

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IKON OFFICE SOLUTIONS, INC.,)
)
 Petitioner,)
)
vs.) Case Nos. 07-1055BID
) 07-1266RU
PINELLAS COUNTY SCHOOL BOARD,)
)
 Respondent,)
)
and)
)
XEROX CORPORATION,)
)
 Intervenor.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 18, 2007, in Tampa, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Respondent acted contrary to the agency's governing statutes, rules or policies, or the bid specifications in its proposed decision to award a contract to Intervenor Xerox Corporation pursuant to Request for Proposal ("RFP") No. 07-015-040-RFP.

PRELIMINARY STATEMENT

On December 15, 2006, Respondent Pinellas County School Board ("PCS") issued RFP No. 07-015-040-RFP (the "2007 RFP") to procure copier service for the Pinellas County School District. The 2007 RFP followed a previous RFP, No. 06-015-117-RFP (the "2006 RFP"), in which all bids were rejected. On January 18,

2007, bids were submitted by Intervenor Xerox Corporation ("Xerox") and Petitioner IKON Office Solutions, Inc. ("IKON"), among other potential vendors, for consideration in the 2007 RFP. The bid was to be awarded according to a two-step procedure. The proposals would first be substantively scored by an evaluation committee or "focus group" composed of principals, teachers and other employees of the Pinellas County School District. Those proposals receiving a minimum of 80 points would qualify for the second step, in which the cost proposals would be opened. The contract would be awarded to the lowest cost proposal among the qualifying vendors, regardless of their scores in step one.

IKON and Xerox were among four vendors obtaining the minimum qualifying score of 80 points, allowing their cost proposals to be considered. The cost proposals were opened on January 26, 2007. On January 30, PCS posted a bid tabulation indicating that Xerox was the low bidder and presumptive awardee of the contract. IKON's bid was the second lowest. On February 1, 2007, IKON filed a Notice of Intent to Protest with PCS. On February 5, 2007, PCS posted the Notice of Intent to Award the contract to Xerox. IKON filed an Amended Formal Written Protest and Petition on February 7, 2007. The case was forwarded to the Division of Administrative Hearings ("DOAH") by notice on March 1, 2007, though the actual protest documents

were not received by DOAH until March 6, 2007. On March 9, 2007, Xerox filed a Petition to Intervene, which was granted by Order dated March 13, 2007.

On March 16, 2007, IKON filed a Petition Seeking an Administrative Determination of the Invalidity of an Agency Statement Defined as a Rule, alleging that the procedure followed by PCS in awarding the contract pursuant to the 2007 RFP violated the rulemaking requirements of Subsection 120.54(1), Florida Statutes, because PCS has not adopted that procedure as a rule. The bid protest and rule challenge were consolidated by order dated March 27, 2007.

After one continuance, the consolidated cases were heard on April 18, 2007. At the final hearing, IKON presented the testimony of Mark Lindemann, the purchasing director for PCS. Xerox presented testimony by Mr. Lindemann and by Geri Pomerantz, the major account contract manager for public sector operations for Xerox. Xerox also entered without objection the deposition testimony of Brian Chepren, the supervisor of central printing for PCS. PCS presented testimony by Mr. Lindemann and by Colin Castle, a productions systems specialist for IKON. The parties stipulated to Joint Exhibits 1 through 53, which were received into evidence.

An expedited Transcript was received by the undersigned via electronic mail from the court reporter on April 18 and 19,

2007. The official Transcript was filed at DOAH on April 26, 2007. Pursuant to stipulation, the parties filed their Proposed Recommended Orders in Case No. 07-1055BID on April 25, 2007, and their Proposed Final Orders in Case No. 07-1266RU on April 26, 2007. The parties' submissions have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of the proceeding, the following findings of fact are made:

1. On December 15, 2006, PCS issued the 2007 RFP, entitled "Copier Program--Request for Proposals." The 2007 RFP was intended to provide a comprehensive copier program for the entire Pinellas County School District from the award date of the bid, then anticipated to be February 20, 2007, through June 30, 2012. The purpose of the 2007 RFP was stated as follows in Section 3.1 of the General Information section:

[PCS] requests proposals from experienced and qualified vendors to provide a comprehensive copier program countywide which fulfills the priorities and needs expressed by district focus groups. PCS wishes to partner with a qualified vendor who will continue to improve information sharing, right size number of assets, and reduce the number of device types while lowering the district's cost. Vendors may propose whatever program they feel best meets the district's needs and are not restricted in any way other than to meet the

basic equipment specifications, terms and conditions outlined in this bid. . . .
(Emphasis added)

2. A statement of the 2007 RFP's "scope" set forth in the Special Conditions similarly provided:

[PCS] requests proposals from experienced and qualified vendors to provide a comprehensive copier program countywide which fulfills the priorities and needs expressed by district focus groups. Vendors may propose whatever program they feel best meets these needs and a district evaluation committee made up of participants from the focus groups will evaluate proposals and make the selection it feels best meets these needs based upon a set of criteria published in this document. . . . [Emphasis added]

3. The 2007 RFP provided for proposals to be received no later than January 18, 2007, at 3:00 p.m.

4. The 2007 RFP contained General Terms and Conditions, setting forth the standard boilerplate terms common to all PCS procurements, and Section 1 of "Special Conditions" particular to this contract.¹ These were followed by: Section 2, "Personnel Matrix"; Section 3, "General Information"; Section 4, "Program Specifications"; Section 5, "Equipment Specifications"; Section 6, "Cost Proposal"; and Section 7, "Contractor Response." PCS has adopted the General Terms and Conditions as rules, codified in Part A of the PCS Purchasing Handbook.

5. Paragraph 1(g) of the General Terms and Conditions, "Freight Terms," provided:

All items are to be bid FOB destination with all transportation charges prepaid and included in the bid prices and title transferring to the district at the time of delivery, unless otherwise stated in bid invitation. Any exceptions to these freight terms taken by the bidder must be clearly stated in the bidder's proposal. The purchasing department will evaluate any such exceptions and determine if the exception constitutes grounds for rejection of the bidder's proposal. [Emphasis added]

6. Paragraph 3 of the General Terms and Conditions, "Acceptance and Withdrawal of Bids," provided:

A bid (or amendment thereto) will not be accepted by the purchasing department after the time and date specified for the bid opening, nor may a bid (or amendment thereto) which has already been opened in public be withdrawn by the bidder for a period of sixty (60) calendar days after the bid opening date and time, unless authorized by the purchasing department. By written request to the purchasing department, the bidder may withdraw from the bid process and ask to have their sealed bid proposal returned at any time prior to the closing date and time for the receipt of bid proposals.

7. Paragraph 14 of the General Terms and Conditions, "Variance to Bid Documents," provided:

For the purpose of bid evaluation, bidders must clearly stipulate any or all variances to the bid documents or specifications, no matter how slight. If variations are not stated in the bidder's proposal, it shall be construed that the bid proposal submitted fully complies in every respect with our bid documents.

8. Paragraph 30 of the General Terms and Conditions, "Errors and Omissions," provided:

In the event an error or obvious omission is discovered in a bidder's proposal, either by the purchasing department or the bidder, the bidder may have the opportunity of withdrawing their bid, provided they can produce sufficient evidence to document that the error or omission was clerical in nature and unintentional . . . This privilege shall not extend to allowing a bidder to change any information contained in their bid proposal; however, in the event of a minor omission or oversight on the part of the bidder, the purchasing department (or designee) may request written clarification from a bidder in order to confirm the evaluator's interpretation of the bidder's response and to preclude the rejection of their bid, either in part or in whole. The purchasing department will have the authority to weigh the severity of the infraction and determine its acceptability.

9. Paragraph 31 of the General Terms and Conditions, "Basis of Award of Bids," provides: "A Bidder who substitutes its standard terms and conditions for the district's, or who qualifies its bid in such a manner as to nullify or limit its liability to the district will be considered nonresponsive."

10. The standard form cover sheet to both the 2006 and 2007 RFPs contained a "Note to Bidder" that stated: "A signed bid submitted to the School Board obligates the bidder to all terms, conditions and specifications stated in this bid document, unless exceptions are taken and clearly stated in the bidder's proposal." (Emphasis added)

11. The Special Conditions of the 2007 RFP included a provision titled "Acceptance of Vendor Responses," which stated: "The purchasing department reserves the right to accept proposals from multiple vendors, and to accept or reject portions of a proposal based upon the information requested. Vendors may be excluded from further consideration for failure to fully comply with the requirements of this RFP solely at the purchasing department's discretion." (Emphasis added)

12. The Special Conditions of the 2007 RFP also included a provision entitled "Integrity of Bid Documents," which stated:

Bidders shall use the original Bid Proposal Forms provided by the Purchasing Department and enter information only in the spaces where a response is requested. Bidders may use an attachment as an addendum to the Bid Proposal form if sufficient space is not available on the original form for the bidder to enter a complete response. Any modifications or alterations to the original bid documents by the bidder, whether intentional or otherwise, will constitute grounds for rejection of a bid. Any such modifications or alterations that a bidder wishes to propose must be clearly stated in the bidder's proposal response and presented in the form of an addendum to the original bid documents.

13. Both Xerox and IKON timely submitted proposals in response to the 2007 RFP. Evaluations of the responses to the RFP were based on a two-step procedure. First, a focus group of individuals from the Pinellas County School District would analyze the bids and award points based on the specifications

and the Proposal Evaluation Form set forth in the RFP. The maximum award was 100 points, with 80 points constituting the threshold for further consideration. Second, those vendors which met the 80-point threshold would compete solely on price. Those bidders who did not score 80 points in the first stage would not have their price bids opened.

14. By January 24, 2007, the focus group had finalized its evaluations, and the cost proposals were to be opened on January 26, 2007. Both IKON and Xerox scored above the 80 point level. IKON received a score of 87 points from the focus group and Xerox received a score of 81 points.

15. Xerox's proposal included, among 15 unnumbered appendices, an appendix titled "Xerox Clarification Addendum to the RFP." This Addendum contained four "clarifications" of portions of the General Terms and Conditions, seven "clarifications" regarding the Program Specifications portion of the Special Conditions, and 12 items under the heading "Other Xerox Service Terms" that purported to set forth contractual provisions regarding service, personnel, risk of loss, limitations on liability, payment schedules, and other standard contract terms.

16. PCS's purchasing department conducted a responsiveness review of the proposals prior to sending them to the focus group for substantive evaluation, but did not notice the Xerox

Addendum. Mark Lindemann, the director of purchasing for PCS, testified that it is not customary for bidders to submit such an addendum, and, therefore, his staff was not looking for it when conducting their responsiveness review.

17. On January 30, 2007, after the focus group had performed its evaluation of all the bids, and the cost proposals had been opened and the bid tabulations had been posted on the PCS website, Colin Castle of IKON brought to the attention of the PCS purchasing department the presence of the Xerox Addendum.

18. Geri Pomerantz is the Xerox employee responsible for public sector solicitations in the Southeast United States. She is responsible for understanding the terms and conditions of a solicitation, for pricing the solution based on the customer's requirements, and for ensuring that Xerox submits a responsive proposal. Ms. Pomerantz signed and submitted Xerox's proposal in response to the 2007 RFP.

19. Ms. Pomerantz believed that the Xerox Addendum complied with the "Integrity of Bid Documents" provision of the Special Conditions, quoted above. By submitting the Addendum, Xerox sought to clarify areas of the RFP, to explain how Xerox was meeting the requirements of the RFP, and to propose new items where Ms. Pomerantz believed the RFP was silent on important terms.

20. Ms. Pomerantz testified that, to comply with the "Integrity of Bid Documents" provision, Xerox included the proposed clarifications in the body of its proposal, where that was possible, then further called them to the attention of PCS by placing them in the Addendum. Though unnumbered, the Xerox Addendum is clearly identified in the Table of Contents at the front of the Xerox proposal and on a separate tab on the side of the proposal.

21. Xerox incorporated its clarifications in the body of its proposal in those places where the 2007 RFP requested a response from the vendor, i.e., Section 4, the Program Specifications portion and Section 5, the Equipment Specifications portion. Xerox incorporated clarifications to the following Program and Equipment Specifications: Section 4.3.1--Equipment Build Status; Sections 4.3.4, 5.3.2 and 5.3.13 --Price Offering; Sections 4.7.4 and 4.7.5--Inspection and Acceptance; Section 4.10.2--Response Time; Section 4.10.3--Uptime; Section 4.10.4--Electronic Meter Reads; and Section 4.17--Insurance Specifications for Contractors. The General Terms and Conditions did not call for a vendor response, and Xerox's clarifications or proposed modifications to those were made only in the Addendum.

22. The introduction to the Xerox Addendum provides as follows:

We have reviewed your Invitation to Bid ("Bid")^[2] for a Copier Program, and have prepared a proposal that we believe addresses your requirements. However, some of the Board's requirements require that we make some limited clarifications to the terms and conditions included in your Bid. These clarifications are set forth below and are part of our Proposal. In addition, we have included some additional terms and conditions, which are also included as part of our Proposal. Should there be a conflict between the terms and conditions of the various documents the order of precedence will be this Addendum, followed by your Bid. Please note that if any of the terms or clarifications are inconsistent with Florida law or otherwise unacceptable to you, Xerox agrees to negotiate a reasonable alternative that is acceptable to both parties. Our team is also prepared to discuss the Xerox Proposal in greater detail and, if required, adjust our offering based on your final requirements, which may include a modification to our proposed equipment, support services, terms and conditions, and/or price offering.

23. The Xerox Addendum expressly proposed clarifications or modifications to four provisions of the General Terms and Conditions. Paragraph 1(g), set forth in full above, contains PCS's standard freight terms and describes the process by which a vendor may take exception to those terms: exceptions must be clearly stated in the proposal, and the purchasing department will determine whether the exceptions constitute grounds for rejecting the vendor's proposal. The Xerox Addendum proposed to transfer to PCS the cost of any "non-standard delivery or removal expenses, such as additional costs where additional time

or resources are required to disassemble equipment due to lack of adequate facility access, or the need to use stair creepers or cranes to deliver equipment to upper floors of buildings.³

24. Ms. Pomerantz justified this variance by asserting that the 2007 RFP was silent regarding the issue of "non-standard delivery", and that Xerox was merely offering a clarifying solution to this problem. Mr. Lindemann believed this clarification to be salutary, based on disputes PCS has had with its current vendor, IKON, regarding unusual delivery issues. Paragraph 1(g) of the General Terms and Conditions specifically allowed the vendor to propose exceptions to the standard freight terms, provided those exceptions were clearly stated and the vendor understood that its exceptions could be grounds for rejection of its proposal. Thus, it is found that the Xerox Addendum did not materially deviate from the provisions of the RFP as to this variance.

25. The Xerox Addendum also proposed modification of paragraph 11 of the General Terms and Conditions, which states that PCS has "sole and exclusive property" rights to any discovery, invention or work product produced under the contract. Xerox proposed that any work developed under this contract would be of a generic nature and would remain the sole property of Xerox. Mr. Lindemann reasonably opined that this was not a material deviation because there was no intellectual

property involved in this RFP. The Xerox Addendum did not materially deviate from the provisions of the RFP as to this variance.

26. The Xerox Addendum proposed modification of paragraph 41 of the General Terms and Conditions. Paragraph 41 provided that unless otherwise specified in the Special Conditions, all items requested "must be new, the latest model manufactured, first quality, carry the manufacturer's standard warranty and be equal to or exceed the specifications" listed in the RFP. In this instance, the Special Conditions did provide otherwise. Section 4.3.1 of the Program Specifications provided, in relevant part, that vendors "may propose all used, all new or a combination of new and used equipment, but all equipment must meet the minimum standards outlined later in this section. To assure ease of operation for end users, if used equipment is proposed it should all be of the same brand and model within any given Group of copiers, within any given facility."

27. The Xerox Addendum simply provided clarification regarding the company's terminology for its equipment. The equipment provided by Xerox would be either "Newly Manufactured," "Factory Produced New Models," or "Remanufactured," internal Xerox distinctions regarding the use of new, reconditioned or recycled components, and Xerox

disclaimed any intent to use reconditioned, recycled, refurbished or used equipment as defined by industry standard. In this instance, Xerox submitted a clarification that did not deviate from or attempt to modify the Program Specifications.

28. The Xerox Addendum proposed modification of paragraph 44 of the General Terms and Conditions, the limitation of liability provision, which provided:

The bidder guarantees to save [PCS], its agents and employees, harmless from liability of any nature or kind for use of any copyrighted or non-copyrighted materials, secret process, patented or unpatented inventions, articles or appliances, furnished or used in performance of the contract for which the contractor is not the patentee, assignee or licensee.

29. The Xerox Addendum to paragraph 44 provided as follows:

Xerox agrees that it will indemnify the Board from all copyright and patent information that is included in Xerox-branded equipment/software. However, Xerox will not indemnify the Board, its directors, officers, employees, volunteers, and agent [sic] for any patent infringement caused by complying with the Board's requirement to use, or the Board's use of, the Xerox-branded/supplied equipment with equipment or software not provided by Xerox.

30. Mr. Lindemann testified that this modification of the limitation of liability provision would most likely require PCS to purchase additional contingent liability insurance, which would be a cost essentially passed on from Xerox to PCS. It is

found that the Xerox Addendum materially deviated from the provisions of the RFP as to this variance.

31. The Xerox Addendum proposed a second limitation of liability provision in the section titled "Other Xerox Service Terms," which was essentially a list of standard terms and conditions that Xerox proposed to take precedence over similar provisions in the 2007 RFP. This second limitation of liability proposal provided as follows:

Excluding personal injury (including death), property damage, and intellectual property indemnification on Xerox branded equipment, Xerox will not be liable to you for any direct damages in excess of \$100,000 or the amounts you've paid to Xerox, whichever is greater. Neither party shall be liable to the other for any special, indirect, incidental, consequential or punitive damages arising out of or relating to this Agreement, whether the claim alleges tortious conduct (including negligence) or any other legal theory. Any action you take against Xerox must be commenced within two (2) years after the event that caused it.

32. Ms. Pomerantz testified that when she read the RFP she focused on the indemnification language in paragraph 44 of the General Terms and Conditions regarding copyright and patent issues. She thought the RFP was silent on broader indemnification issues, and she sought to clarify it with this proposed language.

33. Mr. Lindemann testified that the \$100,000 limitation of liability could result in costs to PCS in the event of a

judgment against PCS and might require the purchase of additional liability insurance. Mr. Lindemann believed this proposed limitation on liability was a material deviation and formed the basis for his request to Xerox to withdraw the Addendum. Paragraph 31 of the Standard Terms and Conditions states: "A Bidder who substitutes its standard terms and conditions for the district's, or who qualifies its bid in such a manner as to nullify or limit its liability to the district will be considered nonresponsive." (Emphasis added) It is found that the Xerox Addendum materially deviated from the provisions of the RFP as to this variance.

34. Sections 4.3.4, 5.3.2, and 5.3.13 of the Program/Equipment Specifications related to the vendors' cost proposals provide:

4.3.4 Whatever type of pricing methodology is proposed, it shall include all costs associated with the administration of the service, including, but not limited to: all imaging devices, any peripheral equipment (file servers, etc.), delivery, removal, installation, training, dedicated technician(s), all supplies needed to operate the imaging devices except paper, delivery of supplies and removal of the equipment upon termination of this contract.

* * *

5.3.2 Pricing should include all costs associated with the administration of the service, including, but not limited to all imaging devices, delivery, removal, installation, training, certified

technicians and all supplies except paper needed to operate the imaging devices.

* * *

5.3.13 Pricing must include all costs associated with the administration of the service, including, but not limited to all copier devices, delivery, removal, installation, training, certified technician(s), all supplies except paper, end-user training and semi-annual customer satisfaction surveys.

35. The three quoted provisions state that price proposals must include all costs associated with the administration of the service in question, except for paper, delivery of supplies, removal of equipment upon contract termination, end user training, and customer satisfaction surveys. The Xerox Addendum sets forth a monthly minimum and cost-per-copy charge that would cover standard equipment, supplies, maintenance, delivery and removal, installation and user training, but would require PCS to pay for "optional accessories," "non-standard operating supplies," "excess rigging" needed due to inadequate site access or the need to use stair creepers or cranes to install or remove equipment,⁴ overtime service coverage, and expenses associated with site preparation. The Xerox Addendum attempted to vary the quoted Special Conditions that require the vendor's price to include all costs associated with delivery, removal, and installation and, thus, materially deviated from the provisions of the RFP.

36. Sections 4.7.4 and 4.7.5 of the Program Specifications required the vendor to "provide and pay for all material, labor, tools, transportation and handling, and other facilities necessary for the furnishing, delivery, assembly plus inspection before, during and after installation of all items specified herein." The Xerox Addendum to Sections 4.7.4 and 4.7.5 attempted to limit Xerox's obligation to inspect the devices by stating that they are "deemed accepted" upon installation unless PCS specifically requires an inspection. It is found that the Xerox Addendum materially deviated from the provisions of the RFP as to this variance.

37. Section 4.17.1 of the Program Specifications required acceptance testing for each imaging device and accessory, including a period of four consecutive business days, each containing seven hours of operational use time, in which the equipment maintains a 95 percent level of performance. The Xerox Addendum to Section 4.17.1 attempted to limit Xerox's obligation to inspect the devices by stating that they are "deemed accepted" upon installation unless PCS specifically requires an inspection. It is found that the Xerox Addendum materially deviated from the provisions of the RFP as to this variance.

38. Section 4.10.2 of the Program Specifications provided requirements regarding service calls and response times. This

condition defines "response time" as the interim between the user's call to the repair office and the appearance of a certified technician on-site who is prepared to effect repairs. Section 4.10.2 provides that the response time cannot exceed four hours. PCS would have the option of charging the contractor \$50.00 per failure to meet this four-hour response time requirement. The Xerox Addendum proposed that service response times be averaged quarterly according to a formula by which "target response time" would be divided by "average service response time," which is measured by dividing the sum of all service call response times during the quarter by the total number of service calls. Xerox proposed that the \$50.00 charge be imposed based upon Xerox's failure to meet "the 90-day 4 hour average unit response time commitment."

39. IKON also proposed to calculate the response time using a quarterly average, providing for an average response time "of 2 to 6 hours for all customer service calls located within 30 miles of an IKON service center, and 4 to 8 hours for all customer service calls located 30 miles or more from an IKON service center." IKON's proposal did not clearly state how far IKON's nearest service center is located from any Pinellas County school site. Another section of IKON's proposal discusses the company's recent consolidation of its "customer care centers," which "provide direct customer support" and house

"the field service call center and inside sales function for a geographical region," into four central locations, the closest to Pinellas County being in Atlanta, Georgia.

40. In this instance, both Xerox and IKON have proposed material deviations from the RFP requirement. Section 4.10.2 of the Special Conditions set forth a simple response time requirement that PCS itself could monitor and enforce without input from the vendor. Both Xerox and IKON attempted to substitute complex formulas arriving at quarterly averages for response time. IKON's proposal further attempted to make its compliance with the four hour response time requirement contingent upon the location of IKON's service centers.

41. Section 4.10.3 of the Special Conditions requires a guaranteed uptime of 95 percent per machine for any 90-day period, and further requires that machines failing to maintain 95 percent uptime must be removed and replaced with an identical or comparable model at no cost to PCS. The Xerox Addendum announced an uptime objective of maintaining an average 95 percent equipment uptime performance based on a three-month rolling average, a variation in the wording of Section 4.10.3 that does not materially change the RFP requirement. Xerox also offered slight variations in the definition of "downtime" that are in the nature of clarifications rather than amendments to Section 4.10.3.

42. The Xerox Addendum also contained 12 "Other Xerox Service Terms," essentially Xerox's standard terms and conditions dealing with service guarantees, personnel, substitution of equipment or software, risk of loss for equipment, treatment of confidential information, compliance with laws, vendor liability for customer-supplied items, the limitation of liability provision discussed above, force majeure, payment upon 45 days of invoice, breach of contract and remedies thereto, and a procedure for amendment of the contract. The 2007 RFP's General Terms and Conditions contain requirements for breach of contract, limitation of liability, standards of conduct for vendor personnel, and equipment substitution. Thus, the Xerox Addendum violated the following language in paragraph 31 of the Standard Terms and Conditions: "A Bidder who substitutes its standard terms and conditions for the district's, or who qualifies its bid in such a manner as to nullify or limit its liability to the district will be considered nonresponsive."

43. In summary, the Xerox Addendum materially deviated from the requirements of the 2007 RFP in the following ways: it varied from the limitation of liability requirements of paragraph 44 of the General Terms and Conditions; it offered a cost proposal that was not all-inclusive, in contravention of Sections 4.3.4, 5.3.2, and 5.3.13 of the Program Specifications;

it attempted to limit inspections after installation and acceptance testing, in contravention of Sections 4.7.4, 4.7.5, and 4.17.1 of the Special Conditions; it varied from the response time requirements of Section 4.10.2 of the Special Conditions; and it attempted to substitute several of Xerox's standard terms and conditions for those of PCS, in violation of paragraph 31 of the General Terms and Conditions.

44. After learning of the Xerox Addendum from Mr. Castle on January 30, 2007, PCS reviewed the Addendum and concluded that it included material deviations to the terms and conditions of the RFP solicitation and that either the Addendum or Xerox's bid must be withdrawn. Negotiations commenced between PCS and Xerox. On February 2, 2007, Xerox offered PCS a revised Addendum. PCS rejected the revised Addendum and informed Xerox that the Addendum must be withdrawn in its entirety. On February 5, 2007, Xerox notified PCS by letter that it was withdrawing the Addendum from its proposal. Also on February 5, 2007, PCS posted its notice of intent to award the contract to Xerox.

45. IKON's protest complained that Xerox's letter did not accomplish a complete withdrawal of the deviations included in the Xerox Addendum, because many of those deviations remained in the main body of the Xerox proposal. As noted above, Xerox incorporated its clarifications in the main body of its proposal

in those places where the 2007 RFP requested a response from the vendor. These clarifications were included in Section 7.1.4 of the Xerox proposal, "Proposed Work Plan, Transition Plan." When Xerox withdrew its Addendum, it did not also submit a revised proposal that deleted the Addendum provisions from those places where they had been incorporated into the main body of the proposal. Nevertheless, both Xerox and PCS understood that withdrawal of the Addendum accomplished the complete withdrawal of the materials included in the Addendum, including where they were incorporated into the main body of the Xerox proposal. This understanding was reasonable under the circumstances.

46. However, IKON raises a related objection that is more pertinent. Xerox was allowed to withdraw its Addendum, and then was awarded the contract. Thus, the winning proposal is different than the proposal that was reviewed and scored by the PCS focus group. IKON argues that it is very likely that Xerox would not have passed the 80-point threshold without the Addendum provisions that were incorporated into the main body of the proposal. Mr. Lindemann of PCS believed that Xerox's score would probably have been higher without the Addendum provisions. The salient point is that both sides are free to speculate about what the score of the winning bid might have been, because PCS proposes to award a contract on a proposal that was never reviewed or scored in the manner prescribed by the 2007 RFP.

47. PCS argues that the withdrawal of the Xerox Addendum was entirely in keeping with the RFP, citing paragraph 3 of the General Terms and Conditions, quoted in full above and relevant portion of which provides:

A bid (or amendment thereto) will not be accepted by the purchasing department after the time and date specified for the bid opening, nor may a bid (or amendment thereto) which has already been opened in public be withdrawn by the bidder for a period of sixty (60) calendar days after the bid opening date and time, unless authorized by the purchasing department. [Emphasis added]

48. PCS contends that the emphasized language grants the purchasing department authority to allow a bidder to withdraw a portion of its bid after the bids have been opened. This is correct, if the portion in question is a timely submitted amendment to the original bid.⁵ In their arguments, both PCS and Xerox equate the terms "amendment" and "addendum," and assume that the Xerox Addendum could be withdrawn as an "amendment" to the Xerox proposal. However, the Xerox Addendum was not an amendment to the Xerox proposal; it was an integral part of that proposal. The Addendum did not amend anything contained in the Xerox proposal; rather, it attempted to "amend" the terms of the RFP.

49. The underscored portion of paragraph 3 anticipates the late withdrawal of an entire bid or an amendment to a bid, not a

wholesale grant of authority to the purchasing department to allow a bidder to save a nonresponsive proposal by withdrawing the objectionable provisions. PCS argues that Xerox was given no economic or competitive advantage in being allowed to submit and then withdraw its Addendum. Ms. Pomerantz testified that none of the items in the Addendum would have affected the price bid by Xerox, because they were essentially items of overhead that Xerox cannot "cost out" to include in a price proposal. However, the testimony by Mr. Lindemann convincingly made the point that some of the variations from RFP terms offered by Xerox would affect PCS's costs regardless of their impact on Xerox's price proposal. Passing on costs to the agency that have been absorbed by IKON and the other vendors in their proposals works to Xerox's economic advantage and to the detriment of PCS.

50. Xerox had an obvious competitive advantage in being granted the opportunity to amend its proposal after the substantive proposals were opened and evaluated and the price proposals had been opened and posted. Xerox was also granted the option, afforded to no other bidder, of simply declining to withdraw its Addendum and thereby walking away from the procurement after submitting a proposal that, under the terms of the RFP, is supposed to bind the vendor for a period of 90 days.

51. Subsection 120.57(3)(f), Florida Statutes, provides, in relevant part:

In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. . . .

52. The PCS rules and RFP provisions, correctly understood, do not contravene this statutory requirement. They grant the purchasing department the flexibility to allow a bidder, under special circumstances, to withdraw from a given procurement after submitting a bid, and they allow PCS to waive slight variations or minor irregularities in a bid. To the extent that PCS interprets its rules and RFP to allow Xerox to substantially amend its proposal after the opening,⁶ as occurred in this procurement, then PCS has violated its governing statutes in a fashion that is clearly erroneous, contrary to competition, arbitrary, or capricious.

53. PCS argues that even if the Xerox Addendum contained material deviations, the RFP and PCS's rule permitted bidders to submit addenda with material deviations. PCS based this argument on that portion of Section 3.1 of the Special Conditions stating that bidders "may propose whatever program they feel best meets the district's needs and are not restricted in any way other than to meet the basic equipment specifications, terms and conditions outlined in this bid."

When read within the context of the Special Conditions in their entirety, this language clearly contemplates allowing the vendors to offer creative solutions within their field of substantive expertise, i.e., the establishment of a comprehensive copier program countywide. It was rational for the drafters of the RFP to assume that a company such as Xerox enters the process in possession of more knowledge and experience in the field of copier installation, service, and repair than the school district possesses. PCS conducted focus groups to determine the top priorities of the school personnel who use the copiers and presented the bidders with specifications broad enough to allow maximum flexibility in crafting proposals responsive to the listed priorities.

54. However, there are rarely "creative solutions" to boilerplate RFP terms such as shipping, limitation of liability, the requirement that cost proposals be all-inclusive, inspection of equipment prior to acceptance, and response time for repairs. These are areas in which the purchasing department of PCS may be presumed to have at least as much expertise as Xerox or IKON. Variations from the RFP's requirements proposed by a bidder regarding these items are likely to be self-serving efforts to protect the bidder's interests or pass on costs to the agency. Paragraph 31 of the General Terms and Conditions recognizes this reality by stating that a bidder that substitutes its standard

terms and conditions for those of PCS will be considered nonresponsive.⁷

55. PCS is correct that the "Integrity of Bid Documents" paragraph of Section 1 of the Special Conditions of the 2007 RFP allows bidders to submit addenda that clearly state "modifications or alterations that a bidder wishes to propose." However, contrary to PCS's treatment of Xerox in this procurement, the RFP does not state that the bidder may propose modifications of the RFP terms without risk.⁸ The cited paragraph clearly warns bidders that proposed modifications or alterations constitute grounds for rejection of a bid. The paragraph does not, and under Subsection 120.57(3)(f), Florida Statutes (2006), could not, state that bidders will be given the opportunity to withdraw those portions of their proposals deemed nonresponsive after bid opening.

56. PCS also emphasizes the first sentence of the "Acceptance of Vendor Responses" paragraph of the Special Conditions: "The purchasing department reserves the right to accept proposals from multiple vendors, and to accept or reject portions of a proposal based upon the information requested." However, the next sentence of that paragraph states that the remedy is not after-the-fact withdrawal of the rejected portion of the proposal, but rejection of the proposal: "Vendors may be excluded from further consideration for failure to fully comply

with the requirements of this RFP solely at the purchasing department's discretion."

57. Both PCS and Xerox raised the issue of the 2006 RFP in an effort to show that IKON was now attacking a process from which it earlier benefited. In the 2006 procurement, IKON was allowed to withdraw portions of an addendum after a competitor filed a protest. PCS ultimately rejected all of the 2006 Proposals because of confusion on the part of the bidders, partly related to the fact that IKON was allowed to withdraw its addendum but a competitor was not given the same opportunity. PCS then issued the 2007 RFP in December 2006 to procure the same copy services sought by the 2006 RFP. The 2006 RFP is relevant only to show that PCS has allowed the withdrawal of amendments in at least one previous procurement, a moot point because PCS has freely stated its position that it has the authority to reject an addendum without rejecting the entire proposal.

58. Xerox's original proposal, including the Addendum, was nonresponsive for the reasons set forth above. PCS's effort to save Xerox's low bid by allowing it to withdraw the Addendum violated Subsection 120.57(3)(f), Florida Statutes (2006), as well as the terms of the RFP. The remaining question is whether IKON's proposal was responsive and may therefore be awarded the contract.

59. As already found above, IKON's proposal materially deviated from Section 4.10.2 of the Special Conditions by substituting a complex formula for the simple response time requirement of the RFP and by making compliance with the four-hour response time requirement contingent upon the location of IKON's service centers.⁹

60. Section 7.1.3 of the Contractor Response portion of the 2007 RFP, "Proposed Models and Equipment Configurations," provides the following:

The respondent must provide a comprehensive description of its proposed standard models and equipment configurations for each of the various grade levels (elementary, middle, high school). Consideration should be given to the stated needs of the focus groups (Section 3), particularly "ease of operation", "accessibility" to machines and "reliability". Vendors should provide detailed, technical product literature for each piece of equipment proposed including all options. The respondent should also describe what flexibility will be allowed for adding or deleting equipment as program needs change and how that will effect the amount billed according to the cost proposal plan proposed. [Emphasis added]

61. Section 7.1.7 of the Special Conditions, "Cost Proposal," provides the following:

Respondent must include a complete, detailed cost proposal which encompasses all costs associated with the proposed program. The cost proposal must allow for flexibility to add or delete equipment as program needs change. The district will not entertain any

proposals to purchase or lease any equipment. [Emphasis added]

62. IKON's proposal contained the following paragraph within its response to Section 7.1.3 of the Special Conditions:

As requested by PCS in Section 7.1.7 of the Invitation to Bid, IKON's cost proposal allows for flexibility. IKON will permit PCS to add or delete equipment as PCS' needs change by permitting PCS to upgrade or downgrade equipment at the beginning or at the end of its fiscal year. Under this program, PCS may replace upgraded or downgraded equipment with additional equipment that addresses PCS' needs. Specifically, IKON will permit PCS to identify up to [three] percent of the overall equipment fleet value procured by PCS from IKON, including models and specifications that are representative of the entire fleet population, as flexible equipment that may be upgraded or downgraded at the beginning or at the end of the fiscal year, while all other equipment may be canceled only in the event of a non-appropriation or termination for cause. The flexible equipment may also be relocated or otherwise used to facilitate a rightsizing program, as directed by PCS. PCS may utilize this flexibility program in its own discretion. In no event shall either party be liable to the other party for any indirect, special or consequential damages.

63. Xerox contends that by limiting PCS to a three percent change in the overall equipment fleet value, IKON's proposal materially deviates from Sections 7.1.3 and 7.1.7 of the Special Conditions, which required that PCS have the flexibility to increase or decrease the size of the copier fleet to meet its needs. However, Section 7.1.3 did not prescribe the amount of

"flexibility" required in the vendors' bids; rather, it expressly requested the vendors to "describe what flexibility will be allowed for adding or deleting equipment." IKON's bid described the allowed flexibility as three percent of the overall equipment fleet value and was thus responsive on its face. The evidence presented at hearing was insufficient to determine whether a three percent limit would be so restrictive of PCS's needs to add or delete equipment as to render IKON's proposal nonresponsive.

64. More problematic is the last sentence of the quoted paragraph: "In no event shall either party be liable to the other party for any indirect, special or consequential damages." Xerox cogently argues that if its own proposed limitation of liability is a material deviation, then this similar limitation of liability included in the IKON bid must also be found a material deviation.

65. IKON responds that it is clear from the context that this limitation of liability provision, unlike that in Xerox's proposal, applies only to Section 7.1.3. For this reason, IKON contends, PCS determined that IKON's bid was responsive. IKON argues that its own limitation of liability provision is implicated only in the event that PCS requires additional equipment and that it does not limit any direct liability of

IKON to PCS and concerns only a distinct class of damages: indirect, special or consequential damages.

66. The position of the quoted sentence, at the end of the final paragraph of IKON's response to Section 7.1.3 of the Special Conditions, supports IKON's contention that the limitation of liability applies only to that section. However, the wording of the sentence ("In no event . . .") indicates a broader intended application. IKON also failed to explain why the requirement of additional equipment, and only the requirement of additional equipment, raised concerns within IKON that indirect, special or consequential damages might be claimed by either party to the contract. At best, this provision is ambiguous in the scope of its application and, in any event, seeks to limit the liability of IKON beyond the limits provided by the RFP. If Xerox's limitations of liability constitute material deviations, then so must IKON's.

67. IKON's proposal thus contains two material deviations from the RFP, one regarding response time and one regarding limitations of liability. IKON's proposal is nonresponsive.

CONCLUSIONS OF LAW

68. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this cause, pursuant to Section 120.569 and Subsection 120.57(3), Florida Statutes (2006).

69. Subsection 120.57(3)(f), Florida Statutes (2006), provides in pertinent part:

In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. . . . Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. 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. . . .

70. Pursuant to Subsection 120.57(3)(f), Florida Statutes (2006), the burden of proof rests with IKON as the party opposing the proposed agency action to prove "a ground for invalidating the award." See State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). IKON must prove by a preponderance of the evidence that PCS's proposed award of the contract to Xerox is arbitrary, capricious, or beyond the scope of PCS's discretion as a state agency. Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913-914 (Fla. 1988); Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d

778, 787 (Fla. 1st DCA 1981). See also § 120.57(1)(j), Fla. Stat. (2006).

71. The First District Court of Appeal has interpreted the process set forth in Subsection 120.57(3)(f), Florida Statutes (2006), as follows:

A bid protest before a state agency is governed by the Administrative Procedure Act. Section 120.57(3), Florida Statutes (Supp. 1996)^[10] provides that if a bid protest involves a disputed issue of material fact, the agency shall refer the matter to the Division of Administrative Hearings. The administrative law judge must then conduct a de novo hearing on the protest. See § 120.57(3)(f), Fla. Stat. (Supp. 1996). In this context, the phrase "de novo hearing" is used 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. See Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3d DCA 1992) (interpreting the phrase "de novo hearing" as it was used in bid protest proceedings before the 1996 revision of the Administrative Procedure Act).

State Contracting and Engineering Corp., 709 So. 2d at 609.

72. As outlined in Subsection 120.57(3)(f), Florida Statutes (2006), the ultimate issue in this proceeding is "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." In addition to proving that PCS breached this statutory standard of conduct, IKON also

must establish that PCS's violation was either clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat. (2006).

73. The First District Court of Appeal has described the "clearly erroneous" standard as meaning that an agency's interpretation of law will be upheld "if the agency's construction falls within the permissible range of interpretations. If, however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." Colbert v. Department of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004) (Citations omitted).

74. An agency decision is "contrary to competition" when it unreasonably interferes with the objectives of competitive bidding. Those objectives have been stated to be:

[T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977), quoting Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931).

75. An agency action is capricious if the agency takes the action without thought or reason or irrationally. An agency action is arbitrary if is not supported by facts or logic. See Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

76. To determine whether an agency acted in an arbitrary or capricious manner, it must be determined "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 these factors to its final decision." Adam Smith Enterprises v. Department of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

77. However, if a decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. Dravco Basic Materials Co., Inc. v. Department of Transportation, 602 So. 2d 632, n. 3 (Fla. 2d DCA 1992).

78. IKON's protest contends that PCS acted arbitrarily and capriciously and contrary to competition when it allowed Xerox to withdraw portions of its proposal after the proposals had

been opened and evaluated by the focus group, after the cost proposals had been opened and posted, and after IKON had filed a notice of intent to protest. IKON contends that Xerox's proposal as originally submitted contained material deviations to the RFP requirements; that the withdrawal of Xerox's Addendum amounted to an amendment of its proposal in violation of Subsection 120.57(3)(f), Florida Statutes (2006), and that Xerox gained a competitive advantage by negotiating with PCS following the bid closing date.

79. PCS's failure to note the presence of the Addendum prior to sending the Xerox proposal to the focus group for evaluation was negligent at best and arbitrary in result. Further, PCS then attempted to cure its error by allowing Xerox to withdraw its Addendum, after evaluation, after the cost proposals had been opened, and after a notice of intent to protest had been filed by IKON. This attempted cure of a nonresponsive proposal, particularly where the other bidders were not given the same opportunity to amend their bids, was arbitrary and capricious, contrary to competition and violated Section 3 of the RFP as well as Subsection 120.57(3)(f), Florida Statutes (2006).

80. Xerox's deviations amounted to material variances from the bid requirements. A deviation from the specifications is material "if it gives the bidder a substantial advantage over

the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. Department of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986), citing Robinson Electrical Co., Inc. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982). Robinson Electrical held that a variance is material if its waiver would either deprive the agency of its assurance that the contract will be entered into, performed, and guaranteed in accordance with the specified requirements, or adversely affect competitive bidding by placing one bidder in a position of advantage over other bidders or otherwise undermining "the necessary common standard of competition." 417 So. 2d at 1034. IKON demonstrated that Xerox's Addendum and incorporated provisions deviated from the bid requirements, and, also, demonstrated that Xerox gained a competitive advantage by the inclusion of these provisions.

81. After the bid opening, Xerox was contacted by PCS representatives and allowed to amend its bid. On February 5, 2007, Mr. Lindemann allowed Xerox to withdraw its Addendum, after negotiations during which Xerox attempted to modify the Addendum without entirely withdrawing it.

82. PCS argues that paragraph 3 of the General Terms and Conditions of the 2007 RFP authorize it to allow the withdrawal of portions of a bid after bid opening. Paragraph 3 states, in relevant part:

A bid (or amendment thereto) will not be accepted by the purchasing department after the time and date specified for the bid opening, nor may a bid (or amendment thereto) which has already been opened in public be withdrawn by the bidder for a period of sixty (60) calendar days after the bid opening date and time, unless authorized by the purchasing department. . . .

83. However, IKON correctly notes that the clauses of paragraph 3 are independent: the first clause provides that PCS cannot allow bids or amendments thereto to be submitted after the time and date for bid opening, and the second clause provides that a bid or an amendment to a bid that has already been opened may not be withdrawn for at least sixty (60) calendar days after the bid opening date and time, unless authorized by the purchasing department.¹¹

84. In this case, Xerox's proposal was clearly amended after bid opening by the withdrawal of the Addendum, in violation of paragraph 3 of the General Terms and Conditions and in violation of Subsection 120.57(3)(f), Florida Statutes (2006).

85. PCS points to other provisions of the RFP that give PCS discretion to reject portions of bids, allow Addenda to be submitted with bids, or that allow clarifications to be made to bids. However, while the School Board has a great deal of discretion, it cannot extent to permitting a bidder to rewrite and reinterpret its bid after the bid opening to cure its

nonresponsiveness. See Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977)("a bidder cannot be permitted to change his bid after the bids have been opened, except to cure minor irregularities").

86. The facts found above demonstrate that PCS acted contrary to competition in its efforts to save the low proposal submitted by Xerox, when the proper action should have been to reject the Xerox proposal as nonresponsive. By giving Xerox the opportunity to withdraw its Addendum, PCS also afforded Xerox the option of electing to withdraw its bid entirely. Xerox could have looked at the bid responses, realized it had underbid the project, and declined PCS's offer to withdraw its Addendum, thereby withdrawing its entire proposal from consideration. No other bidder was afforded an opportunity for such second thoughts. Xerox, therefore, was provided a clear advantage, contrary to competition and the equal advantage to be afforded all prospective contractors under the competitive bidding process. Thus, PCS's decision to award the contract for RFP No. 07-015-040-RFP to Xerox was clearly erroneous, contrary to competition, and arbitrary.

87. However, it is well settled that "a 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."

Intercontinental Properties, 606 So. 2d at 384. The evidence presented by Xerox in defense of its position demonstrated that the IKON proposal presented material deviations in two areas, regarding limitations of liability and response time for repairs, both significant aspects of the 2007 RFP.

88. IKON argued with great force that its deviations, if any, were of a lesser degree than those found in the Xerox proposal. The principles of equal treatment of competitors in the bidding process nonetheless compel the conclusion that the IKON proposal, too, should be rejected as nonresponsive. To rule otherwise would require PCS "to spend more money for a higher bid which suffers from the same deficiency as the lower bid." Id.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED that PCS enter a final order that (a) declares Xerox's bid to be materially nonresponsive and, accordingly, rescinds the proposed award to Xerox; and (b) declares IKON'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 PCS should award the contract to the next-lowest responsive bidder

or reject all bids and start over.

DONE AND ORDERED this 10th day of May, 2007, in
Tallahassee, Leon County, Florida.

S

LAWRENCE P. STEVENSON
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of May, 2007.

ENDNOTES

1/ The 2006 RFP contained the same General Terms and Conditions as the 2007 RFP.

2/ Somewhat confusingly, the cover page of the 2007 RFP references the document as both an "Invitation to Bid" and a "Request for Proposals." Thus, the vendors also tended to use the terms interchangeably in their proposals.

3/ Section 4.7.4 of the Special Conditions expressly cautioned the vendor that "some facilities are multi-story and some equipment may be installed above the first floor," and requires the vendor to absorb those installation costs. Xerox is here attempting to pass the delivery portion of those costs on to PCS, in contravention of the RFP.

4/ See footnote 3. Xerox is again attempting to pass costs on to PCS despite the cautionary text of Section 4.7.4 of the Special Conditions.

5/ The Conclusions of Law below discuss IKON's point regarding the first clause of the quoted provision of paragraph 3, that no bid or amendment thereto may be accepted by PCS after bid opening under any circumstances. IKON's reading of the first clause renders it consistent with Subsection 120.57(3)(f), Florida Statutes (2006).

6/ At the hearing, the issue arose whether Xerox could be said to have "supplemented" its proposal, where it deleted rather than added terms to that proposal. This definitional problem does not require extended examination, because Subsection 120.57(3)(f), Florida Statutes (2006), prohibits a bidder from making post-opening submissions that "amend or supplement" their bids. In this case, there can be no doubt that Xerox amended its proposal by withdrawing the Addendum.

7/ It is understood that the inspection and response time requirements were Program Specification, not General Terms and Conditions. They are included in this discussion as items common to procurements in general, regarding which a company that markets copiers possesses no particular expertise.

8/ Mr. Lindemann offered extensive testimony that, in his opinion, the RFP in general and the addendum provision in particular were intended to allow bidders to propose alternatives without fear that their entire bids would be rejected if PCS declined to accept the proposed alternatives. Nothing in the law would prevent PCS from drafting an RFP that allowed bidders to submit multiple bids proposing alternatives to the strict terms of the RFP. The alternative bids could then be rejected without jeopardizing the bidder's participation in the process. However, this RFP did not accomplish the "alternatives without risk" scenario envisioned by Mr. Lindemann.

9/ IKON defended this deviation by noting that its proposal stated that "the response time will comply with any parameters that have been agreed to during contractual negotiations." IKON contends that this language indicates IKON's acceptance of the RFP's four-hour response time requirement. This contention cannot be credited. The plain language of the quotation indicates that IKON is willing to negotiate with PCS regarding response times after IKON has been awarded the contract.

IKON also argued that by signing the RFP, and not submitting any express exceptions to the RFP, IKON agreed to all the bid requirements, including the four-hour response time requirement,

regardless of the language included in the IKON proposal. If this logic were credited, then the only difference between Xerox and IKON in this procurement would be that Xerox clearly labeled its deviations from the RFP and IKON did not. This is not a distinction that should form the basis of an award to IKON.

10/ The meaning of the operative language has remained the same since its adoption in 1996:

In a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. 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. . . .

§ 120.57(3)(f), Fla. Stat. (1997).

11 PCS appears to read the quoted provision as if the phrase "unless authorized by the purchasing department" modifies the first clause as well as the second clause of the sentence. Under this reading, PCS could allow a bidder to submit a bid or amendments thereto after the date its competitors' bids have been opened. This reading defies any common standard of competitive bidding and would place the RFP provision squarely at odds with Subsection 120.57(3)(f), Florida Statutes (2006).

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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.