STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PHIL'S EXPERT TREE SERVICE, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 06-4499BID
BROWARD COUNTY SCHOOL BOARD,	)	
Respondent,	)	
and	)	
INNOVATIVE ENVIRONMENTAL SERVICES, INC.,	)	
Intervenor.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on January 4, 2007, in Fort Lauderdale, Florida.

APPEARANCES

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For Respondent: Robert Paul Vignola, Esquire
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STATEMENT OF THE ISSUES

The issues in this bid protest are whether Intervenor's bid was nonresponsive because Intervenor, a corporation formed in 2005, lacks the required five years' experience in the tree trimming business; and, if so, whether Respondent's preliminary decision to award Intervenor the contract at issue was clearly erroneous, arbitrary or capricious, or contrary to competition.

PRELIMINARY STATEMENT

On August 10, 2006, Respondent Broward County School Board issued an Invitation to Bid for the purpose of soliciting bids on a contract for tree trimming and related services. Fourteen bids were received and opened on September 13, 2006. On September 27, 2006, Respondent announced its intent to award the subject contract to Intervenor Innovative Environmental Services, Inc. Petitioner Phil's Expert Tree Service, Inc., as the second lowest bidder, was named "first alternate" awardee.

Petitioner filed a formal written protest of the intended award on October 13, 2006, alleging that Intervenor's bid should be rejected as nonresponsive. The case was referred to the Division of Administrative Hearings ("DOAH"), where the protest petition was filed on November 9, 2006. One week later, on

November 16, 2006, Intervenor filed a Petition to Intervene, seeking to align itself with Respondent. Permission to intervene was granted on November 17, 2006.

The final hearing took place on January 4, 2007, as scheduled, with all parties present. At the outset of the hearing, after entertaining argument, the undersigned partially granted a motion in limine that Petitioner had brought in an effort to prevent its opponents from offering evidence that Petitioner's own bid was nonresponsive. It was determined that such evidence would be allowable to show that Petitioner's bid suffers from the "same deficiencies" alleged to plague Intervenor's bid. Additionally, the undersigned granted Intervenor's motion for leave to amend its petition, permitting Intervenor to allege that Petitioner's bid was nonresponsive.

The parties stipulated to a number of facts as set forth in their Joint Pre-Hearing Stipulation. Joint Exhibits 1-25 were admitted into evidence with the consent of all parties.

In its case, Petitioner elicited testimony from Deborah and Craig Conway, the principals of Intervenor; as well as from George Toman, Respondent's purchasing agent for the instant procurement. In addition, Petitioner's Exhibits 1-9 were received in evidence.

Intervenor called one witness: Brian Mulgrew, an arborist associated with Petitioner. Intervenor also introduced Intervenor's Exhibits 1 and 2, which were admitted.

The final hearing transcript was filed on January 24, 2007, making the Proposed Recommended Orders due on February 13, 2007, pursuant to the schedule established at the conclusion of the final hearing. Each party timely filed a Proposed Recommended Order. 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 2006 Florida Statutes.

FINDINGS OF FACT

1. Pursuant to Invitation to Bid No. 27-054X (the "ITB"), which was issued on August 10, 2006, Respondent Broward County School Board ("School Board") solicited bids for "Tree Trimming, Planting, Hurricane Cleanup, and Removal Service." Interested vendors were instructed to bid prices on numerous items of service. The items were sorted into two groups, Group A and Group B. The School Board intended to designate a "primary vendor" for each group, who in the ordinary course of events would receive the largest volume of work, but it reserved the right to procure services from the second and third lowest

bidders in each group should it become necessary or desirable to do so. Bids were due on September 13, 2006.

2. Section 4 of the ITB contained "Special Conditions" applicable to this procurement. Of interest in this case is Special Condition No. 11, which specified the qualifications a vendor needed to be considered for an award:

> **BIDDER'S QUALIFICATIONS:** Bidder must have at least five years experience in tree trimming services within the Miami-Dade, Broward and Palm Beach tri-county area. **Bidder must submit, with the bid or upon request, the attached Bidder's Profile form**. This report must include a minimum of three references from commercial jobs. Each reference should include the address of the actual job, work accomplished and a phone number and contact person.

(Emphasis in original.)

3. The Bidder Profile form to which Special Condition 11 referred was located in Section 7 of the ITB as Attachment 1. At the top of the Bidder Profile appeared the following direction and warning:

> **THIS INFORMATION MUST BE SUBMITTED WITH THE BID. FAILURE TO COMPLETE THIS SECTION WILL DISQUALIFY THE SUBMITTED BID.**

(Emphasis in original.) Paragraph 12 of the Bidder Profile form stated as follows:

> References Required. Contractor to provide a list of three references. Three references from jobs completed in each of the past three years.

4. More than one dozen vendors timely submitted bids, which the School Board opened on September 13, 2006. Among the bidders were Petitioner Phil's Expert Tree Service, Inc. ("Expert") and Intervenor Innovative Environmental Services, Inc. ("Innovative"). After tabulating the bids, the School Board determined that Innovative was the lowest and best bid from a responsive, responsible bidder with regard to Group A, followed by Expert and All County Tree & Landscape Co., Inc. ("All County"), in that order. Thus, when the award recommendations were posted on September 27, 2006, Innovative was named the intended primary awardee for Group A, Expert the first alternate, and All County the second alternate.[1]

5. Innovative is a family business whose principals are Craig and Deborah Conway, husband and wife. In the year 2000, the Conways moved to South Florida from Pennsylvania, where, for more than 20 years, they had operated a tree trimming and land clearing business. After arriving in Florida, the Conways entered into a business arrangement with Donald Richter, a certified arborist, whereby they jointly provided tree trimming services under the name "ASAP Tree Service" or "Don Richter's ASAP Tree Service."

6. In October 2002, the Conways formed a corporation called Independent Equipment South, Inc. ("Independent"). Independent operated an equipment sales and rental business

whose inventory consisted of equipment that was not being used in the family's tree trimming operations. Eventually, the Conways' tree trimming service become part of Independent's business portfolio as well.

7. In February 2005, Innovative was incorporated. At all times relevant to this procurement, Mrs. Conway has been the sole corporate officer, Mr. Conway the company's Director of Operations. In addition, at all relevant times, Innovative has employed or otherwise retained Mr. Richter as its certified arborist.

8. Although Innovative and Independent are separate corporate entities, the two businesses operate out of the same location, have the same employees, and use the same equipment. The Conways commonly refer to their businesses as "IES," using that acronym interchangeably to mean either Innovative or Independent (or both).

9. Innovative's Bidder Profile, which was submitted together with its bid, referred to——and incorporated——an attachment entitled, "Brief Company History." The Brief Company History provided background information on Innovative's provenance, albeit from a layperson's perspective. Written by nonlawyers, the summary was not always technically precise, from a legal standpoint, in its descriptions of the various business associations in which the Conways have been involved. Seizing

on the least artful phrases, Expert contends that some of the statements in the Brief Company History were false and perhaps even fraudulent. The undersigned, however, finds otherwise. To the point, the Brief Company History reflects an honest attempt truthfully to describe the Conways' family businesses, which is reasonably accurate when read and understood from the perspective of the small-business owners who prepared it.

10. That said, the undersigned finds and determines that Innovative——as distinct from its principals and/or personnel——did not have five years' experience in the tree trimming business when it bid on the contract at hand, notwithstanding the wealth of tree trimming experience at its disposal. Indeed, having been in existence for fewer than two years at the time it submitted its bid, Innovative, as a separate legal entity, could not possibly have garnered, in its own right, five years' experience doing anything.

11. For the same reason, though Innovative provided plenty of references, the ones that stemmed from jobs completed before February 2005 necessarily related to providers other than Innovative, such as ASAP Tree Service, who actually existed then. To be sure, the providers who earned the references from earlier jobs upon which Innovative relied either were predecessor business associations or individuals who would become personnel of Innovative——but they were not Innovative.

Innovative simply could not have performed or completed any jobs before its creation.

12. It is determined, therefore, as a matter of ultimate fact, that Innovative's bid did not strictly conform to the plain language of Special Condition No. 11.

13. Like Innovative, Expert is a family-owned business. Founded in 1985 by Philip Simeone, Expert was incorporated in 1992. Though Expert clearly possesses the length of experience for which Special Condition No. 11 called, Expert failed in its Bidder Profile to provide three references "from jobs completed in each of the past three years," as instructed in paragraph 12 of the ITB's Section 7, Attachment 1. Instead, Expert gave two references from jobs completed in 2006 plus another from a job completed in 2004. Expert's bid did not contain a reference from a job completed in 2005.

14. Expert contends that the School Board should have rejected Innovative's bid as materially nonresponsive (for lacking the requisite five years' experience) and awarded the contract to Expert as the lowest responsive bidder. The School Board and Innovative take the position that the School Board's decision to treat Innovative's bid as responsive was not clearly erroneous, arbitrary, or capricious.

15. Turning the tables, the School Board and Innovative argue that Expert's own bid deviated from Special Condition No.

11, in that Expert failed to provide a reference from a job completed in 2005.[2] Yet both assert that "it was reasonable for [the School Board] to waive the requirement of the Bidder Profile form that one . . . reference[] be [from] a job completed in the year 2005." Somewhat inconsistently, however, Innovative argues further that Expert's "bid proposal cannot be sustained"——evidently due to its material nonresponsiveness. This apparent inconsistency follows from Innovative's attempt to play down its alternative position, which is that if "a contrary conclusion [had] been reached as to [Innovative's] experience"——meaning that if the School Board had chosen not to waive any irregularity concerning Innovative's length of corporate experience——then the "same analysis would apply to" Expert——meaning that Expert's bid too should have been disqualified.

16. Thus, even though Innovative maintains that the School Board reasonably waived any irregularities in Expert's bid, Innovative is unwilling to concede that the School Board did not err in determining that Expert's bid was responsive, evidently out of concern that such an admission might compromise its fallback position. Innovative's bottom line is that if Innovative's bid were to be disqualified as materially nonresponsive, then Expert's bid would need to be rejected, too.

CONCLUSIONS OF LAW

17. 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.

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

19. 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.

20. 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.

21. 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.

22. 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.

23. 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,[3] the protester additionally must establish that the agency's misstep was: (a) clearly erroneous; (b) contrary to competition; or (c) an abuse of discretion.

24. 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.

25. 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).

26. 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).

27. 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.

28. 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.[4] 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.

29. 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.[5]

30. 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).[6]

31. 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 3, 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.

32. 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.

33. 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.

34. 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

35. 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.

36. 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.

37. 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.

38. 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 Fla. Div. Adm. Hear. LEXIS 163, *58 (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)

39. Turning to the merits of this case, Expert's protest hinges on a single objection, namely that Innovative lacked the requisite five years' experience in providing tree trimming services. That being the case, asserts Expert, Innovative's bid deviated materially from the provisions of Special Condition No. 11 and hence must be rejected as nonresponsive.[7] The School Board and Innovative contend, primarily, that Innovative's bid satisfied Special Condition No. 11 and, alternatively, that if Innovative's bid deviated from the specifications concerning qualifications, then the irregularity was minor and could be waived.

40. The resolution of this issue of responsiveness turns on the meaning of Special Condition No. 11. Because no one timely protested the specifications, the School Board's interpretation of this provision would stand unless clearly erroneous, provided Special Condition No. 11 were ambiguous, vague, or unreasonable. On the other hand, if the provision were unambiguous and otherwise lawful, then the School Board's interpretation would not be entitled to deference (for plain language requires no interpretation); the question, in that event, would be whether the School Board implemented the clear and unambiguous language of the ITB. If not, then the Board's action would be clearly erroneous or contrary to competition. See endnote 6.

41. The language at issue is this: "Bidder must have at least five years experience in tree trimming services within the . . . tri-county area." The School Board and Innovative do not contend that this sentence is ambiguous. Instead, they advance two arguments that focus on other issues.

42. The first tackles the "contention"——which is asserted to be the basis of Expert's protest——that Innovative's bid should be rejected "based on [Innovative's] date of Florida incorporation." This argument is unpersuasive, however, because it attacks a straw man. The gravamen of Expert's protest is not merely (or even essentially) that Innovative was incorporated less than five years before submitting its bid. Rather, Expert's protest is based on the premise that Innovative lacks five years' experience in the tree trimming business, which happens in this case to be, according to Expert, unusually easy to establish because, as a matter of undisputed fact, Innovative came into being less than five years ago.

43. Logically, in order to have acquired five years' experience in tree trimming, it is necessary for the person whose experience is at issue (here the corporation known as Innovative) to have been in existence for that length of time. However, while being at least five years of age is a necessary condition of meeting this experience requirement, it is obviously not a sufficient condition, because not everyone (or

every corporation) trims trees. Thus, a corporation formed 15 years ago could not, on that single fact, be found to satisfy the experience requirement at issue, but neither, without more information, could it definitively be deemed unqualified. On the other hand, a corporation formed three years ago can be deemed unqualified, based on that fact alone, unless Special Condition No. 11 permits consideration of the experience of others besides the corporate bidder, such as the bidder's personnel.

44. In this instance, Expert asserts that, because Innovative is less than five years old, Innovative cannot satisfy a necessary condition of meeting the experience requirement. Consequently, for Expert's purposes, the "vintage of [Innovative's] corporate filings" is relevant only insofar as it establishes Innovative's age. Having negated a necessary condition pertaining to Innovative's experience, as Expert believes it has, Expert needed to go no further in pressing the point.

45. The other argument that the School Board and Innovative make is more compelling. They explain that the School Board, as a consumer of tree trimming services, is not terribly curious about the age of the corporate bidder, but rather is quite interested in knowing about the skills and experience levels of the bidder's personnel——especially those of

the individuals who would actually be trimming trees for the School Board if the bidder were awarded the contract.

46. This is a reasonable position, backed by considerable common sense. It is undeniably true that, as a practical matter, if a property owner hires a corporate tree trimmer, the latter is only as experienced as the human beings who trim trees on the owner's property at any given point in time, regardless of how long the corporation has been in business. It follows, therefore, that placing great weight on the experience of the relevant personnel is a rational tactic in selecting a tree trimmer.

47. But the question at hand is not whether it is reasonable or rational, where the corporate bidder's relevant personnel are well qualified, for the School Board to overlook the fact that the corporate bidder does not, itself, have five years' tree trimming experience; the question, rather, is whether doing so accords with either (a) the plain and unambiguous language of Special Condition No. 11 or (b) a reasonable interpretation of Special Condition No. 11, if the provision be ambiguous.

48. In reviewing the specification in dispute, the undersigned starts from the premise that the term "experience," as commonly used and understood, refers to a personal quality or attribute, the knowledge and skill than one derives from

personally doing and seeing things. Thus, while two or more persons can share a common experience, one person's experience is not generally regarded as being imputable or transferable to another. Each person, ultimately, owns his or her own unique experience and cannot have another's.

49. At first blush, it might seem that this conception of "experience" is inapplicable to corporations, which are, after all, impersonal entities, incapable of acquiring skills and knowledge, through experience, in the manner of human beings. It might seem, then, that "experience," as a corporate attribute, should denote the collective experience of the corporation's employees and agents, the human beings through which the corporation acts.

50. The undersigned was initially tempted to follow this line of reasoning. Upon reflection, however, the undersigned has become convinced that the idea that a corporation cannot acquire experience in its own right is too abstract a consideration to cloud the meaning of Special Condition No. 11. The language at issue——"Bidder must have at least five years experience in tree trimming services"——is neither difficult nor unusual and thus must be understood and applied according to its everyday meaning.

51. As used by ordinary persons in daily discourse, the subject provision, in reference to a corporate bidder, plainly

means that the corporation must have been in the tree trimming business for at least five years. Evidently, the School Board wanted to be assured, through the "experience" provision, that a corporate bidder had "been around" for five years or more, trimming trees commercially.[8] This kind of corporate experience is unique to the corporation and, generally speaking, is nontransferable.[9]

52. The undersigned thus concludes, as a matter of law, that the "experience" provision of Special Condition No. 11 is not ambiguous.[10] Consequently, the language does not need to be interpreted; it can be applied to the circumstances at hand as a fact-finding function.[11]

53. Moreover, in the alternative, when the construction that the School Board and Innovative would place on the "experience" provision——which interpretation is left unstated in their papers but is implicit in their argument——is brought forward for scrutiny, it becomes practically untenable. As the School Board and Innovative read the language, it means either:

> Bidder*, or its principals and/or personnel,* must have at least five years experience in tree trimming services[.]
>
> Or,
>
> Bidder must have *at its disposal individuals having* at least five years experience in tree trimming services[.]

As the foregoing, italicized additions to the actual language demonstrate, the School Board and Innovative effectively would re-write the "experience" provision, changing its plain and unambiguous meaning. This is not a proper method of construction, and it would put an unreasonable gloss on the applicable language.

54. Accordingly, even if the "experience" provision were ambiguous, which it is not, the School Board's interpretation thereof would be clearly erroneous.

55. For the above reasons, the undersigned has determined, as a matter of ultimate fact, that Innovative's bid was not responsive to the plain language of Special Condition No. 11, in consequence of the bidder's want of five years' experience in the tree trimming business.[12]

56. It remains to be determined whether the School Board's intended award might be upheld on the theory that the irregularity in Innovative's bid was a minor one that the School Board could waive. Because the School Board found Innovative's bid to be responsive, however, the intended award was not based on a finding that Innovative's lack of five years' experience constituted a minor deviation, which means that there exists no ultimate factual determination in this regard to review for clear error.[13] As a result, the question whether Innovative's

lack of experience is a minor deficiency must be decided de novo.

57. It has long been recognized that "although a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. [A deviation] is material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. State Department of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986). "The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders." Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

58. In addition to the foregoing rules, courts have considered the following criteria in determining whether a variance is material and hence nonwaivable:

> [F]irst, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

> [S]ometimes it is said that a bid may be rejected or disregarded if there is a material variance between the bid and the advertisement. A minor variance, however, will not invalidate the bid. In this context a variance is material if it gives the bidder a substantial advantage over the other bidders, and thereby restricts or stifles competition.

Robinson Electrical Co. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982), quoting 10 McQuillan, Municipal Corporations § 29.65 (3d ed. rev. 1981)(footnotes omitted).

59. The touchstone of these tests for materiality——substantial advantage——is an elusive concept, to say the least, easier to state than to apply. Obviously, waiving any defect that might disqualify an otherwise winning bid gives the beneficiary of the waiver an advantage or benefit over the other bidders. In practice, differentiating between, on the one hand, "fair" advantages——i.e. those that are tolerable because they do not defeat the object and integrity of the competitive procurement process——and "unfair" (or intolerable) advantages, on the other, is exceptionally difficult; and, making matters worse, there are not (as far as the undersigned is aware) many generally recognized, consistently applied, neutral principles available for the decision-maker's use in drawing the distinction between a "substantial" advantage and a "mere" advantage.

60. That said, the undersigned believes that a bidder's noncompliance with a specification which was designed to winnow the field——especially one which prescribes particular characteristics that the successful bidder must possess——should rarely, if ever, be waived as immaterial. This is because such a provision acts as a barrier to access into the competition, potentially discouraging some would-be participants, namely those who lack a required characteristic, from submitting a bid. See Syslogic Technology Services, Inc. v. South Florida Water Management District, Case No. 01-4385BID, 2002 Fla. Div. Adm. Hear. LEXIS 235, *77 n.23 (Fla.Div.Admin.Hrgs. Jan. 18, 2002)("Of course, it will usually not be known how many, if any, potential proposers were dissuaded from submitting a proposal because of one project specification or another. That is why specifications that have the capacity to act as a barrier to access into the competition . . . should generally be considered material and non-waivable[.]"); Cf. City of Opa-Locka v. Trustees of the Plumbing Industry Promotion Fund, 193 So. 2d 29, 32 (Fla. 3d DCA 1966)(Permitting city to waive necessity that bidder have a certificate of competency prior to bidding would give that bidder "an unfair advantage over those who must prequalify. . . . [I]t would [also promote] favoritism by allowing some bidders to qualify after their bids are accepted

while refusing to consider bids of others on the ground that they did not prequalify.").

61. The "experience" specification of Special Condition No. 11 prescribes an attribute that the successful bidder must possess: five years' experience as a tree trimmer. The obvious intent of this provision was to weed out unwanted potential bidders, i.e. those having less than the requisite experience, who——according to the specification——would not be qualified to perform the contract at stake. The "experience" provision clearly was intended as a barrier to entry into the competition and could have prevented some interested providers from submitting bids.

62. To waive this requirement for Innovative, therefore, would lower the bar retrospectively for the low bidder, giving the appearance, at least, of the sort of preferential treatment that would compromise the integrity of the competitive process. See City of Opa-Locka, 193 So. 2d at 32; Apcoa, Inc. v. City of New Haven, 1995 Conn. Super. LEXIS 958, *12-*13 (Conn. Super. Ct. Mar. 30, 1995). Further, allowing Innovative to compete would give this bidder a substantial advantage over the others, not only for the obvious reason (being permitted to remain in the contest, despite a flawed bid, is a benefit), but also for the less obvious reason that being the "least qualified" (or

sole "unqualified"[14]) bidder is a plus, for the reasons that follow.

63. As is commonly known, in most occupations salary is commensurate with experience; more experienced workers command higher wages than less experienced ones. In theory, then, less experienced bidders, being constrained by market forces to accept lower pay than their more experienced rivals, should be, in the main, more competitive as to cost. The upshot is that, all other things being equal, the least experienced bidder is well-positioned to be the lowest bidder. Waiving a standard that specifies a minimum experience level, therefore, has the potential to affect the amount of the bid, albeit at the risk of compromising on quality.

64. Consequently, Innovative's lack of five years' experience in the tree trimming business was a material defect that the School Board cannot. The School Board's decision to accept Innovative's materially nonresponsive bid cannot be upheld on the ground that the deviation was waivable.

65. The question remains whether Expert's bid also should be rejected, for suffering the same deficiency as Innovative's. See Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380, 384 (Fla. 3d DCA 1992)(The "party protesting an award to the low bidder must be prepared to show not only that the low bid was deficient, but

must also show that the protestor's own bid does not suffer from the same deficiency. To rule otherwise is to require the State to spend more money for a higher bid which suffers from the same deficiency as the lower bid.").

66. As found, Expert failed to submit a reference from a job completed in 2005, which was a requirement under Special Condition No. 11, as implemented through Section 7, Attachment 1——the Bidder Profile. To repeat the relevant specification, each bidder was directed to provide "[t]hree references from jobs completed in each of the past three years." Providing two references from jobs completed in 2006 and one from a job done in 2004, Expert's bid deviated from the plain language of this specification.[15] Although this deviation is not identical to the one that makes Innovative's bid nonresponsive, it reflects a nonconformance to the same special condition respecting qualifications and hence, the undersigned concludes, is sufficiently similar to the defect in Innovative's bid to be considered the "same deficiency" for purposes of applying the rule laid down in Intercontinental Properties.

67. There is no persuasive direct evidence in the record that the School Board waived this irregularity in Expert's bid. Given that it was such a patent defect, however, the undersigned infers that this is what must have happened. Because the School Board determined, for some reason, that Expert's failure to

provide a reference from a job completed in 2005 was not a material deviation from the "references" specification, the undersigned will accord that determination some deference and apply the clearly erroneous standard of review in deciding whether it should stand.

68. One immediate problem the undersigned confronts in reviewing the School Board's determination, however, is that there is no persuasive direct evidence in the record from which the grounds for the determination might be ascertained. The undersigned knows what the School Board did (waive a deficiency deemed immaterial) but not why this was done.

69. Having no evidence upon which to rely, the undersigned speculates that the School Board inferred, from the fact that Expert had produced three references (one from a 2004 job and two from jobs done in 2006), that Expert must have finished a reference-worthy job in 2005, and thus could have produced a positive reference from that year, but failed to do so for some unknown, yet benign, reason. If that were the School Board's rationale, however, then the undersigned is firmly convinced that the School Board committed a fundamental mistake in reasoning.

70. The reasonable inference that follows from the absence of a reference from 2005 is that, more likely than not, no reference from 2005 was available. That references from 2004

and 2006 were provided makes the missing reference somewhat analogous to a nonexistent entry in the records of a regularly conducted activity; the availability of the other references actually strengthens, rather than weakens, the inference of nonexistence. Other explanations for the absence of a 2005 reference are imaginable, of course, but to infer the existence of such a reference, where in fact none was provided, strikes the undersigned unreasonable, even speculative.

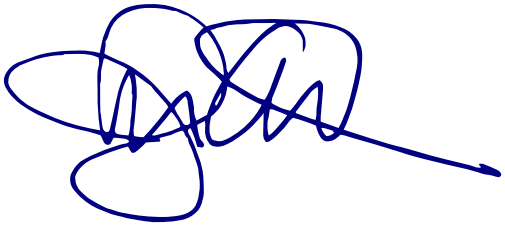
71. Moreover, the "references" specification——like the "experience" provision examined above in connection with Innovative's bid——is a "gatekeeper" requirement that weeds out unwanted potential bidders. Indeed, it works hand-in-glove with the "experience" provision in prescribing minimum qualifications. Whereas the "experience" provision prescribes a quantitative measure of a bidder's qualifications (specifying how long a bidder must have been in the business), the "references" specification prescribes a qualitative measure of ability (demanding consistency of satisfactory performance, as evidenced by references from jobs completed in several sequential years). At bottom, therefore, the "references" specification, which was designed to winnow the field of competitors, is the type of specification that should rarely, if ever, be waived as immaterial.

72. It is concluded that waiving the "references" requirement for Expert would give Expert a substantial advantage over the other bidders, who needed to produce one reference from jobs performed in each of three years, for the same reasons that waiving the "experience" provision for Innovative would give Innovative an anticompetitive assist. Consequently, Expert's failure to provide a reference from a job completed in 2005 was a material, nonwaivable defect. The School Board's decision to waive this material irregularity was clearly erroneous and contrary to competition.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board enter a Final Order that (a) declares Innovative's bid to be materially nonresponsive and, accordingly, rescinds the proposed award to Innovative; and (b) declares Expert's bid to be materially nonresponsive and, accordingly, rejects the same. Because the choice of remedies for invalid procurement actions is ultimately within the agency's discretion, the undersigned declines to make a recommendation as to whether the School Board should award the contract to All County (which was the putative "second alternate") or reject all bids and start over.

DONE AND ENTERED this 19th day of March, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of March, 2007.

ENDNOTES

[1]/ Innovative placed third in the competition for the Group B contract and accordingly was named second alternate therefor; Expert ended up out of the running for the Group B business.

[2]/ They also point out a couple of additional, minor deficiencies in Expert's bid that arguably constitute deviations from the specifications. For example, Expert completed and submitted the necessary form for disclosing potential conflicts of interest, but neglected to sign the paper. Suffice it to say that these "technicalities" (as the School Board and Innovative call them) cannot fairly be considered material deviations. In short, the undersigned agrees with the School Board and Innovative that these technicalities, even if deviations, were waivable ones.

[3]/ 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.)

[4]/ 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.

[5]/ 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).

[6]/ 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.

[7]/ The School Board is required by rule to "accept the lowest and best bid from a responsive and responsible bidder." Fla. Admin. Code R. 6A-1.012(6)(emphasis added). Therefore, the School Board would violate the general standard of conduct (agencies must obey governing laws in letting contracts) if it were to award the contract to a bidder whose bid was materially nonresponsive.

[8]/ This is a rational consideration. Companies that have been in business for a number of years have histories and records of performance that can be examined, develop reputations, perhaps establish identifiable traditions; indeed, simply having survived in the competitive marketplace for many years can be counted as a favorable mark. It is therefore reasonable for a consumer to desire to do business with an established company, whose present employees, he hopes, will perform in a manner consistent with those that have gone before them.

[9]/ This case does not involve a situation where a corporation of many years' experience merely changes its name. The undersigned assumes, without deciding, that a corporation, by any other name, would retain its experience. Nor does this case present

the question——admittedly a close one——whether a division that is "spun off" from an established corporation could lay claim to experience acquired while part of the parent corporation. (An affirmative answer would not help Innovative because the companion corporation which pre-dated Innovative, namely Independent, did not come into being until October 2002, less than five years before the bidding.) Nor is it necessary to consider, in this case, how any number of corporate transactions, such as mergers and acquisitions, might affect the determination of a corporation's experience under Special Condition No. 11. It is sufficient, for present purposes, to speak in general terms, for the facts here are straightforward.

[10]/ Whether an ambiguity exists in the language of a legal instrument is a question of law. E.g. Torwest, Inc. v. Killilea, 942 So. 2d 1019, 1020 (Fla. 4th DCA 2006).

[11]/ See, e.g., Pottsburg Utilities, Inc. v. Daugharty, 309 So. 2d 199, 202 (Fla. 1st DCA 1975)("Where a contract is plain and unambiguous, there is no room for, and the court may not resort to, construction or interpretation, but must apply the contract as it is written.").

[12]/ The undersigned was unable to locate any cases on point, either from jurisdictions in Florida or elsewhere. A few cases have been found, however, which, though distinguishable for one reason or another and lacking precedential value, reinforce the undersigned's determination that Innovative's bid was materially nonresponsive. The most recent of these is Zinn Constr., Inc. v. The School District of Philadelphia, 2000 Phila. Ct. Com. Pl. LEXIS 93, *1 (Pa. C.P. July 10, 2000), in which the court held that a school district properly rejected the bid of a corporation that had been in business for only one year, where the specifications required the successful bidder to have a minimum of five years' experience in installing boilers and control systems. The court declined to construe the specifications as allowing the experience requirement to be met through the personnel of the corporation. Id. at *3.

In P & C Giampilis Constr. Corp. v. Diamond, 619 N.Y.S.2d 271, 273 (N.Y. App. Div. 1994), it was held that the letting authority had a rational basis for rejecting, as nonresponsive, the bid of a corporation that had not, within the previous five years, successfully completed two roofing projects, as the specifications required. The court disagreed with the argument that the experience of corporate personnel must be considered in

determining whether a corporate bidder meets such an experience requirement, explaining:

> [No authority has been offered] for the proposition that [the letting authority] should be required to pierce the corporate veil, as a matter of course, when reviewing bids for responsiveness to determine whether the experience of shareholders, officers and key employees of a *companion* corporation satisfies the experience requirements of the bidder corporation as set forth in the bidding documents. Under most ordinary circumstances, as in the proceedings herein, the independent existence of a corporation cannot be ignored.

Id. (emphasis in original).

In Apcoa, Inc. v. City of New Haven, 1995 Conn. Super. LEXIS 958 (Conn. Super. Ct. Mar. 30, 1995), the low bidder and intended recipient of a contract for operating and managing public parking facilities was a corporation that had come into existence two years and seven months before the invitation for bids. Id. at *10. The specifications, however, required bidders to have been operating parking facilities for the last three consecutive years. The letting authority determined that the corporation met the three-year experience requirement because 2.6 years' experience came within the "spirit" of the requirement, and further because the corporation's principals possessed extensive relevant experience. Id. at *11.

The court enjoined the letting authority from awarding the contract as intended. It wrote:

> The court cannot escape the conclusion that . . . the contract [was to be awarded] either in the belief that two years and seven months experience was sufficient or in the belief that the experience of the principals of the corporation could be included to satisfy the specification.
>
> It is the holding of the court that either belief would defeat the very object and integrity of the competitive bidding

> process. . . . [I]n the instant case, the court does not question that the specification could have provided that the bidder and its principals must have certain experience. The court does not question that if [the intended awardee] had inquired concerning the specification, the specification could have been amended, and the amendment communicated to all bidders, to allow for the experience of principals. It is a consistent policy of advertised procurement that all bidders must be bidding on the same specification. . . . [T]his court is concerned about what bids might have been submitted if the specification had indicated that the bidder could include the experience of principals, officers, and perhaps employees in determining compliance with the bid specification.

Id. at *12-*13.

[13]/ When an agency asserts for the first time as a party litigant in a bid protest that an irregularity was immaterial, the contention must be treated, not with deference as a presumptively neutral finding of ultimate fact, but with fair impartiality as a legal argument; in other words, the agency is entitled to nothing more or less than to be heard on an equal footing with the protester.

[14]/ The undersigned understands that, by most reasonable measures, Innovative is no less qualified to perform the tree trimming services in question than Expert or the other bidders. Unfortunately for Innovative (and the School Board), however, Innovative is "unqualified" pursuant to the only measure that matters here: Special Condition No. 11. The other bidders, having been held to the standard of Special Condition No. 11, are "more qualified" than Innovative because they measured up to that standard, whereas Innovative did not. Thus, it is correct to say that waiving the "experience" requirement for Innovative would make Innovative the least experienced——indeed, the only "unqualified"——bidder in the competition.

[15]/ Actually, the "references" requirement is not a model of clarity. It could be understood as requiring three references from each job meriting a reference, with at least one such job

having been completed in each of the past three years——for a total of at least nine references. When all of the language relating to references is considered, however, it is clear that just three references were needed. Additionally, confusion could have arisen as to whether the pertinent "past three years" were 2006, 2005, and 2004 (counting the then-current year, 2006, as a "past" year)——or 2005, 2004, and 2003. In the event, however, everyone seems to have understood "past three years" to mean 2004 through 2006, and, more important, any ambiguity in this regard is irrelevant to the instant dispute.

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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.