maintenance of the site; water consumption; and closure of the phosphogypsum stack system. Water consumption consists of treating the process water and pore water and removing it from the site by evaporation, irrigation, discharge, or other methods. Closure of the stacks includes draining water from the stacks, grading the banks, and installing liners, clean soil, and sod. The contract is estimated to be worth approximately \$51.2 million to the successful vendor. The contract was intended to replace the Receiver's existing contract with Shaw, although Shaw was free to compete for the new contract.

10. A number of individuals were involved with developing the ITN. First, Gwenn D. Godfrey, who is the Department's Procurement Administrator, assisted with the original ITN. Also, Phil Coram, who is the Department's Chief of the Bureau of

Mine Reclamation, was heavily involved with the ITN and assumed a major role on technical issues such as operation and maintenance as well as water management planning. Although the Department does not normally use private consultants in the procurement process, due to the complex technical issues involved, it retained Ardaman to assist with the procurement process. Ardaman, who was then serving as engineer of record on the project, does approximately 90 to 95 percent of all work performed in Florida in the area of phosphogypsum stack systems and has special expertise in that area. (As noted above, Ardaman designed the complex closure plan for the facility.) One of its employees, Dr. Nadim Fuleihan, a senior vice president and principal engineer, has served as the chief engineer for the Piney Point project since 2001 and has worked closely with Mr. Coram, who has been the Department's coordinator on the project since 2002. According to Mr. Coram, Dr. Fuleihan "knew more about that site, especially the closure aspects, . . . than anyone." This observation was undisputed. For that reason, Dr. Fuleihan was requested to assist in the procurement process.

11. Mr. Coram was asked by Department management to identify individuals to serve as evaluators for the ITN process. Besides Dr. Fuleihan, management wanted the evaluators to consist of Department employees within the Bureau of Mine

Reclamation, the Division of Waste Management, the Office of General Counsel, and representatives from other agencies that had been involved with Piney Point.

12. The seven ITN evaluators consisted of Mr. Coram; Dr. Fuleihan; Sam Zamani, Administrator for the Department's Phosphate Management Program; John Wright, a professional engineer in the Department's Division of Waste Management; Jon Alden, a Department attorney who has represented the Department in the Mulberry bankruptcy case; Robert Brown, a Senior Environmental Administrator for Manatee County; and Richard Eckenrod, Executive Director of the Tampa Bay Estuary Program (TBEP).

13. Before the evaluation process began, the Department required all members of the evaluation team to sign a certification that if "at any time during [their] participation on the contractor selection committee, that a potential conflict of interest exists," they agreed to notify the Department's Procurement Section of the circumstances surrounding the potential conflict of interest. By doing so, the Department complied with Section 287.057(20), Florida Statutes, which requires that if the procurement costs more than \$25,000.00, "the individuals taking part in the development or selection of criteria for evaluation, the evaluation process, and the award process shall attest in writing that they are independent of,

and have no conflict of interest in, the entities evaluated and selected." A requirement that the certification form be executed by each team member is also found in the solicitation instructions. Significantly, the certification form imposed a continuing obligation on the evaluators to notify the Department should any "potential conflict of interest arise."

14. Prior to submitting responses, three potential vendors, Shaw, Compass, and CDM, contacted Dr. Fuleihan and asked him to participate on their respective teams in the ITN process. Dr. Fuleihan declined to work with any of them on an exclusive basis. Tetra Tech, Inc., which is Ardaman's parent company, also considered preparing a response to the ITN but Dr. Fuleihan advised it not to do so since Ardaman's status as engineer of record could raise a conflict of interest.

15. On September 10, 2004, CDM, Compass, Shaw, and Coburn Construction (Coburn) submitted replies to the ITN. The Department subsequently deemed the reply by Coburn to be non-responsive for its failure to comply with the requirements of the ITN. Coburn did not challenge this determination. The other proposals were independently reviewed, scored, and ranked. The results were given to Mr. Coram, who computed an average rank for each of the firms. The final average rankings were very close with Shaw being ranked first, followed by Compass and CDM, who were tied.

16. After the initial replies were filed, Mr. Eckenrod became concerned that he had a potential conflict of interest with Craig A. Kovach, President of QuietEarth Consultants, Inc., which was identified as a CDM subcontractor and team member. Mr. Kovach's wife served on the TBEP Board of Directors and had hiring and firing authority over Mr. Eckenrod. Accordingly, Mr. Eckenrod emailed the Department's Office of General Counsel for a determination of whether a conflict existed.

17. Under the Department's Code of Ethics, which is also known as Administrative Directive DEP 202 (DEP 202), "[e]mployees should avoid any conduct . . . which might undermine the public trust, whether that conduct is unethical or may give the appearance of ethical impropriety." See Compass Exhibit 32, DEP 202, paragraph 7.a. In addition, another document known as DEP 315 establishes Department policy for the purchase of contractual and professional services. See Compass Exhibit 61. Paragraph 26 of DEP 315 adopts the standards of conduct for public officers and employees which are codified in Section 112.313(3) and (7)(a), Florida Statutes. While not specifically applicable to Mr. Eckenrod's situation, among other things, that paragraph prohibits Department employees from having an "employment or contractual relationship with any business entity . . . which is . . . doing business with" the Department.

18. Teresa L. Mussetto, a Department attorney who then served as a Department Ethics Officer on behalf of the General Counsel, issued an opinion on September 29, 2004, stating in part that even though Mr. and Mrs. Kovach had never sought to influence Mr. Eckenrod, his professional association with a member of the CDM team "may be perceived as a conflict of interest," and that if the contract were ultimately awarded to CDM, the transaction might "reasonably give rise to the 'appearance of impropriety.'" See Shaw Exhibit 21. Ms. Mussetto also determined that even though Mr. Eckenrod was not a Department employee, he acted as an integral part of the procurement team and that DEP 202 was applicable to him. (It follows that DEP 315 would likewise apply.) Because DEP 202 requires that every aspect of the procurement process be conducted in a manner which would not undermine the public trust or lead a reasonable person to question its fairness and impartiality, Mr. Eckenrod's potential conflict with CDM's subcontractor was a sufficient basis for his removal from the evaluation team, and he did not participate further in the process.

19. On October 12, 2004, the Department gave notice of its rankings of the vendors and informed them that it intended to exercise its right to conduct oral discussions with all three vendors. The firms would then be asked to submit Best and Final

Offers (BAFOs) which would be scored anew. This was consistent with the ITN, which provided that the Department "reserves the right to short list respondents deemed to be in the competitive range to conduct oral discussions prior to the final determination of contract award." The decision to conduct oral discussions was made by senior management in the Department at the time scores were posted for the replies to the ITN. The Secretary of the Department, along with other senior management, determined oral discussions would be conducted with all three vendors to assist in formulating the BAFO Instructions (Instructions) and then the Department would proceed to score the BAFOs. No one has challenged this process.

c. Development of the BAFO Instructions

20. Before drafting the Instructions, the Secretary of the Department met with Earl Black, a Department of Revenue attorney, and Barbara F. Phillips, a Purchasing Analyst with the same agency. Both individuals had substantial experience with procurements and were asked to participate in the BAFO process. They agreed and were added to the evaluation team. As finally formed, the team consisted of two attorneys, four engineers, and two persons with significant procurement experience. Six of the eight had considerable prior knowledge of the Piney Point site.

21. In an effort to refine the Instructions, CDM, Compass, and Shaw each made oral presentations to the Department's

evaluators and other Department staff on November 3, 2004. All of the evaluators, including Mr. Black and Ms. Phillips, attended the oral presentation. As part of this process, the vendors were able to ask questions of the evaluators, and the evaluators were able to ask questions of the vendors.

22. Following the oral discussions, another round of discussions was held with each vendor. These discussions were referred to as "negotiation sessions." The purpose of these discussions was to better understand the cost elements and facts of each vendor's initial proposal in order to develop the Instructions. Mr. Alden, Dr. Fuleihan, Mr. Black, and Ms. Phillips conducted these discussions with each vendor.

23. The Instructions were drafted by a group of individuals including Dr. Fuleihan, Mr. Black, Ms. Phillips, Ms. Godfrey, Mr. Alden, and Mr. Coram. Dr. Fuleihan gave input on the sections relating to technical issues primarily in the scope of work, which included the process water consumption section. He was also involved in revising the pricing summary and developing the evaluation criteria. Neither Shaw nor Compass challenged any part of the Instructions.

24. After the Instructions were completed, but before the BAFOs were submitted by the three vendors, the Department again required each evaluator to complete a second conflict of interest certification. The form was similar to the earlier

certification in the procurement process and required that the members certify that they had "no conflict of interest" with the "entities being considered for the contract award." Like the earlier form, it imposed a continuing obligation on the evaluators to notify the Department should any potential conflict of interest arise. The form listed CDM, Compass, and Shaw as the relevant entities. Each member, including Dr. Fuleihan, executed the certification. At that time, Dr. Fuleihan was not aware of any projects that Ardaman was doing for Shaw or Compass, and he did not believe that Ardaman was doing any work for CDM because of a past disagreement with one of the CDM entities that resulted in no work between the companies for many years.

25. Section 1.19 of the Instructions provides that the Department reserves the right to waive minor informalities or irregularities in the offers received where such are merely a matter of form and not substance and the correction of which are not prejudicial to other vendors.

d. Evaluation of the BAFOs

26. On November 15, 2004, the Department issued the Instructions, which required that responses be filed by the three vendors no later than Wednesday, December 1, 2004. The Instructions also informed the vendors that negotiations with the top-ranked vendor would begin immediately after the posting

of the scoring results. CDM, Compass, and Shaw timely submitted their BAFOs on December 1, 2004. CDM's response indicated that it proposed to use a specific water treatment process relying on The Mosaic Company (Mosaic) as its subcontractor. This company was formed when the phosphate operations of the Cargill Companies and IMC Global, Inc. were combined in October 2004, or shortly before the BAFOs were filed.

27. The evaluators located in Tallahassee were individually given the responses submitted by CDM, Compass, and Shaw on Thursday, December 2, 2004. For those evaluators located outside of Tallahassee, the responses were given on Friday, December 3, 2004. Pursuant to a specific set of instructions provided by the Department, each evaluator, acting independently, then individually ranked the BAFO responses.

28. In order to determine the responsiveness of the BAFOs, Ms. Godfrey used a checklist to review the individual submittals and found that all three were complete. Also, Dr. Fuleihan, who served as the subject matter expert, reviewed each proposal to ensure that the qualifications of the persons identified in the responses met the minimum qualifications listed in the Instructions. He determined that all three vendors met the minimum qualifications. Therefore, the Department considered all three vendors responsive to the Instructions and qualified to perform the work. (If an evaluator considered a particular

item in the response to be incomplete or defective, the evaluator could reflect that by assigning a lower score to that response.)

e. The BAFO Scoring Process

29. For scoring purposes, each BAFO response was divided into approximately fifteen identified subcategories. A one-to-five scale (with five being the highest score) was used to evaluate each subcategory of the vendor's response. The raw scores for a given subcategory would be multiplied by a weight factor that corresponded to that subcategory to arrive at a weighted score for each subcategory. To obtain a total score for each vendor, the weighted scores for each subcategory would then be added together. The total weighted scores could range between 0 and 220. Each vendor was then assigned a ranking based on its weighted total score. The vendor with the highest score received a rank of one, the second highest score received a rank of two, and the third highest score received a rank of three. If two or more vendors had identical weighted total scores the ranks were added together and divided by two. (For example, if Vendor A received a 175 and Vendors B and C each received a 170, the vendors would be ranked as follows: Vendor A - 1.0, Vendor B - 2.5, and Vendor C - 2.5.)

30. After all the scores had been submitted, the ranks of each vendor were averaged to determine the best proposal for the

State. Average ranks were used in order to normalize the evaluations so that an especially generous or especially hard grader would not skew the outcome.

31. Each of the eight evaluators conducted an individual, objective, and impartial review of the three responses to the Instructions. They all spent four to five days, including a weekend, reviewing each of the responses. (There is some confusion regarding the actual amount of time that Mr. Zamani spent reviewing the BAFOs. Documents offered by Shaw reflect that he received the BAFOs on December 3 and returned his rankings the following day, December 4. Testimony offered by the Department reflects that he spent several days reviewing the filings. Even if Shaw's time frame is correct, there is no evidence that Mr. Zamani evaluated the BAFOs in an improper or arbitrary manner.) The evaluators did not have any discussions during the evaluation process about their evaluations. Outside one phone call from Mr. Brown to Mr. Coram to clarify what the vendors had received with the Instructions, the evaluators had no contact with one another.

32. Mr. Alden ranked CDM first with a score of 177, Compass second with a score of 174, and Shaw third with a score of 172. Mr. Black ranked CDM first with a score of 140, Compass second with a score of 137 and Shaw third with a score of 106. Mr. Brown ranked CDM first with a score of 205, Compass second

with a score of 183 and Shaw third with a score of 182. Mr. Coram ranked Compass first with a score of 180, Shaw second with a score of 175 and CDM third with a score of 170. Dr. Fuleihan ranked CDM first with a score of 192, while Compass and Shaw tied with scores of 189. Ms. Phillips originally submitted her evaluations with Compass ranked first with a score of 144, and Shaw and CDM tied with a score of 141. Due to an error when she transposed her scores from her notes to her score sheet, she corrected her evaluations at the hearing. With the corrected scores Compass was still ranked first with a score of 144, but CDM was now second with a score of 143, and Shaw third with a score of 139. However, this correction did not change the final results of the evaluation process. Mr. Wright ranked Shaw first with a score of 183, Compass second with a score of 181, and CDM third with a score of 166. Mr. Zamani ranked CDM first with a score of 218, Compass second with a score of 210, and Shaw third with a score of 191.

33. After the evaluators submitted their score sheets, the ranks were added up and averaged to obtain a final ranking for each vendor. The final ranking was as follows: CDM was ranked first with an average rank of 1.688, Compass second with an average rank of 1.813, and Shaw third with an average rank of 2.500. (If Dr. Fuleihan's scores were removed from the final tabulation, as requested by Compass, then Compass would be the

highest ranked vendor.) On December 7, 2004, the Department electronically posted a recommended award to CDM as the best-ranked vendor. As predetermined in the Instructions, the announcement also stated that negotiations would immediately begin with CDM, and if those negotiations failed, it would then negotiate with Compass, the second ranked vendor, and if those failed, with Shaw, who was ranked last.

34. Compass and Shaw timely filed their Notices of Protest on December 9, 2004. On December 20, 2004, they timely filed their Formal Written Protests. Both Petitioners have contended that the process was flawed because Mosaic (a listed subcontractor on CDM's proposal) was a client of Ardaman; that Dr. Fuleihan had a conflict of interest which should have been disclosed; and he should have recused himself from the process. Shaw also contends (for the first time in its Proposed Recommended Order) that at least two of the evaluators (Mr. Black and Ms. Phillips) had little, if any, knowledge or experience concerning the scientific and technical requirements sought in the ITN and Instructions and were not qualified to evaluate the responses. It also alleged that a Sunshine Law violation may have occurred; that Mr. Zamani did not have a sufficient amount of time to evaluate the proposals;² and that the proposals of CDM and Compass were non-responsive in various respects. The other contentions raised in Shaw's formal protest

and the Pre-Hearing Stipulation have not been addressed in its Proposed Recommended Order and are deemed to have been abandoned. The remaining contentions are discussed below.

f. Sunshine Law Violation

35. There is no evidence that the evaluators met in closed meetings. Rather than scoring as a group, each of the evaluators scored the BAFOs separately and independently. Therefore, there was no meeting of the evaluators that was required to be conducted in the sunshine.

36. No vendor attended the oral discussion meetings between another vendor and the evaluation team. However, there is no evidence that any of the vendors asked to attend those meetings or that the Department denied the vendors the ability to attend.

g. Qualifications of the Evaluators

37. There was no allegation in the Pre-Hearing Stipulation that any of the evaluators were unqualified. Although Shaw elicited testimony on that issue at hearing, especially regarding the qualifications of Mr. Black and Ms. Phillips, the issue was not timely raised. Even if it was, the evidence does not show that those two individuals, or any other member of the team, were not qualified. Mr. Black and Ms. Phillips were chosen for the team because of their extensive experience in state procurement, and not for their technical or scientific

background. Mr. Black, who has been an attorney for thirty-two years, is an Assistant General Counsel and Section Chief for the Department of Revenue (DOR). In this position, he has handled numerous procurement cases for that agency. His duties include handling procurement matters, leasing matters and administrative functions for DOR. Prior to assuming his position at DOR, he worked for fourteen years for the Department of Management Services (DMS) as its primary attorney responsible for contracts dealing with environmental issues.

38. Ms. Phillips is a Purchasing Analyst for DOR with over 28 years of procurement experience with the vast majority involving solicitation evaluations. Her responsibilities involve ensuring proper administration of complex contracts and specifications, Invitations to Bid (ITB), Requests for Proposals (RFP), ITNs, and advertisements. She develops guidelines and procedures to facilitate the ITB/RFP/ITN process and has evaluated procurement policies and procedures for DOR.

h. Conflict of Interest Issue

39. In its response to the ITN, CDM identified IMC Global, Inc., as a subcontractor for water treatment. After CDM's initial reply was submitted, IMC Global, Inc. and a subsidiary of Cargill merged to form a new company known as The Mosaic Company. To conform its BAFO with this corporate merger, CDM changed its response to reflect the new company as a

subcontractor for water treatment and consumption. Because Ardaman had a contractual relationship with Mosaic at the time the BAFOs were submitted, Petitioners have contended that Dr. Fuleihan had a conflict of interest, that he should have disclosed this fact, and that he should have withdrawn from the ITN process. They also contend that the Department dismissed another non-employee evaluator, Richard Eckenrod, when it learned that he had a potential conflict of interest and that Dr. Fuleihan's circumstances are no different.

40. When Mr. Coram suggested that Dr. Fuleihan participate as an evaluator, he knew that it would be likely that Ardaman would have contractual relationships with most or all of the phosphate companies over time. He expected Ardaman to continue to have such contractual relationships in the future simply because Ardaman does excellent work. However, he did not hesitate to recommend Dr. Fuleihan because he had worked with him on a daily basis for over the past three years and had known him for at least ten years. Mr. Coram testified that he always found Dr. Fuleihan's actions to be ethical and in the best interests of the State.

41. Dr. Ardaman is a Senior Vice President of Ardaman, a member of its management team, and head of the firm's corporate engineering group. He receives a salary, bonus, and stock options; the bonus and stock options are tied to performance and

profitability of Ardaman and its parent company, Tetra Tech, Inc.

42. IMC, The Cargill Companies, and Mosaic have been clients of Ardaman. This is not surprising, however, because Ardaman's clients include "the whole phosphate industry." Indeed, Ardaman does approximately 90 to 95 percent of the engineering work performed in Florida involving phosphogypsum stack systems, a fact well known by virtually all of the players in the phosphate industry, including Petitioners. Over the last five years, Ardaman has represented such clients as Agrico Chemical Company, CF Industries, Inc., the United States Army Corps of Engineers, the Florida Department of Community Affairs, PCS Phosphate, Comanco Environmental Corporation, Moretrench Environmental Services, Inc., Shaw Environmental, Inc. (and its predecessor, IT Corporation), PENN PRO, Inc., and the Florida Department of Transportation. The Department itself is among Ardaman's most significant clients.

43. When the ITN was first posted it was well known that Dr. Fuleihan knew all of the principals of CDM, Compass, and Shaw, including those who testified at the final hearing. In fact, Dr. Fuleihan has worked on numerous occasions with most, if not all, of the subcontractors and the consultants listed by all three vendors in their BAFOs. All three vendors also knew that Dr. Fuleihan had assisted with the ITN and BAFO processes

and was serving as an evaluator for the BAFOs. Prior to the issuance of the Instructions, Dr. Fuleihan was present during the oral discussions along with the other evaluators. He also led the "negotiation sessions" where the Department was gathering information to develop the Instructions. Only after the Department proposed to award the contract to CDM on December 7, 2004, did Petitioners challenge Dr. Fuleihan's participation in the solicitation process and express a fear that the process might be tainted.

44. Mosaic is considered an important client for Ardaman. However, there was no evidence that Ardaman would stand to gain anything from Mosaic by it serving as a subcontractor. Under the terms of the ITN, Ardaman will continue working for the Department at Piney Point as the engineer of record regardless of which vendor ultimately contracts with the Department. Ardaman did not receive any additional work from IMC Global, Inc., when it was conducting work at Piney Point in 2003, and Ardaman does not expect to receive any additional work if Mosaic returns to the site to assist with the operation of water treatment equipment.

45. Although it is characterized as an important team member, Mosaic at most will have a limited role on CDM's team and would receive very little financial benefit from this work. Specifically, Mosaic will receive a nominal fee for allowing CDM

to use the patents on its reverse osmosis equipment and roughly \$50,000.00 for technical support in years three through five of the project, or a total of less than one-tenth of one percent of the estimated \$52 million contract. (There is no guarantee that Mosaic will even be used by CDM since the vendor has the right to substitute subcontractors during the post-award negotiation process. In fact, CDM approached Mosaic because, at that time, Dr. Vaughn Astley worked for Mosaic, and CDM wanted his expertise and experience as part of CDM's team. Dr. Astley subsequently retired from Mosaic, as planned.)

46. There is no evidence that, as a result of Mosaic being retained as a subcontractor for CDM, Ardaman or Dr. Fuleihan would be given extra business over and above what they already provide. There is also no evidence that as a result of CDM's being awarded the contract that Dr. Fuleihan would have his salary increased, obtain some sort of bonus, increase his stock options, or be enriched in any way.

47. There is no evidence that Dr. Fuleihan attempted to influence the BAFO process to the advantage of any particular vendor. There is no evidence that he favored one vendor over another when he assisted in the preparation of the Instructions, determined whether the responses to the Instructions satisfied the minimum qualifications, and reviewed the BAFOs. To the contrary, the evidence supports a finding that Dr. Fuleihan

scored and ranked the individual BAFOs in a fair and objective manner.

48. Notwithstanding the lack of any evidence to show that Dr. Fuleihan exhibited bias or favoritism during the solicitation process, the facts surrounding the removal of Mr. Eckenrod are essentially the same as those of Dr. Fuleihan. In the case of Mr. Eckenrod, a non-employee, he alerted the Department that he feared that there might be an appearance of impropriety due to the fact that one of the individuals listed in CDM's proposal and his wife held positions on boards of the organization where he worked. Because the boards had the ability to hire or fire him, and determine the program's budget, Mr. Eckenrod was under the impression that this relationship might be perceived as potentially influencing his evaluation of the proposals. Given this impression, it was determined that a reasonable person might come to the same conclusion and therefore Mr. Eckenrod was excused from service.

49. In the case of Dr. Fuleihan, also a non-employee, he had a professional relationship with a subcontractor (Mosaic), which relationship might reasonably give rise to an appearance of ethical impropriety in the event the contract was ultimately awarded to CDM. Therefore, even though there is no evidence that Dr. Fuleihan acted improperly in evaluating the proposals, a reasonable person might question his perceived impartiality.

Under the precedent established in Mr. Eckenrod's case, DEP 202 and DEP 315 apply to Dr. Fuleihan's conduct, and he is obligated "to avoid any conduct . . . which might undermine the public trust . . . or give the appearance of ethical impropriety," and to not have a "contractual relationship with any business entity . . . doing business with" the Department. Given these standards, at a minimum, disclosure of this conflict was necessary as soon as the BAFOs were filed. By failing to make such a disclosure, the requirements in Section 287.057(20), Florida Statutes, the corresponding Instructions, and DEP 202 and 315 were contravened. The Department's contention that DEP 202 and DEP 315 do not apply to non-employees has been rejected, especially since the Department applied the same provisions to Mr. Eckenrod.

50. During the course of discovery in this case (and after the solicitation process was over), Dr. Fuleihan learned that Ardaman does have one small contract (valued at \$57,000) with CDM's parent company, Camp, Dresser & McKee (located in St. Louis, Missouri), that was entered into in April 2004. That contract calls for Ardaman to serve as a specialty consultant/subcontractor to Monsanto Company (Monsanto) in providing waste disposal services for Monsanto's elemental phosphorus plant located in Idaho. When Dr. Fuleihan reviewed the BAFOs, he was unaware of this contract. He acknowledged, however, that had he

known, he would have disclosed this fact to the Department. Even so, it is fair to infer that a reasonable search of Ardaman's records prior to the commencement of the process would have revealed this conflict, and the Department's Ethics Officer could have then made a determination as to whether Dr. Fuleihan could serve as a team member.

51. Dr. Fuleihan signed two conflict of interest forms certifying that he had no conflict. He did not disclose any conflict with Mosaic because he did not believe that the form applied to subcontractors (as opposed to prime contractors), and because his firm's relationship with a potential subcontractor would not impede his ability to carry out his responsibilities in evaluating the proposals. (If Mosaic had been a prime contractor, Dr. Fuleihan acknowledged that he would have recused himself from the process.) Other Department witnesses (Godfrey and Coram) conceded, however, that the conflict of interest form applies to subcontractors as well as the prime contractor, and that if a conflict with a subcontractor arose, it should be disclosed to the Department.

52. In summary, while there is no evidence that Ardaman's professional relationship with both a prime contractor and a subcontractor caused the evaluator to exhibit bias or favoritism towards any particular vendor, the relationships give rise to an appearance of ethical impropriety so that a reasonable person

might question the impartiality of Dr. Fuleihan. By not having those relationships disclosed, the Department's governing statutes, policies, and Instructions were contravened.

g. Were the CDM and Compass Proposals Responsive?

53. Shaw also contends that there were "many areas" in which the proposals made by CDM and Compass did not materially comply with the Instructions, and that they should be considered non-responsive. Although Shaw's Formal Written Protest identified a wide range of purported deficiencies, only those items which are discussed in Shaw's Proposed Recommended Order are addressed here.

54. Shaw first contends that even though the vendors were required by the Instructions to demonstrate the reliability of their chosen methods of water treatment, Compass elected to treat half of all water it would treat through an unproven technology that was not demonstrated to be reliable.

55. Compass proposed a water treatment and consumption method consisting of double-liming and air stripping or aeration, followed by reverse osmosis. (Double-liming is a chemical treatment process involving the addition of lime to process water, while reverse osmosis is a physical treatment where process water is forced through a semi-permeable membrane at high pressure to separate the clean and contaminated water.) This was consistent with the Instructions, which specifically

allowed a vendor to use double-lime, air-stripping, and reverse osmosis for water treatment. See Joint Exhibit 4, Attachment 3 at pages 20-21. There is no requirement in Attachment 3 that vendors use "proven technology" or demonstrate the reliability and viability of their proposed water treatment methods.

56. There is no credible evidence in the record that the water treatment method proposed by Compass would not work.

57. Shaw also alleged that Compass failed to adequately bid utility services, because on line A2 of its BAFO, Compass bid only \$36,200.00 for all five years of electric utility services.

58. In its proposal, Compass also included an assumed prevailing rate for power of \$100,922.00 per month. Although only \$36,200.00 is shown on line A2, Compass spread the rest of the utility costs (approximately \$2.3 million) throughout the lines in Section B of Attachment 4. While this amount was lower than the other vendors, the Department believed that Compass' overall operation and maintenance expenses were reasonable, and if any mistake had been made by Compass by understating the power cost, it was to Compass' detriment and would not adversely affect the interests of the State.

59. Shaw also argues that Compass submitted a drawing that included reinforced geotextile but omitted the cost for that item in that portion of its BAFO entitled "clarifications."

(Geotextiles allow for drainage of fluids and provide a basis for bridging over soft, unstable materials).

60. Compass indicated in the clarifications section of its BAFO that "reinforced geotextile would be (as needed). The cost for this reinforced geotextile is not included." Under the terms of the Instructions, there was no requirement that a vendor estimate quantities that are not listed on the Pricing Summary Sheet, so long as it submits a fixed price bid. Here, the Pricing Summary Sheet in the Instructions does not have a line for the "as needed" geotextiles, and Compass submitted a fixed price bid. Therefore, the omission of the cost for that item did not render the BAFO non-responsive.

61. Finally, Shaw has alleged that in its BAFO, Compass limited its exposure for the cost of normal repairs and replacements of pumps and piping and was therefore non-responsive. This argument is based on the fact that Compass included \$1.1 million in its cost estimate for normal repairs and replacement of pumps and piping. Shaw asserts, however, that because the plant is very old, the contractor will have to take responsibility for failing equipment in order to keep the plant running, and Compass has essentially capped its replacement costs for transformers, switch gears, and other necessary equipment.

62. Shaw did not present evidence that Compass had actually capped its pump maintenance costs or that the amount shown was inadequate. In fact, Shaw's estimated pump maintenance was between \$660,000.00 and \$900,000.00, or less than the amount proposed by Compass. Even if the amount shown was underestimated, the Department has made it clear that it wanted a lump sum contract and would hold the vendors to the price stated in the BAFOs. (Like the other vendors, Compass submitted a fixed price bid.)

63. Shaw next contends that CDM's proposal was non-responsive in the areas of spray evaporation, the closure construction schedule, water balance, and spray irrigation. These items will be discussed separately below.

64. Shaw first asserts that CDM overestimated the amount of process water it can treat with spray equipment during the first two years of the contract since the spray equipment CDM proposes to use will not be available until the fifth month of the first year of the contract.

65. During the first two years of the contract, CDM proposes to dispose of 175 million gallons of process water through spray evaporation, which involves spraying water into the air to form a mist of small droplets and enhancing the natural evaporation through various techniques. In doing so, CDM intends to use a new spray system developed by CF

Industries, which has achieved a rate of 200 million gallons per year, or twice as much as the amount CDM proposes over a two year period. Therefore, even if the equipment can only be used for twenty months during the first two years, it is reasonable to assume that CDM can evaporate 175 million gallons of process water during the first two years, as projected in its BAFO.

66. Shaw also points out that the Instructions require each vendor to supply a closure schedule including eight "milestones" that must be completed within certain time frames. The eighth milestone is the closure and placement of grass on all lined reservoir slopes at least one year prior to the end of the contract. See Joint Exhibit 4, Attachment 3, page 4, § IV. While it concedes that CDM included a closure schedule for the site, Shaw asserts that CDM failed to indicate when, if ever, it would place grass-protected soil cover on all lined reservoir slopes.

67. While the Department acknowledged that CDM's BAFO was not as detailed as those of the other two vendors, it points out there is "a lot of flexibility in the BAFO," and that "the covers were not critical for the closure schedule." Because CDM clearly intends to place the soil cover on the lined areas in conformance with the closure schedule, the omission was not material and does not render the BAFO non-responsive.

68. Shaw next contends that even though the Instructions require that a vendor prepare an independent water balance, it is not apparent in the BAFO whether CDM prepared one. See Joint Exhibit 4, page 14, § B. (A water balance is a professional estimate of the volume of water on site, coupled with a projection of how it will fluctuate over time considering rainfall and groundwater inputs, surface and spray system evaporation, groundwater seepage, and other factors.)

69. The Instructions required that CDM independently estimate the water balance for the five-year contract period. Nothing in the Instructions, though, requires that the actual calculation or spreadsheets that support the estimated water balance be shown.

70. With the assistance of its consultants, CDM estimated the total quantity of process water as slightly in excess of one billion gallons, which it rounded off to one billion. This amount was responsive to the Instructions and was similar to the amounts estimated by Shaw and Compass. Accordingly, the estimate by CDM was responsive to the Instructions.

71. Finally, Shaw argues that while "CDM also mentioned the use of spray irrigation," CDM "did not estimate any volume of water to be treated with this method." The contention has been considered and found to be without merit.

72. In summary, the BAFOs submitted by CDM and Compass conformed in all material respects to the solicitation. To the extent that there were any minor deviations, they did not give Compass or CDM an advantage or benefit not enjoyed by Shaw, and under Section 1.19 of the Instructions they could be waived by the Department.

CONCLUSIONS OF LAW

73. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties thereto pursuant to Sections 120.569 and 120.57(3), Florida Statutes.

74. Section 120.57(3)(f), Florida Statutes, provides in relevant part as follows:

Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, . . . 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 solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

75. By including the standard of proof language in the last sentence, the statute is confusing and awkwardly worded. It is clear, however, that Petitioners have the burden of proving by a preponderance of the evidence that the Department's

proposed award of the contract to CDM is contrary to the Department's governing statutes, rules, policies, or the Instructions. Presumably, the standard of proof language requires that Petitioners prove that the Department was clearly erroneous or acted in a manner that was arbitrary, capricious, or contrary to competition when it interpreted, applied, or otherwise considered the governing statutes, rules, policies, or Instructions.

76. Shaw contends that by selecting Dr. Fuleihan, and having him participate in every phase of the process even though he had a conflict of interest which was never disclosed, the Department violated Sections 287.001 and 287.057(20), Florida Statutes, DEP 202 and DEP 315, and the conflict attestation form included in the Instructions. (Section 287.001, Florida Statutes, establishes "fair and open competition" as a basic tenet of the procurement process, which is designed to reduce "the appearance and opportunity for favoritism." Assuming that an agency's action can contravene an aspirational statute that merely expresses legislative intent, the argument has been considered.) Shaw also contends that the Department violated Section 286.011, Florida Statutes (also known as the Sunshine Law), because the evaluation team and the Department's management met privately on several occasions to discuss the proposals. Finally, and presumably for the purpose of

establishing standing, it contends that the BAFOs filed by Compass and CDM were contrary to the Instructions in several material respects and were therefore non-responsive. A contention that at least two of the evaluators were not qualified was not timely raised and need not be considered. Nonetheless, in the findings of fact, this contention has been rejected. In its Formal Written Protest, Compass has raised a single issue, that being Dr. Fuleihan's conflict of interest.

77. By a preponderance of the evidence, Petitioners have established that Ardaman (and Dr. Fuleihan) had a professional relationship with the top-ranked vendor (CDM) and one of its subcontractors (Mosaic) during the solicitation process; that Dr. Fuleihan failed to disclose these conflicts on the certification forms or to the Department; and that this omission contravened the requirements of Sections 287.001 and 287.057(20), Florida Statutes, DEP 202 and DEP 315, and the attestation form in the Instructions. Therefore, "the [Department's] proposed action is contrary to the [Department's] governing statutes, the [Department's] rules or policies, or the solicitation specifications." § 120.57(3)(f), Fla. Stat.³ It is inappropriate, then, to award a contract to CDM using an evaluation team that includes Dr. Fuleihan.

78. For the reasons given in the findings of fact, the evidence does not support a conclusion that the Sunshine Laws

were violated. Likewise, the evidence does not support a conclusion that the BAFOs submitted by Compass and CDM were non-responsive. To the extent that the BAFOs deviated from the Instructions, such deviations were immaterial and could be waived by the Department under Section 1.19 of the Instructions.

79. All other arguments presented by Shaw not specifically addressed by this Recommended Order have been considered and rejected.

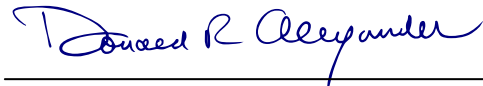
80. In summary, because the proposed award of the contract to CDM contravenes the Department's governing statutes, policies, and the Instructions, the proposed award cannot be sustained.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Environmental Protection enter a final order determining that its proposed award of the contract to CDM Constructors, Inc., which was based upon a review, grading, and ranking of the vendors by an evaluation team that included Dr. Fuleihan, is contrary to its governing statutes, policies, and specifications.

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



DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of March, 2005.

ENDNOTES

- 1/ All future references are to Florida Statutes (2004).
- 2/ This contention has been rejected in Finding of Fact 31.
- 3/ In reaching this conclusion, the undersigned has considered a contention by the Department and CDM (grounded on the two cases cited below) that unless Petitioners can present "hard facts," and not mere suspicion or innuendo, that some impropriety occurred during the procurement process, the Department's action must be sustained. See Gibbons & Company, Inc. v. State of Fla., Fla. Board of Regents et al., DOAH Case No. 99-0697BID, 1999 WL 1486501 *70-71 (allegation that a member of evaluation team, in collusion with highest ranked vendor, designed the RFP so that the vendor would receive contract rejected where no evidence to support that allegation); Enpower, Inc. et al. v. Tampa Bay Water et al., DOAH Case No. 99-3398BID, 1999 WL 1486695 *38 (allegation that "various individuals manipulated the procurement process to the point of corruption" rejected where no facts to support that charge). In the instant case, however, there is evidence that an evaluator had a professional relationship with the highest ranked vendor and one of its subcontractors; and that he participated in reviewing, ranking, and grading those two entities. Given these circumstances, an appearance of ethical impropriety arises, and a

reasonable person might question the evaluator's impartiality. Because governing statutes, the Code of Ethics, and the Instructions require that individuals disclose and avoid this type of conflict, there is no need to show any "hard facts" that favoritism and bias actually occurred.

COPIES FURNISHED:

Kathy C. Carter, Agency Clerk
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Thomas M. Beason, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Jere Earlywine, Esquire
Tew Cardenas LLP
215 South Monroe Street, Suite 702
Tallahassee, Florida 32301-1839

J. Andrew Bertron, Jr., Esquire
Huey, Guilday, Tucker, Schwartz
& Williams, P.A.
Post Office Box 12500
Tallahassee, Florida 32317-2500

Seann M. Frazier, Esquire
Greenberg Traurig, P.A.
Post Office Drawer 1838
Tallahassee, Florida 32302-1838

Dorn C. McGrath, III, Esquire
Greenberg Traurig, P.A.
1750 Tysons Boulevard, Suite 1200
McLean, Virginia 22102-4208

Gregory M. Munson, General Counsel
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

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 render a final order in this matter.