STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUPPLY CHAIN CONCEPTS, Petitioner, vs. MIAMI-DADE COUNTY SCHOOL BOARD, Respondent, and SCHOOL FOOD SERVICE SYSTEMS, INC., Intervenor.	)	Case No. 05-4571BID

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on January 18, 2006, in Miami, Florida.

APPEARANCES

For Petitioner: Paula C. Coffman, Esquire
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For Respondent: Stephen L. Shochet, Esquire
Miami-Dade County School Board
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For Intervenor: Jerome S. Reisman, Esquire
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STATEMENT OF THE ISSUES

The issues in this bid protest are whether, in drawing the specifications for an invitation to bid, Respondent acted contrary to a governing statute, rule, or policy; and, if so, whether the misstep was clearly erroneous, arbitrary or capricious, or contrary to competition.

PRELIMINARY STATEMENT

On October 20, 2005, Petitioner Supply Chain Concepts timely filed its notice of intent to protest the specifications for dry cereal contained in an invitation to bid that Respondent Miami-Dade County School Board had issued in furtherance of its intent to award a contract for food items and distribution services. This notice was followed by a formal written protest, which Petitioner filed on October 31, 2005. Petitioner subsequently submitted two separate addenda to its formal protest. Respondent referred the matter to the Division of Administrative Hearings on December 16, 2005.

The final hearing took place in Miami, Florida, as scheduled. At the outset of the hearing, School Food Service Systems, Inc.——a potential bidder on the proposed contract——was granted leave to intervene, without objection.

Petitioner presented the testimony of its president, William G. Coffman, II; and Carol Chong, a dietician who works for the Miami-Dade County Public School District. Intervenor

called Barry Gray, its Director of Purchasing, as its sole witness. Respondent called no witnesses. Respondent's Exhibit 1 was the only exhibit offered and received in evidence.

Although a court reporter recorded the proceeding, neither party ordered a transcript. Each party submitted a proposed recommended order before the established deadline, which (after one enlargement) was February 3, 2006. These were carefully considered.

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

FINDINGS OF FACT

1. In 2005, Respondent Miami-Dade County School Board (the "Board") issued Invitation to Bid No. 010-FF03 to solicit bids on a contract for Mainline Foods and Distribution Services. The Board intends, during the life of the proposed contract, to purchase from the vendor to whom the contract is awarded approximately 400 items of food, in varying quantities, for service in the cafeterias of the schools located in the Miami-Dade County Public School District (the "District").

2. Petitioner Supply Chain Concepts ("Supply Chain") is a brokerage firm that represents the Malt-O-Meal Company ("Malt-O-Meal"). Malt-O-Meal manufactures cereal, at least some of which is sold under the Malt-O-Meal® brand. (Malt-O-Meal® cereals are basically imitations of pricier, nationally recognized brands.

For example, Malt-O-Meal makes Coco Roos®, a cereal which resembles Cocoa Puffs®, the familiar product of General Mills, Inc.; and Crispy Rice®, a copy of Kellogg's Rice Krispies®.) As of the date of the final hearing in this case, Supply Chain was under contract with the Board to supply——and was supplying—— Malt-O-Meal® cereals to the District's schools.

3. Under the proposed contract, the Board would purchase cereal, together with hundreds of other foodstuffs, from a single distributor. Supply Chain, which is not a distributor, is not qualified to bid on the subject contract. Supply Chain, however, supplies Malt-O-Meal® cereals to Intervenor School Food Service Systems, Inc. ("SFSS"), which is a distributor eligible to bid on the subject contract. SFSS would offer Malt-O-Meal® cereals in its bid, if such cereals were responsive to the bid specifications (which question goes to the heart of the present dispute). Thus, Supply Chain's substantial interests are affected by the instant procurement.[1]

4. One of the food items in the subject bid is dry cereal. The descriptive specifications for this item require that the cereal be packaged in individual, self-serve bowls. The specifications further provide as follows:

> ASSORTED SWEETENED AND UNSWEETENED FLAVORS. EACH PRODUCT SERVING MUST MEET MINIMUM OF ONE BREAD COMPONENT CREDIT AS INDICATED BY THE USDA STANDARDS FOR THE NATIONAL SCHOOL BREAKFAST PROGRAM. A MINIMUM OF VARIETIES

> OF EIGHT FLAVORS, PLUS BRAN CEREAL WITH RAISINS, TOTAL OF NINE FLAVORS, FLAVORS TO BE SELECTED BY THE DEPARTMENT OF FOOD AND NUTRITION FROM A LIST OF FLAVORS PROVIDED BY THE WINNING VENDOR. **CEREALS TO CONTAIN A MINIMUM OF 0.5 GRAMS OF DIETARY FIBER AND A MAXIMUM OF 12 GRAMS OF SUGAR PER SERVING (28G).** INDIVIDUAL PRODUCT SERVING MUST MEET MINIMUM OF ONE BREAD COMPONENT CREDIT AS INDICATED BY THE USDA STANDARDS FOR THE NATIONAL SCHOOL BREAKFAST PROGRAM.

(Boldface and uppercase in original.) The boldface in the above specifications (hereafter the "Nutritional Standards") prescribes requirements that the Board is implementing for the first time in the procurement under review.

5. Finally, the specifications identify a number of "approved brands." Six of these are products of the Kellogg Company and four are General Mills' cereals.[2] None of Malt-O-Meal's cereals is listed as an approved brand.

6. The Board did not designate any Malt-O-Meal® cereals as approved brands because it had determined, in the process of preparing the bid specifications, that Malt-O-Meal does not offer a sufficient number of varieties that meet the Nutritional Standards. It is the Board's position (which is not disputed) that eight flavors (excluding raisin bran) must meet the Nutritional Standards.[3] It is undisputed that Malt-O-Meal makes only seven varieties (excluding raisin bran) that meet the Nutritional Standards.[4]

7. The Board included the requirement that the each competing vendor offer a minimum number of flavors to ensure that students will have a variety of cereals from which to choose. As for why the Board chose to require a minimum of eight flavors plus raisin bran, as opposed to some other number, the evidence establishes that the "eight plus one" formula was used in the last procurement and proved satisfactory.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes, and the parties have standing.

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

The Rules of Decision in Bid Protests

The Standard of Conduct.

10. 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, proposals, or replies, 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.

11. 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.[5] The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." State Contracting and Engineering Corp. v. Department of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). In this, the court followed its earlier Intercontinental Properties, Inc. v. State Dept. of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 1st DCA 1992), a decision which predates the present version of the bid protest statute, wherein the court had reasoned:

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

12. 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, policies, 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.

13. 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.

14. 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,[6] the protester additionally must establish that the agency's misstep was:

(a) clearly erroneous;

(b) contrary to competition; or

(c) an abuse of discretion.

15. 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.

The Standards of Review.

16. The Clearly Erroneous Standard. 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).

17. 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).

18. 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 responsibility, 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.

19. 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.[7] 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.

20. 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.[8]

21. 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).[9]

22. The Abuse of Discretion Standard. 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 6, 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.

23. 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.

24. 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.

25. 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

26. 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.

27. 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.

28. The Contrary to Competition Standard. 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.

29. 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.

The Protest Grounds

30. Supply Chain protests the specifications for dry cereal on two main grounds. First, Supply Chain contends that requiring a manufacturer to offer at least eight varieties of cereal that meet the Nutritional Standards is arbitrary and capricious. Second, Supply Chain argues that specifying approved brands is unduly restrictive of competition, in

violation of federal law. Each contention will be examined below.

Minimum Compliance With the Nutritional Standards.

31. Supply Chain is not challenging the Nutritional Standards per se, nor is it objecting to the Board's requiring that some number of the cereals that a vendor offers meet the Nutritional Standards. Rather, Supply Chain complains that "requiring the Petitioner [meaning, apparently, Malt-O-Meal, the manufacturer which is not a party to this proceeding] to provide a minimum of eight (8) varieties that comply with the new nutritional specifications, instead of seven (7)," is arbitrary.[10]

32. Underlying Supply Chain's argument is the assumption—which all of the parties share—that the specifications require that at least eight of a cereal manufacturer's brands must meet the Nutritional Standards in order for a vendor to offer any of that manufacturer's brands in its bid. The parties apparently consider this "requirement" to be self-evident, for none has identified where, in the specifications, such a "requirement" is to be found. Yet, having independently scrutinized the specifications, the undersigned concludes that, contrary to the parties' assumption, the specifications clearly do not prohibit a vendor from offering, as one (or more) of the eight flavors meeting the Nutritional Standards, the brand(s) of a

manufacturer whose line of cereals contains fewer than eight products that conform to the Nutritional Standards.

33. Accordingly, under the specifications at hand, the fact that Malt-O-Meal makes fewer than eight varieties of cereal that conform to the Nutritional Standards is not (or should not be), of itself,[11] determinative of whether a vendor can include Malt-O-Meal® cereals in its bid. If a vendor wants to offer Malt-O-Meal® cereals, however, it must also include in its bid some brands of another manufacturer, such as General Mills, in order to fulfill the requirement of offering a minimum of eight flavors (not including raisin bran) that conform to the Nutritional Standards.[12]

34. Turning now to what the specifications do require, Supply Chain has not pointed to any statute, rule, or policy which precludes the Board from demanding that, for a bid to be responsive, a bidder must offer at least nine flavors of cereal (including raisin bran), of which a minimum of eight (excluding raisin bran) must satisfy the Nutritional Standards. Moreover, the evidence, such as there is, establishes that the Board had a rational basis in fact for selecting the specified minimum number of flavors, namely, favorable experience with that amount. In this regard, the undersigned rejects, as unfounded in fact or law, Supply Chain's contention that the Board's imposition of the Nutritional Standards somehow compelled the

Board to settle for less variety in the assortment of cereals to be served in the District's schools.

35. It is concluded, therefore, that requiring a vendor to offer, in addition to a bran cereal with raisins, at least eight flavors of cereal that conform to the Nutritional Standards is neither arbitrary nor capricious.

The Approved Brands.

36. Supply Chain's argument——echoed by SFSS——that the specifications' inclusion of approved brands violates federal procurement regulations is an interesting one. But because neither Supply Chain nor SFSS fully developed the argument, and because the Board elected to ignore it, the undersigned must resolve the questions presented with considerably less input from the parties than is desirable.

37. Supply Chain contends that the specifications contravene 7 C.F.R. § 3016.36(c), which provides in relevant part as follows:

> (c) Competition. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 3016.36. Some of the situations considered to be restrictive of competition include but are not limited to:
> (i) Placing unreasonable requirements on firms in order for them to qualify to do business,
> (ii) Requiring unnecessary experience and excessive bonding,
> (iii) Noncompetitive pricing practices

> between firms or between affiliated companies,
> (iv) Noncompetitive awards to consultants that are on retainer contracts,
> (v) Organizational conflicts of interest,
> (vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and
> (vii) Any arbitrary action in the procurement process.

(Emphasis added).

38. Before considering whether the specifications run afoul of the foregoing federal regulation (a point which Supply Chain largely assumes), it must be explained that the undersigned does not have jurisdiction generally to enforce compliance with federal law. Thus, that the Board might have violated an applicable federal regulation in drawing the specifications under review is of no immediate concern, unless there exists a state statute, rule, or policy that requires the Board to obey the federal law in question.

39. For that reason, it is necessary to determine not only whether the Board is subject to 7 C.F.R. § 3016.36(c), but also, if so, whether the instant state administrative forum is the proper place to enforce the Board's compliance therewith.

40. On the question whether the Board is subject to 7 C.F.R. § 3016.36(c), Supply Chain asserts that, as a matter of fact, the Board "operat[es] an entitlement program within the

State of Florida under the auspices of the United States Department of Agriculture."[13] Supply Chain then argues that, as a legal consequence of the asserted "fact," the Board must follow the above-referenced federal regulation, plus other federal laws applicable to the "entitlement program."[14]

41. The undersigned recalls no testimony about an entitlement program. The specifications mention "USDA standards for the National Breakfast Program," and apparently this is the entitlement program to which Supply Chain refers, but the references to the National Breakfast Program in the specifications are insufficient, without more, to prove that the Board participates in the program.

42. Research reveals that the Florida Legislature has enacted the following statute pertaining to school food service programs:

> (1) In recognition of the demonstrated relationship between good nutrition and the capacity of students to develop and learn, it is the policy of the state to provide standards for school food service and to require district school boards to establish and maintain an appropriate private school food service program consistent with the nutritional needs of students.
>
> (2) The State Board of Education shall adopt rules covering the administration and operation of the school food service programs.
>
> (3) Each district school board shall consider the recommendations of the district

school superintendent and adopt policies to provide for an appropriate food and nutrition program for students consistent with federal law and State Board of Education rule.

(4) The state shall provide the state National School Lunch Act matching requirements. The funds provided shall be distributed in such a manner as to comply with the requirements of the National School Lunch Act.

(5)(a) Each district school board shall implement school breakfast programs in all elementary schools that make breakfast available to all students in kindergarten through grade 6 in each district school, unless the elementary school goes only through grade 5, in which case the requirement shall apply only through grade 5. Each district school board shall implement breakfast programs in all elementary schools in which students are eligible for free and reduced price lunch meals, to the extent specifically funded in the General Appropriations Act. A district school board may operate a breakfast program providing for food preparation at the school site or in central locations with distribution to designated satellite schools or any combination thereof.

(b) The commissioner shall make every reasonable effort to ensure that any school designated a "severe need school" receives the highest rate of reimbursement to which it is entitled pursuant to 42 U.S.C. s. 1773 for each free and reduced price breakfast served.

(c) The department shall calculate and distribute a school district breakfast supplement for each school year by multiplying the state breakfast rate as specified in the General Appropriations Act by the number of free and reduced price breakfast meals served.

> (d) The Legislature shall provide sufficient funds in the General Appropriations Act to reimburse participating school districts for the difference between the average federal reimbursement for free and reduced price breakfasts and the average statewide cost for breakfasts.

§ 1006.06, Fla. Stat. (emphasis added). As this statute makes clear, Florida has elected to participate in the national school food service programs for which federal grants are available under the National School Lunch Act, and local school districts are authorized——and required in some circumstances——to participate in the National Breakfast Program, which was established under the Child Nutrition Act of 1966. The undersigned therefore accepts the premise that the District operates a school food program that is funded, in part, through federal grants.

43. As a general rule, when a state chooses to participate in a voluntary federal program for which federal funds are distributed, the state must comply with the federal statutes and regulations governing the program, to be eligible for the federal money. See Public Health Trust of Dade County, Fla. v. Dade County School Bd., 693 So. 2d 562, 564 (Fla. 3d DCA 1996)(state's participation in the Medicaid program necessitates its compliance with federal statutes and regulations governing Medicaid); Florida v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976)("Once a state chooses to participate in a federally funded program, it must comply with federal standards."); Buchanan v.

Ives, 793 F. Supp. 361, 363 (D. Me. 1991)(states receiving federal grants for the provision of vocational rehabilitation services must comply with federal guidelines). The undersigned therefore concludes that the Board is required to comply with the federal statutes and regulations governing the entitlement programs authorized by the National School Lunch Act and the Child Nutrition Act of 1966.

44. The United States Secretary of Agriculture is authorized to promulgate regulations for the operation of the National School Breakfast Program, 42 U.S.C. §§ 1771 et seq., and the National School Lunch Program, 42 U.S.C. §§ 1751 et. seq. See 42 U.S.C. § 1779. Among the federal regulations prescribed under this authority is 7 C.F.R. § 3016.4, which provides in pertinent part as follows:

> (b) Entitlement programs. In USDA, the entitlement programs enumerated in this paragraph are subject to subparts A through D and the modifications in subpart E of this part [i.e., part 3016].
> (1) Entitlement grants under the following programs authorized by The National School Lunch Act:
> (i) National School Lunch Program, General Assistance (section 4 of the Act),
> (ii) Commodity Assistance (section 6 of the Act),
> (iii) National School Lunch Program, Special Meal Assistance (section 11 of the Act),
> (iv) Summer Food Service Program for Children (section 13 of the Act), and
> (v) Child and Adult Care Food Program (section 17 of the Act);

(2) Entitlement grants under the following programs authorized by The Child Nutrition Act of 1966:
(i) Special Milk Program for Children (section 3 of the Act),
(ii) School Breakfast Program (section 4 of the Act)[.]

45. Title 7, Code of Federal Regulations, Section 3016.36(c), a portion of which was quoted above in paragraph 37, is located in subpart C of part 3016 of the Code. Therefore, to the extent the Board receives federal financial assistance for the operation of School Breakfast and School Lunch Programs, it is subject, according to 7 C.F.R. § 3016.4, to the procurement standards prescribed in 7 C.F.R. § 3016.36.

46. The important question still remains whether any state statute, rule, or policy requires the Board's compliance with referenced federal procurement regulation. Unless the specifications under review would contravene a state law by violating the procurement standards prescribed in 7 C.F.R. § 3016.36, the undersigned would lack jurisdiction to invalidate the specifications as contrary to the federal regulation. Put another way, if the specifications violate 7 C.F.R. § 3016.36 but are not contrary to a state statute, rule, or policy as a result of such violation, then this administrative forum is not the proper place for the violation of federal law to be addressed.

47. Section 1006.06, Florida Statutes, which was quoted above in paragraph 42, is the logical starting point in reviewing potentially applicable state laws, for it deals with school food service programs. But while Section 1006.06 provides that the state shall distribute matching funds to the school districts "in such a manner as to comply with the requirements of the National School Lunch Act," this statute does not explicitly direct the districts to adhere to federal procurement standards in purchasing food for their respective school food service programs. Thus, we must look elsewhere for the requisite state law.

48. Florida Administrative Code Rule 6-7.042 allocates responsibilities for school food service programs. It provides as follows:

> (1) The Deputy Commissioner for Planning, Budgeting and Management, shall have the following responsibilities:
> (a) To provide leadership and guidance in the overall administration and development of school food service programs.
> (b) To administer federal and state school food service funds, as provided by law or regulation.
> (c) To require that all programs for which federal reimbursement is granted shall meet at least the minimum standards established by the United States Department of Agriculture as provided in 7 CFR Parts 210, 215, 220, 225, 226, 227, 235, 240, 245, 250 and 252.
> (d) To require that all programs meet at least the minimum standards established by Florida law and rules of the State Board.

Provided, however, that under extenuating circumstances and upon written recommendation of the Deputy Commissioner for Planning, Budgeting and Management, the Commissioner shall have authority to waive any state school food service regulation for a period of time not to exceed six (6) months; provided further, that an extended waiver may be granted based upon evidence that it will contribute to the maintenance of district or school goals. Such an extended waiver shall be for no more than an additional twelve (12) months during which time the district must make periodic reports to the Department as to the impact of the waiver upon the districts food service programs. Based upon positive results the Commissioner may grant further waivers as deemed appropriate.

(e) To distribute the required state matching in such a manner as to comply with the provisions for state matching under the National School Lunch Act. The annual state matching allocation shall be distributed by computing the district's percentage share of total federal revenue received times the state general revenue matching allocation. The federal revenue includes Sections 4 and 11 of the National School Lunch Act and Sections 4 and 5 of the Child Nutrition Act of 1966, as mended, for two (2) fiscal years prior to the current fiscal year. The state matching allocation shall be distributed to school districts in equal amounts quarterly.

(f) To prescribe an incentive plan for qualified supervision for Child Nutrition Programs.

(2) Each district school board shall have the following responsibilities:

(a) To provide the necessary food service programs to meet nutritional needs of students during the school day. These food service programs shall be appropriately scheduled and shall include as a minimum a reimbursable lunch and if desired, a reimbursable breakfast, both priced as a unit. Supplemental foods which make a

nutritional contribution to these meals may also be provided.

(b) To adopt policies covering all phases of the district school food service program.

(c) To control the sale of food and beverage items in competition with the district approved food service program, including those classified as "foods of minimal nutritional value," listed in Code of Federal Regulations 210, Appendix B. These items may be sold in secondary schools only, with the approval of the school board, one (1) hour following the close of the last lunch period. A school board may allow the sale of carbonated beverages to students in high schools by a school activity or organization authorized by the principal at all times if a beverage of one hundred (100) percent fruit juice is sold at each location where carbonated beverages are sold. However, carbonated beverages may not be sold where breakfast or lunch is being served or eaten. Non-carbonated beverages, including one hundred (100) percent fruit juice, may be sold at all times during the day at any location. Consideration should be given to allowing only the sale of nutritious food and beverage items which meet at least United States Department of Agriculture dietary guidelines for Americans.

(d) To require that when competitive food and beverage items are sold during the school day all proceeds from such sales shall accrue to the food service program or to a school organization approved by the school board.

(e) To provide an alternative food service program for students attending double session schools. The school board, after considering the nutritional needs of all the students attending the school, shall determine the alternative program needed.

(f) To provide facilities and equipment necessary for the efficient and effective operation of the school food service programs, in compliance with Chapter 6-2,

F.A.C.
(g) To provide for the control, administration, supervision, and operation of all of the food service programs of the district. The school board may contract with a food management company to provide food service in one (1) or more schools; provided that the school board shall retain responsibility for its operation, administration, supervision and control, in compliance with the program agreement and federal regulations.
(h) To adopt a policy for providing economically needy students with free and reduced price lunches and breakfasts, when breakfasts are served, that will comply with federal regulations. This policy shall include a plan for verifying economic need of students and shall be approved by the Deputy Commissioner for Planning, Budgeting and Management.
(i) To adopt policies prescribing procedures for purchases of food and nonfood items in compliance with the requirements of Rule 6A-1.012, F.A.C., of these rules, provided that such policies:
1. Shall establish procedures to assure that all foods purchased conform to the Federal Food, Drug and Cosmetic Act, the Federal Meat Inspection Act, and the Meat Inspection Law of Florida, and any other federal or state safeguards relating to wholesomeness of specific items being purchased.
2. May exempt food products except milk from the bid requirements of Rule 6A-1.012, F.A.C. Milk may be exempt under the following conditions:
a. The district school board has made a finding that no valid or acceptable firm bid has been received within the prescribed time; or
b. The district school board has made a finding that an emergency situation exists and may enter into negotiations with suppliers of milk and shall have the authority to execute contracts under

whatever terms and conditions as the board determines to be in the best interest of the school system.

(j) To provide optional meal service at cost to Department approved nonprofit child nutrition sponsors of federal or state nutrition programs operating within a district.

(k) To limit, beginning with fiscal year 1984-1985, the amount of funds recovered annually for food service indirect costs to the district's approved restricted federal indirect cost rate, multiplied by the total Food Service Fund expenditures less expenditures for capital outlay, replacement of equipment, and United States Department of Agriculture donated foods; and cash-in-lieu of donated foods.

(l) To conduct a survey at the beginning of each school year, in each school not having a breakfast program asking parents whether their children would participate if a reimbursed breakfast program were available. Within thirty (30) days after completion of the survey, upon due public notice, the superintendent shall present the results of these surveys on a school by school basis to the school board. The survey results shall include the number of students represented by parents requesting school breakfast and recommendations from individual principals desiring a school breakfast program, based on the needs of the children within their school. Upon presentation of the survey to the school board, the school board shall determine whether or not to accept the recommendations of the individual principals and whether or not to accept the breakfast program in individual schools. If surveys have been conducted for three (3) consecutive years and the school board has not established a breakfast program, the survey may be conducted thereafter once every three (3) years.

(3) The school principal and local school staff shall have the following responsibilities:

(a) To comply with federal and state laws, regulations and district school board policies.
(b) To effect, through classroom instruction and learning experiences outside the classroom, ways to increase the pupil's knowledge concerning nutrition.
(c) To schedule meal serving periods in such a manner as to permit and encourage maximum student participation in the food service program.
(4) Forms ESE 156, Preaward Nondiscrimination Compliance Review Summer Food Service Program for Children; ESE 195, Monthly Claim for Reimbursement Summer Food Service Program for Children; ESE 196, Summer Food Service Program for Children Application for Participation; ESE 197, Summer Food Service Program for Children Site Information Sheet; ESE 198, Summer Food Service Program for Children Agreement; ESE 003, Food Service Special Revenue Financial Report; ESE 157, Application for Change in Food Service Program; ESE 174, Monthly Reimbursement Voucher School Lunch and Breakfast Programs; ESE 177, Monthly Reimbursement Voucher Special Milk (Only) Program; ESE 178, Private School/Institution Financial Report; ESE 491, National School Lunch, School Breakfast and Commodity School Program Application, Agreement & Policy Statement; ESE 472, Special Milk Program for Children Application, Agreement and Policy Statement; and Form ESE 080, Breakfast Program Supplement Report are hereby incorporated by reference and made a part of this rule to become effective September, 1999. These forms may be obtained from the Administrator of Information Services and Accountability, Division of Technology and Administration, Department of Education, The Florida Education Center, Tallahassee, Florida 32399.

Fla. Admin. Code R. 6-7.042. (emphasis added).

49. Pursuant to Rule 6-7.042(2)(h), the Board is required to adopt a policy for operating its school food service programs, and the policy must adhere to federal regulations. Conceivably, therefore, the Board has promulgated a policy under which it is obligated to comply with federal laws including 7 C.F.R. § 3016.36. Supply Chain did not offer any evidence of such a policy, however, and hence the undersigned is unable to determine whether the specifications at issue, if found in violation of 7 C.F.R. § 3016.36, would be contrary to the Board's food service policy.

50. Rule 6-7.042(2)(i) directs district school boards to adopt procurement policies in compliance with the provisions of Florida Administrative Code Rule 6A-1.012. Although this latter Rule is silent regarding compliance with federal law, it is possible that the Board's procurement procedures require its compliance with federal purchasing regulations such as 7 C.F.R. § 3016.36. But Supply Chain did not offer any evidence of such policies, and therefore the undersigned is unable to determine whether the specifications at issue would be contrary to the Board's procurement procedures were the specifications violative of 7 C.F.R. § 3016.36.

51. The undersigned has not overlooked Rule 6-7.042(3)(a), which requires school principals and local school staffs to comply with federal law (among other applicable laws). Because,

however, the question at hand is whether state law compels the Board to obey federal law——specifically federal procurement regulations——Rule 6-7.042(3)(a) is not instructive. Further, Supply Chain offered no evidence that school principals or local school staffs were (or likely will be) directly involved in the procurement at issue. Thus, the undersigned would be unable to conclude that the challenged specifications contravene Rule 6-7.042(3)(a), even if he were to find them to contrary to 7 C.F.R. § 3016.36.

52. In sum, Supply Chain failed to establish that if the specifications for dry cereal were restrictive of competition in violation of 7 C.F.R. § 3016.36(c), then they would be "contrary to the agency's governing statutes, [or] the agency's rules or policies." See § 120.57(3)(f), Fla. Stat. The protest fails for this reason.

53. Although this case could be decided without determining whether the specifications are anti-competitive under federal procurement law, the undersigned will nevertheless render his opinion on the issue, providing an independently dispositive basis for the ultimate recommendation.

54. The federal regulation deems it an anti-competitive procurement practice to specify "only" a "brand name" product instead of describing the relevant characteristics of the product sought and allowing equivalent "off brands" to be

offered. Here, the Board's specifications do not specify only a brand name product; rather, they describe the relevant requirements for the product sought, namely dry cereal. This is consistent with 7 C.F.R. § 3016.36(c), not contrary thereto.

55. The specifications list 10 approved brands, each of which is a cereal manufactured either by General Mills or Kellogg. Supply Chain assumes that a bidder may offer only these 10 brands and no others. Thus, according to Supply Chain, because Malt-O-Meal® cereals are not mentioned, SFSS and other bidders are precluded from offering them. If this were true, then the specifications would be restrictive of competition pursuant to 7 C.F.R. § 3016.36(c).

56. The undersigned does not believe, however, that the approved brands identified in the dry cereal specifications were intended to be the only responsive brands.[15] If that were the Board's intent, then it would not have been necessary to publish, in the invitation to bid, the descriptive specifications (including the Nutritional Standards) for dry cereals, as they would be mere surplusage. Rather, it would have been sufficient simply to ask for bids on the 10 approved brands of cereal. To give meaning to the specifications as a whole, without rendering a large portion thereof essentially pointless, it is necessary to interpret the list as being exemplary rather than exclusive, naming items which are

definitely responsive to the Board's invitation while allowing others of like kind (i.e. meeting the descriptive specifications including the Nutritional Standards) to be offered as well.

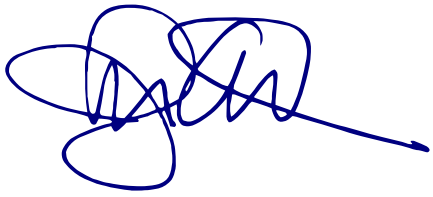
57. In further support of this interpretation, the undersigned notes that there is no dispute that Kellogg and General Mills each offer brands, in addition to the approved brands, that meet the Nutritional Standards. If the list of approved brands were exclusive, then these other brands of Kellogg and General Mills could not be offered. Yet, although there was no direct evidence on this point, the undersigned infers from the testimony presented that the specifications were intended to allow a bidder to offer any products of General Mills or Kellogg that meet the Nutritional Standards and other requirements. The undersigned believes that the specifications likewise allow a bidder to offer any Malt-O-Meal® cereals that meet the Nutritional Standards and other descriptive requirements, because to exclude them while accepting bids on other brands not listed would be irrational, arbitrary, and contrary to competition——and the Board undoubtedly does not intend to act in such a manner.

58. The undersigned therefore concludes that the specifications, properly understood, are not restrictive of competition as such is defined in 7 C.F.R. § 3016.36(c).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board enter a Final Order declaring Supply Chain's protest to be unsuccessful and authorizing the procurement to proceed.[16]

DONE AND ENTERED this 13th day of February, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of February, 2006.

ENDNOTES

[1]/ The Board did not challenge Supply Chain's standing to maintain this protest.

[2]/ The approved brands are identified by manufacturer and product number, e.g. Kellogg's 01996——not brand name, e.g. Kellogg's Corn Flakes®. The evidence is insufficient to permit the undersigned to make findings regarding the particular brands of cereal deemed approved pursuant to the bid specifications.

[3]/ The undersigned is less sure than the parties that the specifications at issue unambiguously require that only eight out of the total of nine minimum flavors must meet the Nutritional Standards. The undersigned would read the specifications as requiring: (a) that raisin bran be one of the nine minimum flavors (the only flavor specifically required), and (b) that all varieties offered (of which there must be at least nine including raisin bran) meet the Nutritional Standards. Nevertheless, because all parties accepted the Board's position as described above, and because the Board's position is not clearly contrary to the specifications, the undersigned, too, accepts the Board's position without further comment.

[4]/ There is information in the file——but not in the evidentiary record——concerning the nutritional specifications of Malt-O-Meal® cereals. Based on these data, which are set forth in a document that was appended to a memorandum referenced in the second addendum to Supply Chain's formal protest, the undersigned counts seven of Malt-O-Meal's cereals (including raisin bran) as being in compliance with the Nutritional Standards, after adjusting the fiber and sugar contents of the respective varieties to match the specified serving size of 28 grams. (The Nutritional Standards are expressed in terms of fiber/sugar per 28 grams of product. Many of the Malt-O-Meal® cereals are packaged in bowls containing an amount not equal to 28 grams, e.g. 21 grams (Apple Zings®) or 24 grams (Coco-Roos®). To determine the amount of fiber and sugar in 28 grams of, say, Coco-Roos® requires, therefore, that the nutritional data for a 24-gram serving be increased by a factor of 1.17 (28÷24).) Thus, it could be that, in fact, Malt-O-Meal makes only six varieties (excluding raisin bran) that conform to the Nutritional Standards. But evidence to support such a finding was not offered, and the parties agreed on the finding expressed in the text.

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

[6]/ 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.

[7]/ 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.

[8]/ 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), rev. denied, 542 So. 2d 1333 (Fla. 1989); 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).

[9]/ 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.

[10]/ Pet.'s Prop. Findings of Fact at 5.

[11]/ A separate issue concerning whether the list of approved brands is exclusive will be addressed below.

[12]/ There is no evidence as to whether a distributor is likely, as a practical business matter, simultaneously to offer cereals of competitors such as Kellogg and Malt-O-Meal. The specifications pertaining to minimum compliance with the Nutritional Standards do not, however, prevent such from occurring. In fact, if the list of approved brands were exclusive in nature, then a vendor would have to offer cereals of both Kellogg and General Mills because each makes fewer than nine approved brands.

[13]/ Pet.'s Prop. Findings of Fact at 3-4.

[14]/ Id. at 4.

[15]/ The undersigned recalls the Board's counsel arguing at hearing that the list of approved brands in the specifications

was indeed meant to be exclusive. This argument was never reduced to writing, however, and no evidence was presented to establish the Board's intent as a matter of fact. For the reasons set forth in the text above, the undersigned considers it unreasonable to interpret the mention of approved brands as an exclusion of all other brands.

[16]/ The Board's motion for attorney's fees is denied.

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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.