STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MERKURY CORPORATION, d/b/a MERKURY DEVELOPMENT,	)	
Petitioner,	)	
vs.	)	Case No. 05-4454BID
DEPARTMENT OF MANAGEMENT SERVICES,	)	
Respondent,	)	
and	)	
E.L.C.I. CONSTRUCTION GROUP, INC.,	)	
Intervenor.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on April 27, 2006, in Miami, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this bid protest are whether Intervenor's bid materially deviated from the project specifications and, if so, whether Respondent's preliminary decision to award Intervenor the construction contract at issue was clearly erroneous, arbitrary or capricious, or contrary to competition.

PRELIMINARY STATEMENT

Respondent Department of Management Services issued an Invitation to Bid for the purpose of soliciting proposals from contractors interested in building classrooms for the ICARE Baypoint School, a Department of Juvenile Justice facility. Six bids were received and opened on September 22, 2005. On October 17, 2005, Respondent announced its intent to award the construction contract to Intervenor E.L.C.I. Construction Group, Inc.

Petitioner Merkury Corporation filed a formal written protest of the intended award on October 20, 2005. The case was referred to the Division of Administrative Hearings, where the protest petition was filed on December 8, 2005.

At a scheduling conference on December 16, 2005, the parties agreed that the case could probably be decided without

an evidentiary hearing, and it was decided——with the parties' input and consent——that the undersigned would defer setting a final hearing until after the parties had filed a joint stipulation of facts, which would be due no later than January 6, 2006.[1] That date was nearly a month after the undersigned's receipt of the protest petition; by agreeing to it, as they did, the parties waived their right to an expedited hearing.[2]

On December 29, 2006, Respondent filed a Motion to Relinquish Jurisdiction. That particular motion gave rise to a briefing schedule that extended into February 2006. The parties, who had input into this schedule, consistently told the undersigned that they continued to believe the case probably could be resolved without a formal hearing.

On February 1, 2006, while Respondent's Motion to Relinquish Jurisdiction was pending, Petitioner moved for leave to amend its formal protest and, on February 21, 2006, was granted permission to do so. Petitioner's Amended Bid Protest raised new protest grounds, giving rise to genuine disputes of material fact. Consequently, Respondent's Motion to Relinquish Jurisdiction was denied and the final hearing scheduled.

On March 16, 2006, Intervenor filed a Petition in Intervention, which the undersigned granted on March 27, 2006.

The final hearing took place on April 27, 2006, as scheduled, with all parties present. In its case, Petitioner elicited testimony from its corporate president, Paul A. Tolles, as well as from Moises Bichachi, the vice president of Intervenor. In addition, Petitioner's Exhibits 1 and 2 were received in evidence.

Respondent offered the testimony of its Project Manager, Jere Lahey. Respondent also offered 347 Bates-numbered pages of exhibits, which were admitted into evidence without objection.

The final hearing transcript was filed on May 26, 2006, making the proposed recommended orders due on June 1, 2006, pursuant to the schedule established at the conclusion of the final hearing. Respondent timely filed a Proposed Recommended Order. Petitioner's late-filed Proposed Recommended Order was accepted out-of-time, as was Intervenor's. All of the parties' post-hearing submissions were carefully considered during the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2005 Florida Statutes.

FINDINGS OF FACT

1. Pursuant to an Invitation to Bid (the "ITB"), Respondent Department of Management Services ("DMS") solicited bids on a project known as the ICARE Baypoint School Classroom Addition (the "Project").[3] Bids were due on September 22, 2005.

2. As a condition of submitting a bid, interested contractors needed first to be "prequalified" by DMS. DMS prequalified Petitioner Merkury Corporation ("Merkury") and Intervenor E.L.C.I. Construction Group, Inc., ("ELCI"), among several others.

3. Each bidder was required to submit a "Base Bid" (i.e. the total price for all work, including labor and materials, specified in the ITB), together with a price for each of six numbered "Alternates."[4] The contract would be awarded to the responsive bidder offering the lowest bid, the latter being defined as, generally speaking, the bid proposing the lowest aggregate price on the Base Bid plus the cost(s) of any Alternate(s) chosen by DMS.[5]

4. Of interest in this case is Alternate No. 1, which, in the ITB as originally issued, appeared as follows:

> Alternate No. 1 – Allowance for Owner [=DMS] contribution for buried feeder conduit to the electrical transformer (Owner will provide number).

Alternate No. 1 referred to the work——described in the Electrical Site Plan (which was part of the ITB)——that would be necessary to bring electricity to the Project (hereafter, the "electric service connection"). In brief, establishing the electric service connection entailed installing the wiring between the electrical panel in the new building and the nearest

transformer, which latter belonged to the local electric company, Florida Power & Light ("FP&L").

5. DMS knew that the Project would need power. Thus, Alternate No. 1 was not optional, as the nomenclature might suggest. But the cost of establishing the electric service connection would be largely dependent on factors exclusively within FP&L's control. And as of the time the ITB was issued, DMS had been unable to obtain from FP&L sufficient information to allow bidders accurately to estimate the cost of this particular item. The purpose of Alternate No. 1, therefore, was to make the electric service connection a non-competitive item. This would be accomplished by DMS's providing prospective bidders with a cost estimate based on information to be obtained from FP&L. DMS expected that each competing contractor would bid the same amount on Alternate No. 1, namely, the amount that DMS had provided.

6. As initially defined, however, Alternate No. 1 was somewhat confusing, and at the pre-bid meeting in early September 2005, an issue was raised about DMS's intent regarding this item. As a result, Addendum No. 1 to the ITB, which was issued on September 8, 2005, to address questions raised at the pre-bid meeting, included the following:

> **ADDENDUM NO. 1 — ITEM NO. 5:** An allowance shall be carried for the cost of new service connection from new transformer to nearest

> FP & L point of service. Owner will provide budget number to be carried for this allowance.

This addendum amended the description of Alternate No. 1, making clearer (it was believed) DMS's intent that the electric service connection not be a point of competition between the bidders, as each would carry, as an allowance, the Owner-provided budget number for this item.

7. Unfortunately for everyone concerned, DMS never provided the interested contractors the budget number reflecting the estimated cost of establishing the electric service connection.[6] Consequently, none of the bidders proposed a dollar figure for Alternate No. 1. Instead, each responded to Alternate No. 1 by stating, in effect, that the requested allowance could not be provided according to the specifications (which unambiguously instructed that DMS would provide the number to be carried for this allowance).

8. To be sure, the bidders' respective responses to Alternate No. 1 were not identical. Merkury, for example, wrote "N/A," which is commonly understood to mean "not applicable." ELCI's bid proposal, on the other hand, stated, "By Owner." Merkury argues that the phrase "By Owner" means that DMS, rather than ELCI, should be responsible for establishing——at DMS's expense——the electric service connection. The undersigned rejects this interpretation of ELCI's bid as unpersuasive and

unsupported by the greater weight of the evidence. In the instant context, the phrase "By Owner" is most readily and reasonably understood, objectively, as being functionally the equivalent of "N/A." ELCI was simply expressing the idea that the budget number (not the work) would be provided by DMS——a reasonable response, given the language of Alternate No. 1. In sum, despite some differences in wording, every one of the responses to Alternate No. 1, including ELCI's, was the product of the bidder's inability, in the absence of the Owner-provided budget number, to carry as an allowance the Owner-provided budget number.

9. Of the five contractors who timely submitted a bid proposal, Merkury's Base Bid of $2,874,597 was the lowest, followed closely by ELCI's Base Bid of $2,877,000. DMS decided to take all six Alternates, however, and after the additional costs were added, ELCI was deemed the lowest responsive bidder, Merkury the second lowest. Accordingly, on October 17, 2005, DMS announced its intent to accept ELCI's bid in toto and award ELCI the contract for the Project.

10. Protesting the intended award, Merkury takes the position that DMS's failure to provide the budget number for Alternate No. 1 effectively rendered this item a nullity, compelling the bidders to include in their respective Base Bids the cost of the electric service connection, which work remained

a part of the Project, by virtue of the bid specifications, notwithstanding the loss of Alternate No. 1. Consistent with this understanding of the effect of DMS's silence regarding the budget figure, Merkury took into account the anticipated cost of establishing the electric service connection when working up its Base Bid, ultimately adding $33,388 to the bottom line as a result. ELCI, in contrast, assuming that DMS eventually would provide the figure for the allowance, did not factor into its Base Bid calculation the cost of the electric service connection.

11. ELCI guessed correctly, for in choosing Alternate No. 1, DMS decided that it would provide the successful bidder with the budget number when such became available and thereafter pay the cost of establishing the electric service connection via a change order. Merkury maintains that DMS should have rejected ELCI's bid as materially non-responsive (because the costs that were used in preparing ELCI's Base Bid did not include the cost of establishing the electric service connection) and awarded the contract to Merkury as the lowest responsive bidder.

12. In light of Merkury's argument, it is relevant to note that the ITB called for the Base Bid to be given as a lump sum, without breaking out individual costs; that is, in fact, how each of the six responding contractors presented their respective Base Bids. Thus, there was no way for DMS to know,

upon opening the bids, that Merkury's Base Bid included a cost component relating to the electric service connections, while ELCI's did not.

CONCLUSIONS OF LAW

13. 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.

14. Pursuant to Section 120.57(3)(f), Florida Statutes, the burden of proof rests with the party opposing the proposed agency action, here Merkury. See State Contracting and Engineering Corp. v. Department of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Merkury 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).

15. 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.

16. 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. 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 deciding State Contracting, the court followed Intercontinental Properties, Inc. v. State Dept. of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 1st DCA 1992), an earlier decision——it actually predates the present version of the bid protest statute——in which 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 . . . have been satisfied.

17. 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.

18. 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.

19. 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,[7] the protester additionally must establish that the agency's misstep was: (a) clearly erroneous; (b) contrary to competition; or (c) an abuse of discretion.

20. 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.

21. 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).

22. 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).

23. 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.

24. 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.[8] 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.

25. 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.[9]

26. 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).[10]

27. 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 7, 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.

28. 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.

29. 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.

30. 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

31. 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.

32. 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.

33. 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.

34. 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)

35. Turning to the merits of this case, Merkury's argument that ELCI's bid was materially non-responsive proceeds from the premise that, notwithstanding DMS's failure to provide the budget number as promised in the description of Alternate No. 1, the successful bidder is obligated under the bid specifications to perform all work necessary to complete the electric service connection. Building on this proposition, Merkury reasons that because installation of the electric service connection was an essential aspect of the Project, bidders were bound to estimate the cost of this work in computing their respective Base Bids—— and to include such cost in their bids. ELCI's failure to include the cost of the electric service connection in its Base Bid, Merkury concludes, constituted a material deviation from the bid specifications, for which its bid should have been rejected as non-responsive.

36. Merkury's initial premise is based on an interpretation of the bid specifications that, while contrary to DMS's, is at least plausible and perhaps reasonable. It is not necessary to determine whether DMS's interpretation is clearly erroneous, however, because the next step in Merkury's reasoning——the assertion that bidders were bound to include in

their Base Bids the cost of performance associated with the electric service connection——is a non sequitur. That the successful bidder will be contractually obligated to perform a particular piece of work does not logically compel the conclusion that, to be responsive, a bidder must include the cost of such work in its bid. To the contrary, where an "out the door" bid price is solicited, as here, practically any bid that proposes a lump-sum total cost within reason must be considered responsive, regardless of how the bidder computed its bid, or what expenses were included (or not included) therein.[11]

37. Thus, even if Merkury were correct about the meaning of the bid specifications vis-à-vis the electric service connection, the upshot would be that ELCI underbid on the Project by mistakenly omitting a material cost from its bid computation——but its bid would be responsive nonetheless. The downside for ELCI in that event would be possibly having to install the electric service connection at a loss, because as a general rule, bidders on public contracts must bear the consequences of their bid computation errors. Department of Transp. v. Ronlee, Inc., 518 So. 2d 1326, 1328 (3rd DCA 1987), rev. denied, 528 So. 2d 1183 (Fla. 1988); Graham v. Clyde, 61 So. 2d 656, 658 (Fla. 1952)("After the bid is accepted, the bidder is bound by his error and is expected to bear the consequence of it.").

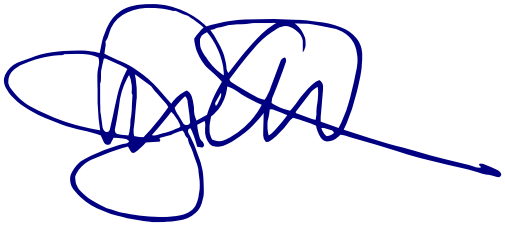
38. In sum, DMS did not err in deeming ELCI's bid responsive. Indeed, because DMS had no way of knowing, at the time the bids were opened, what costs ELCI or the other bidders had included in (or omitted from) their Base Bids, it was not possible for DMS to reject ELCI's bid on the basis of the alleged deviation about which Merkury has complained. That being the case, accepting ELCI's bid was not contrary to any governing statute, rule, or bid specification, and it is concluded that DMS did not violate the applicable standard of conduct in the manner that Merkury has urged.[12]

39. There having been no cognizable violation of the standard of conduct, it is concluded that the intended award should stand.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered directing that the proposed award to ELCI be implemented in accordance with DMS's intentions.

DONE AND ENTERED this 10th day of July, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of July, 2006.

ENDNOTES

[1]/ The parties ultimately filed a Joint Stipulation on January 23, 2006. The stipulated facts, being thus memorialized in the record, were taken as established without need of further proof.

[2]/ Section 120.57(3)(e), Florida Statutes, requires that bid protests be heard within 30 days after the administrative law judge's receipt of the formal written protest, unless the parties waive the right to a prompt hearing.

[3]/ The Project entails the construction of additional classrooms at a facility operated by the Department of Juvenile Justice.

[4]/ The cost of an Alternate can be either positive (an increase in the Base Bid) or negative (a deduction from the Base Bid). In this instance, each Alternate was expected to add an additional cost to the Base Bid, if accepted.

[5]/ The ITB permitted DMS to select any, all, or none of the six Alternates. If, however, DMS chose fewer than all six, then the lowest bid would belong to the bidder offering the lowest price for the Base Bid plus each Alternate (if any) taken in numerical order. For example, if DMS were to select Alternate Nos. 1, 2, and 4, then the relevant respective bid prices, for the purpose of determining the lowest bid, would be each bidder's Base Bid plus its proposed costs for Alternate Nos. 1 and 2, Alternate No. 4 having been taken out of order.

In its original protest, Merkury alleged that DMS had chosen Alternates out of order, effectively starting with Alternate No. 2. Because Merkury (as will be seen) had submitted the lowest Base Bid, Merkury alleged that DMS should have designated Merkury the lowest bidder, according the ITB's instructions for determining the lowest bid. Later, however, Merkury moved for, and was granted, leave to file an amended protest petition. The gravamen of Merkury's amended petition was not, as before, DMS's alleged miscalculation of the lowest bid, but rather DMS's alleged failure to reject ELCI's bid as non-responsive.

At hearing and in its Proposed Recommended Order, Merkury focused exclusively on the alleged non-responsiveness of ELCI's bid. The undersigned has determined, therefore, that Merkury abandoned its original protest ground, and accordingly that issue will not be discussed further herein.

[6]/ DMS blames its failure to furnish the figure on FP&L, on whom DMS was still waiting, as of the date the bids were due, to provide information believed necessary for developing a reasonable cost estimate.

[7]/ 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.)

[8]/ 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.

[9]/ 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).

[10]/ 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.

[11]/ A bid conceivably might be so far below the range of reasonable bids as to be deemed non-responsive, or to cause the bidder to be rejected as not responsible, but such a situation would be unusual, and in any event would be readily distinguishable from the present case, where none of the bids was patently ridiculous.

[12]/ DMS's failure to provide the budget number as promised in connection with Alternate No. 1, which seems clearly to have been contrary to the bid specifications, is another matter. It is unnecessary, however, and would be inappropriate to boot, to decide whether that misstep constitutes reversible error under the applicable standard of review, for Merkury did not raise the matter as a protest ground.

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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.