STATE OF FLORIDA
COMMISSION FOR THE TRANSPORTATION DISADVANTAGED

VEOLIA TRANSPORTATION SERVICES, INC.,

Petitioner,

vs. **CASE NO. 08-1636BID**

COMMISSION FOR THE TRANSPORTATION DISADVANTAGED,

Respondent,

and

MV TRANSPORTATION, INC.,

Intervenor.

_____/

FINAL ORDER

THIS MATTER came before the Florida Commission for the Transportation Disadvantaged (hereinafter the "Commission") at a duly noticed public meeting held on August 25, 2008, in Orlando, Florida. The hearing was conducted pursuant to Sections 120.569 and 120.57(3), Florida Statutes, for the purpose of considering the Administrative Law Judge's Recommended Order, Intervenor's Exceptions to the Recommended Order, and Petitioner's Response to Intervenor's Exceptions (copies of which are attached hereto as Exhibits A, B, and C, respectively) in the above-styled cause.

Upon review of the Recommended Order, the arguments of the parties, and after a review of the complete record in this case, the Commission makes the following findings and conclusions.

RULING ON EXCEPTIONS

The Commission reviewed the Intervenor's Exceptions and Petitioner's Response to Intervenor's Exceptions. Upon review of the exceptions, the argument of the parties, and being duly advised on the premises, the Commission rejects Intervenor's Exceptions. There is competent substantial evidence in the record to support the findings and conclusions of the Administrative Law Judge.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

3. The Commission has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes and Part I of Chapter 427, Florida Statutes.

4. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

5. The conclusions of law are consistent with the evidence and are reasonable.

DISPOSITION

6. Upon a complete review of the record in this case, the Commission rejects all proposals and will reissue a new Request for Proposals.

This Final Order shall become effective upon filing with the Clerk of the Department of Transportation.

DONE AND ORDERED this 24 day of Sept, 2008.

COMMISSION FOR THE TRANSPORTATION DISADVANTAGED

JR Harding, Chairperson
Commission for the Transportation Disadvantaged

NOTICE OF APPEAL RIGHTS

Pursuant to Section 120.68, Florida Statutes, the parties are hereby notified that they may appeal this Final Order by filing one copy of a notice of appeal with the Clerk of the Department and by filing a filing fee and one copy of a notice of appeal with the District Court of Appeal within thirty days of the date this Final Order is filed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U.S. Mail to Seann M. Frazier, Esq. Greenberg Traurig, P.A., 101 E. College Avenue, Tallahassee, Florida 32302; Michael E. Riley, Esquire, Gray Robinson, P.A., 301 South Bronough Street, Suite 600, Tallahassee, Florida 32303, Tom Barnhart, Senior Assistant Attorney General, Office of the Attorney General, Pl-01, The Capitol, Tallahassee, Florida 32399-1050; and Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060, this 24 day of September, 2008.

Wendy Smith
Administrative Assistant
Commission for the Transportation Disadvantaged

WENDY SMITH
Commission DD 815663
Expires August 18, 2012
Bonded Thru Troy Fain Insurance 800-385-7019

Exhibit A

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VEOLIA TRANSPORTATION SERVICES, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 08-1636BID
COMMISSION FOR THE TRANSPORTATION DISADVANTAGED,	)	
Respondent,	)	
and	)	
MV TRANSPORTATION, INC.,	)	
Intervenor.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was held in this proceeding before Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings on May 6, 2008, in Marianna, Florida.

APPEARANCES

For Petitioner: Seann M. Frazier, Esquire
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Senior Assistant Attorney General
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Assistant Attorney General
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For Intervenor: Michael E. Riley, Esquire
Mary-Jo Lewis-Wilkinson, Esquire
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STATEMENT OF THE ISSUE

The issue in this proceeding is whether the Respondent's decision to award a community transportation provider contract to the Intervenor is clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On March 5, 2008, pursuant to Request for Proposals No. 10-07-1, Respondent, the Florida Commission for the Transportation Disadvantaged (Commission or Respondent) awarded Intervenor, MV Transportation, Inc. (MV or Intervenor), a contract to provide community transportation coordinator services for Florida's Transportation Disadvantaged Program in Hardee, Highlands, and Okeechobee Counties. On March 7, 2008, Petitioner, Veolia Transportation Services, Inc. (Veolia or Petitioner), filed a Notice of Intent to protest the Commission's award of the contract to MV. The parties could not

resolve the protest and on April 4, 2008, Veolia filed a petition challenging the award of the contract to MV and requesting a formal administrative hearing. Subsequently, Veolia filed a Motion to Amend its Petition. Veolia's motion was granted.

At the hearing, the parties offered Joint Exhibits 1 through 29 and 31 through 36 into evidence. Veolia called two witnesses to testify and offered one exhibit into evidence. MV called one witness to testify and offered two exhibits into evidence. Additionally, the depositions of Ms. Kathryn Hall, Ms. Shannon Brett and Ms. Helen Sears were offered into evidence.

After the hearing, the parties filed Proposed Recommended Orders on May 30, 2008.

FINDINGS OF FACT

1. The Commission is an independent entity established by Section, 427.012, Florida Statutes (2007). It is housed, administratively and fiscally, within the Florida Department of Transportation. The purpose of the Commission is to coordinate and set policy for transportation services provided to the "transportation disadvantaged." It also is the entity that awards contracts to service providers in the coordinated transportation system.

2. The term "transportation disadvantaged" is defined in Section 427.011(1), Florida Statutes, as:

> Those persons who because of physical or mental disability, income status, or age are unable to transport themselves or to purchase transportation and are, therefore, dependent upon others to obtain access to health care, employment, education, shopping, social activities, or other life-sustaining activities, or children who are handicapped or high-risk as defined in § 411.012.

3. Section 427.0155, Florida Statutes, sets forth the powers and duties of a community transportation coordinator as follows:

> (1) Execute uniform contracts for service using a standard contract, which includes performance standards for operators.
>
> (2) Collect annual operating data for submittal to the commission.
>
> (3) Review all transportation operator contracts annually.
>
> (4) Approve and coordinate the utilization of school bus and public transportation services in accordance with the transportation-disadvantaged service plan.
>
> (5) In cooperation with a functioning coordinating board, review all applications for local government, federal and state transportation disadvantaged funds, and develop cost-effective coordination strategies.
>
> (6) In cooperation with, and approved by, the coordinating board, develop, negotiate, implement, and monitor a memorandum of

agreement including a service plan, for submittal to the commission.

(7) In cooperation with the coordinating board and pursuant to criteria developed by the Commission for the Transportation Disadvantaged, establish priorities with regard to the recipients of non-sponsored transportation disadvantaged services that are purchased with Transportation Disadvantaged Trust Fund moneys.

(8) Have full responsibility of transportation services for the transportation disadvantaged as outlined in § 427.015(2).

(9) Work cooperatively with regional workforce boards established in Chapter 445 to provide assistance in the development of innovative transportation services for participants in the welfare transition program.

4. In addition to the Commission, independent, local metropolitan planning organizations or designated official planning agencies carry out the transportation planning process required by 23 U.S.C. § 134. See 23 U.S.C. § 134(d)(1); § 427.015(1), Fla. Stat. Each metropolitan planning organization or designated official planning agency serves an urbanized area with a population of at least 50,000 individuals. In this case, the Central Florida Regional Planning Council (CFRPC) is the metropolitan planning organization or designated official planning agency covering the multi-county area of Hardee, Highlands, and Okeechobee Counties in Florida. As such, the CFRPC recommends to the Commission a single community

transportation coordinator to serve Hardee, Highlands, and Okeechobee Counties. See 23 U.S.C. § 134(d)(1); § 427.015(2), Fla. Stat.

5. A community transportation coordinator may be a not-for-profit entity, a for-profit entity or a public body such as a county commission. A community transportation coordinator may personally provide transportation services to the transportation disadvantaged within its service area or contract with other entities for the provision of those services. In either event, because the coordinator's duties include payment of transportation providers, there is an expense or cost associated with the provision of those transportation services to the community coordinator. The payment of the expense or estimate of such expense is part of the coordination services of the community coordinator.

6. Since 1993, Veolia has been the community transportation coordinator for Hardee, Highlands, and Okeechobee Counties. The current contract expired on June 30, 2008.

7. On October 16, 2007, the Commission issued Request for Proposal (RFP #10-07-01) entitled "Request for Technical, Cost and Rate Proposals for the Community Transportation Coordinator Under Florida's Transportation Disadvantaged Program in Hardee, Highlands, and Okeechobee Counties, Florida" (RFP). The contract to be awarded by the Commission through the RFP was a

five-year contract. The contract only concerned the provision of coordination services. The contract did not include the actual carrier services. As indicated, however, payment of the estimated or actual expense or cost for future transportation services remained part of the overall expense or cost of the requested coordination services.

8. Section I, B of the RFP states, in pertinent part:

> The following is the anticipated schedule for the selection of the firm or agency as the designated Community Transportation Coordinator (CTC). If there are changes in the meeting dates, each agency/firm that submits a letter of interest/proposal will be notified.

* * *	* * *
Mandatory Pre-Proposal Conference	November 8, 2007
Proposal Due (Deadline)	December 6, 2007 3:00 p.m. EST
Proposal Opening	December 6, 2007 3:00 p.m. EST
Proposer Presentations to Selection Committee	January 4, 2008
Final Action on Recommendation by Central Florida Regional Planning Council	January 9, 2008
Florida Commission for the Transportation Disadvantaged Final Selection	Meeting Date Unknown Possibly February /March
* * *	* * *

9. Section I, C of the RFP states, in pertinent part, as follows:

* * *

> 2. The issuance of this request for proposals constitutes an invitation to present proposals from qualified and experienced proposers. The CFRPC reserves the right to determine, in its sole discretion, whether any aspect of the statement of proposal satisfactorily meets the criteria established in this request for proposal, the right to seek clarification from any proposer, . . . ,and the right to reject any or all responses with or without cause. . . .

* * *

> 8. It is the responsibility of the proposer to prepare the proposal as clearly as possible in order to avoid any misinterpretation of the information presented. Proposals will be reviewed solely on the basis of the information contained therein. Modifications or changes cannot be made to the proposals after they are opened.

* * *

> 13. The criteria for evaluation of the proposals is provided in Section III (Evaluation Criteria/Proposal Rating Sheet). Only these criteria will be used to determine the best response.

* * *

10. Section I, D of the RFP states in part:

> The response to this Request for Proposal will be as follows:

1. Community Transportation Coordinator Only - The Central Florida Regional Planning Council is requesting proposals for the Community Transportation Coordinator only. Proposers who are interested in providing some or all of the transportation trips as a carrier will be expected to competitively compete with other operators to provide that portion of service. The Council will assist the CTC in conducting a Request for Qualifications/Request for Proposals process for selection of carriers prior to service start up on July 1, 2008.

* * *

11. Section I, H of the RFP states, in part, as follows:

> The CFRPC's Executive Director will appoint a selection team of at least three employees who have experience and knowledge of the coordinated transportation system. Each selection team member will assign points to the proposal using criteria listed in Section III (Evaluation Criteria/Proposal Rating Sheet). Selection team members will assure that each proposal has been rated fairly, impartially and comprehensively.

* * *

12. Section K of the RFP specified that proposers "must" use the Florida CTD standardized rate calculation model to determine rates and rate structures for service delivery. The CTD rate calculation model was designed to produce a rate which accounts for the costs associated with providing coordination services and transportation services. As indicated earlier, the contract in this case only asked for prices pertaining to coordination services.

13. Section III of the RFP contains the Evaluation Criteria/Proposal Rating Sheet. The rating sheet states, in part:

> **EVALUATION CRITERIA/PROPOSAL RATING SHEET**
>
> Each proposal submitted will be evaluated on listed criteria. Evaluation Committee members will use this proposal rating sheet to assign point values to items in Section II using the following scale (the weighing for each criterion has been assigned):
>
> 6 Excellent
> 5 Very Good
> 4 Good
> 3 Adequate
> 2 Fair
> 1 Poor
> 0 Not addressed
>
> 1. **GENERAL**
>
> **The following items must be included in the submitted proposal. Any proposal with a "no" response on any of the following questions will be rejected without further consideration.**

14. After the above general introductory language, Section 1 of the rating sheet then lists four criteria that have yes or no responses. The remainder of Section 1 of the rating sheet lists seven categories and subcategories of evaluation criteria along with the total possible points for each category. The categories for evaluation were Management Resources (24 points), Proposer's Experience (30 points), Financial Capacity to Undertake Project (30 points), Demonstration of Transportation

Coordination Ability (42 points), Demonstration of Transportational Coordination Operational Ability (18 points), Vehicle Acquisition (18 points), and Rate Proposal (6 points). The category for Demonstration of Transportational Coordination Operational Ability required the committee members to evaluate and score a proposer's "transition plan describing the process needed to ensure a smooth change-over."

15. The employees who would comprise the selection committee were to be employees of CFRPC. In this case, the selection committee consisted of Marcia Staszko, Kathryn Hall, Helen Sears, and Shannon Brett. Therefore, under the RFP, each committee member could award a total of 168 points on a proposal and each proposal could score a maximum of 672 points.

16. Veolia and MV were the only two vendors that submitted responses to the RFP.

17. On December 6, 2007, Ms. Staszko opened Veolia and MV's responses and distributed them to the other three selection committee members. She also instructed the other selection committee members to preliminarily score Veolia and MV's proposals but not to finalize their scores until after the oral presentations by representatives of Veolia and MV on January 4, 2008.

18. As set forth in the time table of the RFP, the selection committee members met on December 19, 2007, in order

to discuss any questions or concerns that had arisen during the evaluations of the proposals. The December 19th meeting was noted on page 3 of the RFP documents. However, the RFP did not specify where or at what time the December 19, 2007, meeting would occur. Likewise, the RFP did not specify the purpose of the December 19, 2007 meeting. The evidence demonstrated that the purpose of the meeting was to discuss any issues or questions which the individual evaluators had regarding the RFP requirements or the RFP process. The evidence further demonstrated that no final decisions were made regarding the scoring of the parties' proposals and that no evaluator finalized their individual score regarding the parties' proposals. Given this lack of finality and the fact that the meeting was limited to the processes of the RFP, the December 19, 2007, meeting was not required to be noticed within the parameters of the Florida Sunshine Law, Section 286.011, Florida Statutes.

19. In its proposal, MV submitted a rate for coordination services of $2.47 per trip for all five years of the contract. Veolia submitted a rate proposal for coordination services of $2.99 per trip until July 1, 2009, at which time the rate would increase to $3.05 per trip.

20. As indicated earlier, the RFP required the proposers to use the CTD rate model to calculate the rate submitted by

that proposer. The RFP included a compact disk for use with the model and referenced a web site where the model could be obtained. The RFP also included historical data which could be used in the CTD model.

21. The model's general use is to calculate a rate based on the provision of both coordination services and transportation services. The calculation in the model includes categories of business costs or expenses of the provider such as salaries and payments made to the actual transportation carriers. The evidence showed that the payment of costs to the carriers are part of the coordination services requested under the RFP and a legitimate cost, or estimate thereof, should be included in any rate calculation for coordination-only services. These costs are not insubstantial and range from $150,000.00 to $300,000.00 a year. Additionally, the use of the rate calculation model ensures that a proposer's rate for coordination services is based on a budget that includes all of the duties of a transportation coordinator.

22. Prior to the submission of its bid, MV submitted a written question regarding the use of the CTD model. MV asked:

> The RFP indicates that the current CTC is a broker that only handles the 'administrative' part of the delivery system. When responding with pricing in the RFP, are we expected to base our rates only on this function, or as a total including the service delivery functions? If it is

the latter, are we expected to negotiate rates for potential providers in advance of the proposal submittal?

23. Unfortunately, MV did not receive a response to its question and submitted its bid without using the CTD rate calculation model. MV used the rate calculation model as a guideline for including relevant cost data in its proposal. However, MV did not include cost data or estimated cost data regarding the payment of transportation costs to transportation carriers. The exclusion of such data, when such payments are required as part of the coordination services, could potentially lower the rate MV proposed. MV disclosed its non-use of the CTD model in its proposal. The evidence was not clear on what data MV did not include in its rate proposal.

24. On the other hand, Veolia did use the rate calculation model and submitted the model's calculation as part of its proposal. Veolia made some adjustments to its proposed rate due to the fact that the RFP was requesting a rate proposal only for coordination services. Again, the evidence was not clear what adjustments were made by Veolia to its rate proposal. However, the evidence showed that Veolia did include an expense or cost for the payment of transportation services to carriers. In effect, the inclusion of the transportation expense could potentially increase the rate proposed by Veolia.

25. Ms. Staszko, as well as other committee members, was uncertain whether MV's failure to use the CTD model was responsive to the RFP. As a result, she contacted Commission staff members and sought guidance on the CTD model issue.

26. The Commission staff members instructed Ms. Staszko that MV's rate calculation did not render its answer unresponsive since the RFP was only for coordination services. However, that instruction ignored the clear language of the RFP specifications and resulted in a comparison of rates which were not based on a uniform method of calculation.

27. During the December 19, 2007, meeting, Ms. Staszko informed the other committee members of the instructions she received from the Commission's staff. Ms. Staszko did not instruct other selection committee members how they should score the rate portion of MV's proposal. That determination was left up to the individual judgment of each selection committee member.

28. In this case, Ms. Staszko awarded MV five out of a possible six points for its rate proposal. She deducted one point because MV did not fully utilize the standardized rate calculation model set forth in the RFP. She awarded a five to Veolia because she considered MV's rate proposal to be lower. Ms. Hall considered MV's failure to use the CTD model, but awarded six points on MV's rate proposal. She also awarded six

points to Veolia. Ms. Sears awarded four points to MV because it did not use the rate calculation model. She awarded a score of six to Veolia. Ms. Brett awarded five points to MV and five points to Veolia because she felt both proposals were "sufficient." In sum, MV received a cumulative score of 20 points and Veolia received a cumulative score of 22 out of 24 possible points on their respective rate proposals. However, even though Veolia received a higher overall score than MV, the higher score cannot offset the impact of the Commission's attempt to waive the requirement of the rate model. The committee did not have the information necessary to compare MV's rate with Veolia's because expense data for transportation carriers was not reported or estimated by all the proposers. This lack of uniformity was material and not waivable by the Commission.

29. Section I-1 of the RFP required each proposer to "provide a transition plan describing the process needed to ensure a smooth startup, July 1, 2008." Each of the evaluators was to use her own judgment in awarding zero to six points for a proposer's transition plan.

30. Rather than setting forth any explanation pertaining to the transition from its current contract to the one for which it was competing, Veolia responded that this aspect of the RFP was not applicable to its proposal. Veolia's statement was

clearly non-responsive to the sub-category requesting a transition plan. Veolia's proposal did not take into consideration the fact that transportation provider contracts would have to be sought or renewed at the termination of this contract. Similarly, Veolia's response did not mention transition plans should Veolia not be awarded the contract. On the other hand, MV provided a detailed transition plan in its proposal. A comparison of the two clearly shows that MV's transition plan was superior to Veolia's.

31. During the December 19, 2007 meeting, the other selection committee members questioned Ms. Staszko about Veolia's response, and Ms. Staszko stated that she did not consider Veolia's answer to be responsive to the RFP's inquiry about a transition plan. However, Ms. Staszko did not instruct the other selection committee members how they should score this aspect of Veolia's proposal.

32. Ms. Staszko awarded zero points to Veolia on its transition plan. She awarded MV five points on its transition plan. Ms. Hall's rating sheet reflects that she initially awarded Veolia six points for its transition plan. At some point after discussions on the subject, she changed her score to zero and then three points. Ms. Hall awarded six points to MV for its transition plan. Ms. Sears was also dissatisfied with Veolia's transition plan and awarded zero points to Veolia for

its transition plan. She awarded MV four points. Likewise, Ms. Brett awarded zero points to Veolia for its transition plan. She awarded six points to MV.

33. However, in scoring Veolia's non-response to the transition plan sub-category, the committee did not recognize the fact that Veolia's proposal was non-responsive to the RFP. The response was essentially a negative answer to one of the categories that Section III of the RFP stated in bold and underlined language should be materially addressed in a proposal.

34. Finally, as indicated earlier, the RFP required at least three committee members who have knowledge and experience of the coordinated transportation system. The RFP did not require expertise regarding the coordinated transportation system.

35. Ms. Staszko is the CFRPC's Program Director. She has been with the transportation program since its inception in 1979. As director, she is the person primarily responsible for the transportation disadvantaged program in Hardee, Highlands and Okeechobee Counties and was primarily responsible for writing the RFP. She also was responsible for overseeing the process for procuring the contract at issue in this case. All of the parties to this proceeding agree that Ms. Staszko possesses an extensive amount of knowledge about the coordinated

transportation system for the "transportation disadvantaged in Hardee, Highlands and Okeechobee Counties and is well qualified to evaluate responses to the RFP at issue in this proceeding.

36. Ms. Hall has been the Program Coordinator for the CFRPC since October of 2007. In that position, she works with the Director of the Transportation Disadvantaged Program. Prior to becoming the CFRPC's Program Coordinator, Ms. Hall spent 27 years working as the CFRPC's executive assistant. During those 27 years, she gained knowledge and experience about the coordinated transportation system and the issues facing it. She also gained knowledge and experience through her time as the coordinator for that program. Ms. Hall is clearly qualified to serve on the selection committee.

37. Ms. Sears is a principal planner at the CFRPC. She has maintained that position for over two years. During her time with the CFRPC, Ms. Sears has worked on a series of projects relating to transportation issues in the Central Florida region. Her transportation planning experience was primarily related to the issue of concurrency of infrastructure, like roads and sewers, and fair share arrangements among developers and various governmental entities for providing such concurrency. In general, her experience did not relate to coordinated transportation systems. Prior to working for the CFRPC, Ms. Sears worked with a national engineering and

consulting firm for six years. During her employment at the engineering firm, Ms. Sears gained experience in public and private projects relating to general transportation planning and experience in public contract procurement. Indeed, the evidence demonstrated that Ms. Sears did not have any more than passing knowledge about, and no significant experience with, coordinated transportation systems. Given these facts, Ms. Sears did not meet the requirement of the RFP that committee members have knowledge and experience with coordinated transportation systems.

38. Ms. Brett is employed by CFRPC as a Senior Planner. She has held that position since about June of 2007. During her time with the CFRPC, Ms. Brett has worked on procuring capital improvements for local municipalities, organized a long-term comprehensive plan for infrastructure development, taken part in a series of projects assigned to her by the CFRPC's Director, and has been responsible for a different RFP pertaining to the acquisition of marketing services for the CFRPC. None of her experience appears to be in the area of transportation or transportation for the disadvantaged.

39. Prior to working for the CFRPC, Ms. Brett was employed as a city manager administrator in Hallandale Beach, Florida. During the course of her seven years with Hallandale Beach, Ms. Brett was involved with hundreds of procurement requests and

served on dozens of evaluation committees. Again, none of Ms. Brett's experience appears to be in the area of transportation or transportation for the disadvantaged.

40. In sum, the evidence demonstrated that only two selection committee members met the requirement of the RFP that the selection committee be comprised of "at least three employees who have experience and knowledge of the coordinated transportation system." Indeed, Ms. Staszko was aware of the lack of experience and knowledge on the selection committee and attempted to find potential committee members outside of the CFRPC. Her attempts were not successful.

41. On January 4, 2008, Veolia and MV made oral presentations to the selection committee. Following those presentations, the committee members met privately to discuss their scoring and submit their scores for each item set forth in the RFP. Ultimately, the committee members scored the proposals of MV and Veolia. All of the committee members rated MV's proposal slightly higher than Veolia's proposal. Ms. Staszko awarded 138 points to MV and 134 points to Veolia. Ms. Hall awarded 165 points to MV and 163 points to Veolia. Ms. Sears awarded 134 points to MV and 132 points to Veolia. Ms Brett awarded 144 points to MV and 142 points to Veolia. When added together, the committee awarded 571 points to Veolia and 581 points to MV. Given the closeness of the scoring and the

importance of understanding the information provided by the CTD rate model, the requirement in the RFP of experience and knowledge is material and not waivable by the Commission.

42. The evidence was clear that this RFP had a number of problems associated with its process. Most importantly, the attempted waiver of at least two material requirements of the RFP related to the use of the model calculation and the knowledge and experience of the committee members. Compounding the difficulties is the fact that Veolia's proposal was not responsive to the RFP. Given this myriad of problems, the Commission should reject all bids and begin the RFP process anew.

CONCLUSION OF LAW

43. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.57(3), Fla. Stat. (2007).

44. Section 120.57(3), Florida Statutes (2007), provides in pertinent part:

> [i]n 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.

45. The object of the proceeding is to evaluate the action taken by the agency. State Contracting Agency Eng'g Corp. v. Dept. of Transp., 709 So. 2d. 607,609 (Fla. 1st DCA 1998), Intercontinental Prop., Inc. v. State, Dept. of Health Rehab. Serv., 606 So. 2d. 380,386 (Fla. 1st DCA 1992).

46. The burden of proof is on the party protesting the award to establish by a preponderance of the evidence that the proposed award is clearly erroneous, contrary to competition, arbitrary, or capricious. Infrastructure Corp. of America v. Dep't of Transport., Case # 07-4410BID, ¶89 (DOAH 2007). Gtech Corp. v. State, Dep't of the Lottery, Gtech Corp. v. State, Dep't of the Lottery, 737 So. 2d. 615,619 (Fla.1st DCA 1999).

47. A proposed award is clearly erroneous if the evidence demonstrates a definite and firm conviction that a mistake has been committed in the agency's award of the contract. An agency action is capricious if the action is irrational or without thought or reason. Agency action is arbitrary if it is not supported by facts or logic. An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding. Lakeview Center, Inc. v. Agency for Health Care Administration, Case # 06-3412BID, ¶44 (DOAH 2006) (internal citations omitted).

48. In this case, Petitioner has alleged that the meeting of December 19, 2007, violated Florida's Sunshine Law, Section 286.022(1), Florida statutes. In general, the Sunshine Law provides that meetings in which official actions are taken by state or local government must be properly noticed to the public. The notice of such meetings must state the purpose of the meeting and the date, time and location of the meeting. The Sunshine Law applies to meetings "at which official acts are to be taken". If a government action is taken at a meeting that should have been noticed as required by the Sunshine Law, such action is void. However, enforcement of the Sunshine Law is given to the circuit courts. Under the statute, the Division of Administrative Hearings has no jurisdiction to enforce the Sunshine Law. See Kids, Inc. v. Palm Beach County School Bd., DOAH Case No. 03-2168BID, ¶78 (DOAH 2003) (concluding that "[d]isputes about alleged violations of Section 286.011 are normally resolved in civil actions in the courts of this state. There does not appear to be any jurisdiction for the judges of the Division of Administrative Hearings to dispose of such disputes."); Affiliated Computer Serv., Inc. v. AHCA, et al., DOAH Case No. 05-3676BID, ¶95 (DOAH 2006)(concluding "[t]he Administrative Law Judges of the Division of Administrative Hearings continue to lack jurisdiction to dispose of disputes

involving allegations of violations of Florida's Sunshine Law. Relief for any such violations must be sought elsewhere.").

49. Moreover, even if the Division of Administrative Hearings had jurisdiction to resolve the alleged violation of the Sunshine Law, the evidence demonstrated that no "official acts" were taken during the December 19, 2007, meeting. At that meeting, Ms. Staszko relayed the instructions she received from the Commission staff regarding MV's rate calculation. She did not tell the other selection committee members how to score that aspect of MV's proposal. Likewise, she stated her opinion regarding Veolia's transition plan. Again, she did not tell the other selection committee members how they should score this aspect of Veolia's proposal. According to the testimony of the committee members, any scoring that had occurred prior to or at the meeting was preliminary only because final scoring would not occur until after the oral presentations of the proposers in January. The committee members did not make any final decision regarding their scores and did not collectively determine a total score for either MV or Veolia at the December meeting. Since no official action was taken during the December 19th meeting, notice was not required under Section 286.011, Florida Statutes, and the RFP award of the contract to MV should not be set aside on the basis of a Sunshine Law violation. See Compass Envtl., Inc. et al. v. Dept. of Envtl. Protection, et al., DOAH

Case No. 05-0007BID, ¶35 (DOAH 2005)(finding there was "no evidence that the evaluators met in closed meetings. Rather than scoring as a group, each of the evaluators scored the BAFOs separately and independently. Therefore, there was no meeting of the evaluators that was required to be conducted in the sunshine."); South Fla. Jail Ministries, Inc. v. Dep't of Juvenile Justice, et al., Case No. 00-1366BID, ¶113 (DOAH 2000)(noting that "members of the SSET met together as a group on only one occasion" but that "no 'official acts' were taken" and concluding "there was no obligation, under the Sunshine Law, to have given reasonable public notice of the meeting and to open the meeting to the public").

50. However, Veolia also alleges that the award of the contract to MV should be set aside based on MV's failure to use the rate calculation model required by the RFP and the selection committee's failure to have at least three employees with knowledge and experience in coordinated transportation systems.

51. The evidence was clear that the RFP required the use of the CPT rate calculation model. Further, the evidence demonstrated that data related to the costs associated with paying transportation carriers provided in that model was useful, if not critical, to analyzing the proposed rates submitted by the proposers. The use of the model provided a uniform method for calculating and analyzing such submitted

rates. Clearly, the method of calculation impacted the rates submitted. Veolia included transportation cost data. MV did not. Unfortunately, the Commission did not clarify the question about the model and carrier expenses posed by MV prior to submission of the proposals in this case. If such clarification or RFP amendment had been forthcoming, then the rates submitted by the proposers could be compared with a reasonable degree of confidence that the rates were based on similar information and within a reasonable budget for the transportation coordinator.

52. Additionally, the evidence demonstrated it was essential to have a rate calculation which accounts for the costs associated with coordination and provision of transportation services because part of the coordination service in the contract includes paying the transportation providers. This payment is not a simple pass-through expense and is a substantial cost for the transportation coordinator. Given these facts, use of the model rate calculation was a material requirement of the RFP and could not be waived by the Commission. Therefore, the award of the contract to MV should be set aside. See Robinson Electrical Co., Inc. v. Dade County, 417 So.2d 1032, 1034 (Fla. 3rd DCA 1982)(noting that "not every deviation from the invitation is material" and that "[i]n determining whether a specific noncompliance constitutes a substantial and hence, non-waivable irregularity, the courts

have applied two criteria - first, 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."); Tropabest Foods, Inc. v. State, Dep't of General Serv., 493 So. 2d. 50, 52 (Fla. 1st DCA 1986)(noting that "although a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Infrastructure Corp. of America, Case No. 07-4410BID, ¶89 (DOAH 2007)(noting "[i]t is not enough under Section 120.57(3), Florida Statutes, for the protestor to show that the proposed award is inconsistent with some provision of the RFP; the protestor must also show that . . . the proposed award is clearly erroneous, contrary to competition, arbitrary, or capricious.").

53. Compounding the Commission's attempted waiver of a material provision of the RFP, the selection committee did not consist of at least three employees with knowledge and

experience in coordinated transportation systems. Such knowledge and experience was required by the RFP.

54. Section 287.057(17)(a), Florida Statutes, provides that if the value of a contract will exceed $150,000, then there must be "[a]t least three persons to evaluate proposals and replies who collectively have experience and knowledge in the program areas and service requirements for which commodities or contractual services are sought." (emphasis added) However, the RFP imposed a specification more stringent than Section 287.057(17)(a), Florida Statutes, in that at least three members of the selection committee have knowledge and experience with coordinated transportation systems.

55. In this case, the evidence showed that two of the four committee members had sufficient knowledge and experience with coordinated transportation systems. Two of the committee members did not have such knowledge or experience. The requirement was material since the RFP required the committee members to evaluate complex rate proposals based on an amount of knowledge regarding the duties of a transportation coordinator and the operation of a transportation coordinator. Without such knowledge and experience, the rates proposed by the proposers could not be independently analyzed by the selection committee and reasonable confidence cannot be given to the committees' scoring of the proposals. Such lack of confidence serves to

undermine the competitive bid process. See R.N. Expertise, Inc. v. Miami-Dade County School Board, Case No. 01-2663BID, 2002 WL 185217 (Fla. Div. of Admin. Hrgs, Feb 4, 2002).

56. In R.N., four out of five evaluators did not have sufficient knowledge or experience to evaluate the proposals for compliance with the technical requirements of the RFP. The evaluation committee had technical advisors available, one of whom served on the committee. In analyzing the requirement that at least three employees were required to have knowledge and experience in the program areas involved in the RFP, the court noted:

> Among the sound reasons for requiring a knowledgeable and experienced selection team is to produce evaluations in which merits of competing proposals are fairly and competently considered.

The court held that such lack of competence was contrary to competition and eroded public confidence in the bidding process.

57. Finally, the evidence demonstrated that Veolia's proposal was not responsive to the RFP since it did not provide a transition plan in its proposal. Because of Veolia's non-responsiveness, there is no proposal which materially meets all the requirements of the RFP. Moreover, the RFP process was flawed since the selection committee did not meet the requirements of the RFP. Given the multiplicity of problems in

this RFP and the lack of any responsive bidder, the Commission should reject all proposals and re-issue its RFP.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order rejecting all proposals and re-issuing its RFP.

DONE AND ENTERED this 9th day of July, 2008, in Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of July, 2008.

Exhibit B

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VEOLIA TRANSPORTATION SERVICES, INC.,

Petitioner,

vs. Case No: 08-1636 BID

COMMISSION FOR THE TRANSPORTATION DISADVANTAGED,

Respondent,

and

MV TRANSPORTATION, INC.,

Intervenor.
_____/

EXCEPTIONS OF INTERVENOR, MV TRANSPORTATION, INC. TO RECOMMENDED ORDER

Pursuant to Rule 28-106.217, Florida Administrative Code, MV Transportation, Inc. ("MV") files the following exceptions to the Recommended Order, entered on July 10, 2008.

1. MV takes exception to the findings of fact in the first sentence of paragraph 19 on page 12. MV's rate proposal was $2.47 per trip for the first year; $2.38 for the second year; $2.48 for the third year; $2.56 for the fourth year; and $2.67 for the fifth year. See the summary of pricing following p. 56 of MV's proposal.

2. MV takes exception to the findings of fact in the fourth sentence of paragraph 23 on page 14. This statement conflicts directly with the RFP which states: "The Central Florida Regional Planning Council is requesting proposals for the Community Transportation Coordinator only." RFP at p. 7. Therefore, the cost data or estimated cost data for transportation

services was not to be included in the rate proposal. The omission of presenting cost data or estimated cost data could have nothing to do with "potentially" lowering the per trip rate proposal of MV. Even Veolia's representative testified that MV's rate proposal included all expenses "associated with the operations of the CTC." Transcript at p. 162.

3. Further, the evaluation criteria captioned "Rate Proposal" stated: "Proposer utilized the Florida Commission for the Transportation Disadvantaged Rate Calculation Model to determine their coordination rate." RFP at p. 34. The evaluation criteria did not look for the respondent to state any price in order to be evaluated; awarding points for process only.

4. MV takes exception to the findings of fact in the sixth sentence of paragraph 23 on page 14. MV presented all of its data composing its rate proposal attached to its proposal responsive to the RFP. See the summary of pricing following p. 56 of MV's proposal.

5. MV takes exception to the findings of fact in the fifth sentence of paragraph 24 on page 14. There are literally no facts supporting the statement that the inclusion of transportation costs "could potentially increase the rate proposed by Veolia." After making certain assumptions Veolia reached a per-trip management fee independent of the costs of providing transportation services. Transcript at p. 161.

6. MV takes exception to the findings of fact in the second sentence of paragraph 26 on page 15. The instructions given to Ms. Staszko by the staff of the CTD did not conflict with the terms and conditions of the RFP. Rather the request for instructions and the instructions themselves were contemplated by the RFP. The RFP allowed the CFRPC "the right to determine, in its sole discretion, whether any aspect of the statement of proposal satisfactorily meets the criteria established in this request for proposal . . . ." RFP at p. 4. That is all that Ms. Staskzo was doing when she requested clarification from CTD staff regarding the application of

the Rate Calculation Model ("RCM"). Also, the reference to the RCM at page 22 of the RFP was not a mandatory requirement such as those identified on p. 25 of the RFP.

7. MV takes exception to the findings of fact in the tenth and eleventh sentence of paragraph 28 on page 16. Clearly the evaluation team had sufficient information to compare the two rate proposals. Whether the respondent showed the expense data for transportation providers or not does not affect what respondent said it would charge for each trip it would arrange as the CTC. Therefore the literal application of the RCM in the construction of the rate proposal was not material and could be waived by CTD.

8. MV takes exception to the findings of fact in the first sentence of paragraph 40 on page 21. CFRPC's employees are qualified generally to evaluate responses to contract solicitations including proposals responsive to RFPs. Here, all the evaluators had sufficient experience and knowledge to serve on the selection committee. In addition to the acknowledged experience and knowledge of Ms. Staszko and Ms. Hall, Ms. Sears has reviewed a number of responses to contract solicitations for transportation related facilities. [Ex. 33 at 34:15-24.] Ms. Brett has been involved in scores of public contract procurements as a city manager in Hallandale Beach, Florida and with CFRPC. [Ex. 32 at 29:3-25, 30:1.] Further, to the extent that any of the evaluators did not have sufficient experience and knowledge, the term of the RFP that the selection committee consist of "at least three employees who have experience and knowledge of the coordinated transportation system" does not control over the provisions of section 287.057 (17) (a) of the Florida Statutes which provides for a selection committee of "[a]t least three persons to evaluate proposals and replies who *collectively* have experience and knowledge in the program areas and service requirements for which commodities or contractual services are sought." Given this conflict between the RFP term requiring at least three

"experienced and knowledgeable" evaluators and state law providing for an evaluation committee "collectively" so "experienced and knowledgeable," the RFP suggests that state law controls. RFP at p. 4. "An evaluator's past experience which is not necessarily specific to the limited contractual area for which services are sought but whose experience is in agency 'services selection' in general has been found sufficient for purposes of statutory compliance." *Id.* (citing *Wackenhut Corp. v. Dep't of Transp.*, 1995 WL 1052604, Case No. 94-3160BID (Fla. Div. Admin. Hrgs, Jan. 31, 1995) (recommended order)). Therefore, for purposes of this RFP, the experience and background of the other individuals chosen as evaluators sufficiently met the statute's requirements particularly as there is "collective" knowledge and experience through Ms. Staszko's and Ms. Hall's involvement.

9. Also, Veolia waived its right to object to the experience and knowledge of the evaluation team. Veolia's representative learned the identity of the evaluators sometime after the RFP was issued, and before the January 4, 2008, oral presentations. Transcript at p. 151:6-10. He said that he did not believe there were three persons employed at CRFPC with the sufficient experience and knowledge of the coordinated transportation system capable of evaluating the proposals. Transcript at p. 151: 15-20. Given that understanding, Veolia was then bound to file a notice of protest within 72 hours pursuant to section 120.57 (3) (b) of the Florida Statutes alleging that CFRPC was not in compliant with the RFP or Florida law. Veolia did not object apparently waiting to see what result would occur, and whether it would receive the intended award. In effect, Veolia reserved the objection on this preliminary objection until CTD made its intended award. That is impermissible under the statute.

10. MV takes exception to the findings of fact in the tenth sentence of paragraph 41 on pages 21-22. The closeness of the scoring does not lead to the conclusion that the

"requirement in the RFP of experience and knowledge is material and not waivable by the Commission." Rather, the closeness of the scoring shows that all evaluators – even those deemed by the ALJ not be knowledgeable or experienced - did in fact review information in the proposals similarly. The "remarkable similarity in scoring range of the various proposals between the evaluators leads to the conclusion that no different result would have occurred." *Financial Clearing House, Inc. & Fla. Prop. Recovery Consultants v. Office of the Comptroller, Dep't of Banking and Finance*, 1997 WL 1053421, Case No. 97-3150BID (Fla. Div. Admin. Hrgs. Nov. 25, 1997) (recommended order).

11. MV takes exception to the conclusions of law in paragraph 51 on pages 26-27. Given the right of CFRPC to clarify proposals received from respondents, CFRPC had the authority to accept the rate proposal of MV in the stated form. Further, the evaluation team had sufficient information from both respondents supporting their respective rate proposals.

12. MV takes exception to the conclusions of law in paragraph 52 on page 27. The conclusion that it was "essential to have a rate calculation which accounts for the costs associated with coordination and provision of transportation services because part of the coordination service in the contract includes paying for transportation providers." This conclusion conflicts directly with the RFP which states: "The Central Florida Regional Planning Council is requesting proposals for the Community Transportation Coordinator only." RFP at p. 7.

13. MV takes exception to the conclusions of law in paragraph 54 on page 29. CFRPC complied with Florida law in selecting a selection committee "collectively" experienced and knowledgeable in the program area. §287.057 (17) (a), Fla. Stat.

14. MV takes exception to the conclusions of law in paragraph 55 on page 29. CFRPC complied with Florida law in selecting a selection committee "collectively" experienced and knowledgeable. There was sufficient information available to the evaluators to review the rates proposed by the respondents. The total points of six to be awarded for the rate proposal compared to the total of 168 available for scoring for each proposal as whole suggests that the evaluation criteria for the rate proposal was not material to the evaluation process as well.

15. MV takes exception to the conclusions of law in paragraph 55 on page 29-30. MV's rate proposal was $2.47 per trip for the first year; $2.38 for the second year; $2.48 for the third year; $2.56 for the fourth year; and $2.67 for the fifth year. Veolia's rate proposal was $2.99 per trip until July 1, 2009, when it would increase to $3.05 per trip. Even though MV's annual rate proposals were lower on a per trip basis during each of the five contract years, the evaluation team used its judgment and expertise to score Veolia's rate proposal higher demonstrating their capabilities to evaluate properly.

16. Given MV's lower rate proposal "there is a strong public policy in favor of awarding contracts to the low bidder, and an equally strong public policy against disqualifying the low bidder for technical deficiencies which do not confer an economic advantage on one bidder over another." *Intercontinental Properties, Inc. v. State Dep't of Health & Rehab. Servs.*, 606 So. 2d 380, 387 (Fla. 3rd DCA 1992).

17. MV takes exception to the conclusions of law in paragraph 57 on page 30. MV's proposal is responsive to the RFP, and the composition of the selection committee complied with Florida law. CTD should award the contract to MV consistent with the recommendation of CFRPC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed this 21st day of July, 2008, with the Florida Commission for the Transportation Disadvantaged, c/o Lisa M. Bacot, Executive Director, 2740 Centerview Drive, Suite 1A, Tallahassee, Florida 32301 and copies have been furnished by electronic delivery to the following:

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Counsel for Intervenor, MV Transportation, Inc.

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Exhibit C

FLORIDA COMMISSION FOR THE
TRANSPORTATION DISADVANTAGED

08 JUL 31 PM 3:01

TRANSPORTATION
DISADVANTAGED
COMMISSION

VEOLIA TRANSPORTATION
SERVICES, INC.,

Petitioner,

vs.

RFP No. 10-07-1

COMMISSION FOR THE TRANSPORTATION
DISADVANTAGED,

DOAH Case No. 08-1636

Respondent,

and

MV TRANSPORTATION, INC.

Intervenor.

_____/

VEOLIA TRANSPORTATION SERVICES, INC.'S
RESPONSE MV TRANSPORTATION, INC.'S
EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Rule 28-106.217(3), Florida Administrative Code, Veolia Transportation Services, Inc. ("Veolia") responds in opposition to the Exceptions filed by MV Transportation, Inc. After a thorough examination of contested evidence, an administrative law judge has concluded that a bid evaluation conducted by the Central Florida Regional Planning Council was fundamentally flawed. MV has asked the Commission for Transportation Disadvantaged to reverse the judge's detailed findings by re-arguing the evidence it already presented during the final hearing. However, the Commission's authority to reject the judge's determinations are restricted at this stage of the proceedings.

The Commission may only reverse factual findings made by the judge by reviewing the entire record, including the final hearing transcript, filed depositions and record evidence. Following that detailed review, the Commission may not re-weigh the evidence and insert its judgment for that of the administrative law judge. Instead, the judge's findings must be accepted so long as the record contains some competent, substantial evidence that supports the findings. As demonstrated in response to each of the several exceptions filed by MV, competent, substantial evidence supports the judge's findings of fact.

Those factual findings include determinations that MV failed to respond to a material requirement of the Request for Proposals, its complete price estimate in the form of a completed rate calculation model. By failing to respond to this material requirement, MV, as a matter of fact established by the record, failed to provide a responsive bid. It's bid should have been rejected.[1] The facts established at the final hearing demonstrate that the problem of an unresponsive bid was compounded by the fact that two out of the four evaluators that reviewed the proposals had no experience in the subject of the procurement, the coordinated transportation system. Their lack of experience was established through competent substantial evidence including cross-examination of the evaluators and admissions from one of the two experienced evaluators, Ms. Staszko, that others were not experienced. Because they are supported by the record, these findings should not be reversed.

Moreover, the Commission is required to accept conclusions of law recommended by the judge unless it finds that specific legal conclusions warrant reversal and those legal conclusions address subject which is within the substantive jurisdiction of the Commission. As set forth below, the legal conclusions reached by the judge are sound. The recommended order should not be overturned. A detailed explanation of Veolia's response to MV's Exceptions follows.

Standard of Review

This matter returns to the Commission following a trial where witnesses were called and cross-examined, where evidence was submitted and reviewed, where proposed orders were analyzed and weighed, and where an administrative law judge made a carefully considered recommendation. The conclusion of that detailed review was a determination that the bid evaluation under review was fundamentally flawed. MV Transportation, Inc. ("MV") now asks that the Commission for Transportation Disadvantaged ("Commission") reverse those detailed findings and conclusions of the administrative law judge and substitute different findings and conclusions.

However, at this stage of review, the Commission is not free to re-weigh the evidence or to reject the administrative law judge's findings of fact that are supported by "competent, substantial evidence." *See Health Care and Retirement Corporation v. Department of Health and Rehabilitative Services,* 516 So. 2d 292, 296 (Fla. 1st DCA 1987); *Heifetz v. Department of Business Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Schumacker v. Department of Professional Regulation,* 611 So. 2d 75 (Fla. 4th DCA 1982).

The standard for what constitutes "competent, substantial evidence" is not high. The courts have described it this way:

[1] Notably, the judge also found that Veolia's bid should have been rejected because it failed to adequately respond to criteria calling for a transition plan. Though disputed evidence was presented o this subject at trial, Veolia has not challenged this finding because competent, substantial evidence exists in the record to support the finding.

> Competent, substantial evidence is " 'such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred' or such evidence as is 'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.' " *Heifitz v. Dep't of Bus. Regulation,* 475 So.2d 1277, 1281 (Fla. 1st DCA 1985) (quoting *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla.1957)).

See Bill Salter Advertising, Inc. v. Dep't of Transp., 974 So. 2d 548, 550-51 (Fla. 1st DCA 2008).

Thus, if findings of fact made by the judge below are supported by competent testimony, or if those findings "can reasonably be inferred" from such testimony, then the Commission is required by law to adopt those findings. See § 120.57(1)(l), Fla. Stat. As the Commission decides whether to adopt each of the detailed findings of fact made by judge below, the Commission is not free to re-weigh the evidence. *See Heifitz*, 475 So. 2d at 1281. The Commission may not resolve conflicts in testimony. It may not draw inferences. It may not judge the credibility of witnesses and it is not authorized to interpret the evidence. *See id.* All of those duties lie within the province of the judge below.

Instead, the Commission's limited role at this stage of the proceedings is to adopt the judge's findings of fact unless the Commission concludes, after a review of the complete record below, that a specific finding of fact was not supported by competent substantial evidence. *See* § 120.57(1)(l), Fla. Stat; *Fonte v. State, Dep't of Envt'l Reg.*, 634 So. 2d 663 (Fla. 2nd DCA 1994). As set forth below, each of the factual findings challenged by MV Transportation were supported by competent substantial evidence, and often by more than one witness. Those findings of fact should not be disturbed.

MV Transportation also urges the Commission to reject conclusions of law reached by the judge below. However, the law limits the ability of the Commission to reject the judge's conclusions. The Commission may only reject conclusions of law over which it has substantive jurisdiction. See § 120.57(1)(l), Fla. Stat. The Commission may not reject conclusions of law that do not fall within the Commission's substantive jurisdiction to administer the Transportation Disadvantaged program.

A detailed response to each exception noted by MV Transportation follows:

Response to Exception No. 1
Challenging FOF ¶ 19, first sentence

In paragraph 19 of the Recommended Order, the Judge finds "in its Proposal, MV submitted a rate for coordination services of $2.47 per trip for all five years of the contract." In its first exception, MV notes that its bid described a "per trip rate" that

varied over its five (5) proposal. *See MV Proposal, page 56.* In fact, the average per trip rate over the course of five (5) years proposed by MV was $2.51. Though MV provides some record basis for reversal for this individual sentence within the Recommended Order, the finding is moot, as it is uncontroverted that the RFP did not call for an evaluation of which bidder offered the lowest price. Instead, the RFP simply sought a demonstration of the proper use of a rate calculation model and presentation of a balanced budget. (Staszko, page 54, 58, 73; Joint Exhibit 27, page 22, 34). Within its own Exceptions, MV Transportation points out that price was not a factor used to compare bids. *See MV's Exception ¶ 3.*

Instead, the RFP simply called for an evaluation of whether and how the standardized rate calculation model was used. As noted below, MV failed to use that rate calculation model. Because this exception is moot, it should be denied.

Response to Exception No. 2 and 3
Challenging FOF ¶ 23, fourth sentence

The fourth sentence of paragraph 23 of the Recommended Order provided "the exclusion of such data [the rate calculation model] when such payments are required as part of the coordination services, could potentially lower the rate MV proposed."

Here, the judge emphasized the detrimental effects caused by MV's failure to follow the RFP specifications by expressly declaring that it would not use a rate calculation model. Instead of using such a model, MV presented information regarding only its costs to provide coordinator services. It provided no estimate of transportation provider costs. In other words, it estimated coordinator service costs in a vacuum and offered no estimate of trip costs. Both types of costs are required by the rate calculator model.

At the final hearing, a representative of MV Transportation was questioned about MV's failure to use the rate model and failure to include transportation provider rates within MV's bid. (Transcript, Griffin, 196-197). MV Transportation's witness denied that its failure to include rates for transportation providers was intended to keep MV's options open, and to perhaps even allow MV to provide carrier service directly. (Griffin at 197). However, the finding of fact contained in the fourth sentence of paragraph 23 of the Recommended Order may reasonably be inferred from the evidence presented. The exclusion of such transportation costs from MV's bid could potentially lower the rate MV proposed.

By failing to pledge or even estimate carrier costs even when recent carrier costs were available, MV allowed itself the option to either negotiate lower rates from existing providers or to provide transportation services itself. If MV planned to offer carrier services directly, it could lower its expected coordinator costs. Internal coordination of trips by MV could certainly be less expensive than coordination and scheduling with one, two or even three independently contracted carriers.

Evidence in the record established a substantial basis from which a finding may be reached that MV's failure to use the required rate model could potentially have lowered the rate proposed by MV. *See Bill Salter Advertising, Inc. v. Dep't of Transp.*, 974 So. 2d 548, 550-51 (Fla. 1st DCA 2008). The finding is supported by competent and substantial evidence and should not be disturbed.

Response to Exception No. 4
Challenging FOF ¶ 23, sixth sentence

Here, MV takes exception to the sentence that reads "the evidence was not clear on what data MV did not include in its rate proposal." MV argues that the evidence it submitted was perfectly clear and that the Commission should substitute its findings regarding that evidence for the findings made by the Judge who heard the evidence directly.

At this stage of the proceedings, the Commission is not free to re-weigh the evidence or substitute its own findings. The evidence was clear that MV submitted some information concerning its cost of providing coordinator services, but no information regarding its expected cost to fund transportation services, as required by the rate model and the RFP. This finding of fact should not be reversed.

Response to Exception No. 5
Challenging FOF ¶ 24, fifth sentence

Here, Veolia challenges the following finding: "In effect, the inclusion of transportation expense could potentially increase the rate proposed by Veolia." As noted in response to MV's Exceptions 2 and 3, above, competent substantial evidence supports this finding of fact. MV's failure to include transportation costs inherently creates a risk that MV's actual carrier costs could be lower or higher than may be accommodated in the overall transportation system's budget. If an assumption is made that only one carrier will be used, coordinator costs could be lower. If several carriers are used, coordianation costs could be higher. Because MV provided no estimate of carrier costs, it is impossible to determine whether its coordinator rate is reasonable, overstated, or understated. MV's costs could potentially be higher or lower than the estimate they provided.

A qualified witness testified that if a bidder fails to use the required rate model, then there is a risk that the transportation provider's costs will exceed the available revenues. This could cause the coordinator and the entire program to operate in the red. (Banks, 149). This finding of fact should not be disturbed, as it was supported by competent substantial evidence.

Response to Exception No. 6

Challenging FOF ¶ 26, second sentence
and
Response to Exception No. 7
Challenging FOF ¶ 28, tenth and eleventh sentences

In paragraph 26 of the Recommended Order, the judge commented that an Evaluator, Ms. Stazsko, was instructed by Commission staff that MV's failure to use the rate model did not render MV's answer unresponsive. MV then challenges the following finding by the judge, "However, that instruction ignored the clear language of the RFP specifications and resulted in a comparison of rates which were not based on a uniform method of calculation."

This finding of fact is supported by ample, competent and substantial evidence. That MV did not use the rate calculation model required by the RFP is undisputed. Moreover, it is undisputed that the RFP required the use of that model. It is also undisputed that Veolia used the rate model correctly. On the other hand, MV presented transportation coordinator costs only. The decision by MV not to use the rate model required by the RFP forced the evaluators to compare one set of pricing that used the model, with an incomplete list of coordinator prices only. This finding of fact is supported by competent substantial evidence and should not be disturbed.

The tenth and eleventh sentences of paragraph 28 read "However, even though Veolia received a higher overall score than MV, the higher score cannot offset the impact of the commission's attempt to waive the requirement to the rate model. The committee did not have the information necessary to compare MV's rate with Veolia's because expense data for transportation carriers was not reported or estimated by all the proposers."

This evidence is uncontroverted and more than supported by competent substantial evidence. MV would have the Commission re-weigh that evidence and conclude instead that, at least for coordinator costs, MV presented comprehensive information. However, at this stage of the proceedings, the Commission is not free to re-weigh the evidence or to substitute its judgment regarding disputed facts. The judge's finding should be upheld.

Response to Exception No. 8 and 9
Challenging FOF ¶ 40, first sentence

This challenged portion of the Recommended Order reads "In sum, the evidence demonstrated that only two selection committee members met the requirement of the RFP that the selection committee by comprised of <u>at least</u> three employees who have experience and knowledge of the coordinated transportation system." (emphasis in the original).

In this lengthy exception, MV again seeks to have the Commission re-weigh the evidence and substitute its findings for those made by the judge. Once again, the judge's finding is supported by competent substantial evidence presented at the final hearing. This finding of fact should not be overturned.

All must agree that the law at issue, Section 287.057(17)(a), Florida Statutes, requires the use of at least three employees with experience and knowledge of the services being procured, the coordinated transportation system. The RFP expressly stated this requirement noting that at least three evaluators with knowledge and experience in the "coordinated transportation system" would be required. (See RFP 10-07-1, s. H., p. 13). After carefully considering the qualifications of each evaluator, the judge found that only two evaluators, Ms. Stazsko and Ms. Hall, had such experience. Though other evaluators may have had some experience in procurements for other unrelated services, those other two evaluators had no experience in the coordinated transportation system. Competent witnesses testified that Ms. Sears had no experience in the coordinated transportation system and Ms. Brett also had no direct experience in that system. (Staszko, 49, Sears, 5). This finding of fact is based upon competent, substantial evidence must be sustained. (See Staszko, 47, 49; Hall, 5-6. 11-12; Sears 5; Brett, 7-8).

In its exception number 9, MV Transportation does not identify a particular portion of the Recommended Order it challenges. However, it argues that Veolia waived its right to challenge the experience and knowledge of the evaluation team. However, competent substantial evidence in the record establishes that Veolia was not provided formal notice and opportunity to challenge the makeup of the evaluation committee until after a bid decision had been made. (See, e.g, RFP 10-07-1). MV Transportation argues that Veolia should have inferred who the evaluation committee team would be and should filed a challenge as soon as its suspicions were raised. However, this not what the law requires. Protests must be filed once a notice and opportunity to file such protest is provided. The RFP solicitation never disclosed the names of any of the evaluators. Veolia did not waive this argument and MV's exception should be denied.

Response to Exception No. 10
Challenging FOF ¶ 41, tenth sentence

The tenth sentence of paragraph 41 reads "Given the closeness of the scoring and the importance of understanding the information provided by the CTD rate model, the requirement in the RFP of experience and knowledge is material and not waivable by the Commission."

MV does not dispute the closeness of the scoring or any other factual error related to this paragraph. Indeed, competent substantial interest supports the finding. Instead, MV argues that these facts should lead to a different conclusion. Close scores, MV argues, provide evidence that all evaluators had a similar, informed view of the proposals. In essence, MV is simply rearguing the evidence which is no longer permissible. The scores upon which the judge's finding of fact are set forth in paragraph 41. Those scores

are supported by competent substantial evidence as is the Judge's finding that the closeness of those scores highlights the need to retain experienced and knowledgeable evaluators. Just a slightly different score from an experienced evaluator could have changed the result of the initial bid decision. This finding of fact should not be disturbed.

Response to Exception No. 11
Challenging COL ¶ 51

In this exceptions, MV challenges the conclusions of law in paragraph 51 of the Recommended Order. Paragraph 51, the judge concluded that the RFP required the use of the rate calculation model. She also concluded that carrier costs to be used in that model was useful, if not critical, to analyzing the proposed rates submitted by the bidders. In this conclusion, the Judge also indicated that the use of the model by both bidders would allow for a uniform system of comparison and impact calculated rates. The judge finally concludes that Veolia included the transportation cost data while MV did not.

MV argues that the regional planning council had the authority to accept the rate proposal of MV, even though the rate model wasn't used. Ample evidence indicates that the RFP demanded use of the rate model and that MV ignored that requirement placing its own bid at risk. This conclusion of law is supported by competent findings of fact made above and is more than reasonable.

Response to Exception No. 12
Challenging COL ¶ 52

Here MV takes exception to the conclusions of law in paragraph 52 of the Recommended Order. In this paragraph, the judge found that use of a complete rate model was essential. The Judge concludes that this was a material requirement of the RFP and could not be waived by the Commission. The judge then provides case law regarding the materiality determination and its impact. She concludes that MV's proposal was not responsive and should be rejected.

MV argues that the requirement of including a rate model was less important. It also argues that conflicting evidence indicated that the RFP was for coordinator services only, and that, despite the express requirement that a rate model must be used, MV's presentation of only coordinator costs should be sufficient. However, the Commission is not authorized to compare conflicting evidence and reach different conclusions. *See Heifitz v. Department of Business Regulation*, 475 So.2d 1277 (Fla 1st DCA 1985) (Holding of an agency may not resolve conflicts in testimony or draw inferences or otherwise interpret the evidence at this stage of the proceedings). This conclusion of law should be sustained.

Response to Exception No. 13

Challenging COL ¶ 54
and
Response to Exception No. 14
Challenging COL ¶ 55

MV next takes exceptions with the conclusion of law in paragraph 54 by arguing that Florida law only requires that a selection committee be "collectively experienced and knowledgeable in the program area." §287.057(17)(a), Fla. Stat. Thus, even if only two out of four evaluators were competent, the competence of those two evaluators could be considered when assessing the "collective" competence of the entire panel of evaluators. In essence MV argues that the experience and knowledge of one evaluator, or perhaps two, may be implied to "collectively" other evaluators who have no such knowledge or experience.

While creative, this argument runs counter to the requirement in the same statute that there be at least *three* evaluators with such knowledge and experience. If only one evaluator is allowed to provide the "collective" experience of an entire evaluation team, there would be no reason to specify the need for three evaluators as required by law. This conclusion of law by the Judge is well founded and complies with Florida Statutes. It should not be rejected.

Response to Exception No. 15 and 16
Challenging COL ¶ 55

MV challenges the conclusion of law in paragraph 55 by comparing the rates of the two providers and then comparing the closeness in scoring. However, as MV's exceptions already note, (exception number 3) the rates proposed by each provider were not relevant to scoring criteria. Points were awarded based upon demonstrating an ability to properly complete the rate model, "awarding points for process only." MV's exception does not provide a valid basis for reversing the finding of the judge below that two of the four committee members lacked knowledge and experience to properly score the proposal. This conclusion of law should not be disturbed.

Response to Exception No. 17
Challenging COL ¶ 57

Finally, MV takes exception to conclusion of law in paragraph 57 of the Recommended Order. This conclusion determined that the entire RFP process was fundamentally flawed because it involved the review of non-responsive bids by inexperienced evaluators. The judge's order described a "multiplicity of problems in this RFP" and concluded that the Commission should reject all proposals and reissue its RFP. Based on the competent and substantial evidence relied upon by the Judge, no other conclusion should be reached. This conclusion of law should be sustained.

WHEREFORE, Veolia urges that the Commission reject the exceptions submitted by MV Transportation and instead adopt the Recommended Order *in toto*.

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CERTIFICATE OF SERVICE

I HEREBY CERITFY that the original of the foregoing has been filed this 31st day of July, 2008, with the Florida Commission for the Transportation Disadvantaged, c/o Lisa M. Bacot, Executive Director, 2740 Centerview Drive, Suite 1A, Tallahassee, Florida 32301 via hand delivery and facsimile transmission (850-410-5757) and copies have been furnished by electronic delivery to the following:

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