STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

MHM CORRECTIONAL SERVICES, INC.,

Petitioner,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent,

And

CORRECTIONAL MEDICIAL SERVICES, INC.,

Intervenor.
_____/

Case No. 09-2577BID
DC Case No.

Final Order

This matter comes before the Secretary of the Department of Corrections ("Department") for consideration and final agency action. There was an administrative hearing conducted before Suzanne F. Hood, Administrative Law Judge, Division of Administrative Hearings. A recommended Order was entered by the Administrative Law Judge on July 27, 2009. Exceptions were filed with the agency on August 6, 2009.[1] The Secretary of the Department has considered

[1] The Exceptions were not filed with the Secretary's Office or with the Clerk of the Agency, but they were accepted by an employee of the Agency. Section 120.57(3)(e), Fla. Stat. (2008), states only that "[e]ach party shall be allowed 10 days in which to **submit** written exceptions to the

the exceptions, the record and the recommended order. The Secretary will deny most of the exceptions, adopt the recommended order and enter a final order awarding the contract for Mental Healthcare Services in Region IV to Correctional Medical Services Inc, and dismissing the Protest of MHM Correctional Services Inc.

Abbreviations

The following abbreviations will be used in this Final Order:

MHM	MHM Correctional Services, Inc., the Petitioner.
CMS	Correctional Medical Services Inc., the intervenor, and party to whom the contract was awarded.
The Department	The Department of Corrections
RFP	Request for Proposal
BPS	The Department's Bureau of Procurement and Supply
T.	Transcript of Final hearing, followed by volume ("Vol.") and page ("p.") number

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recommended order." (Emphasis supplied). Since the statute does not specifically mandate filing with the Secretary or the agency clerk, acceptance of the exceptions by a department employee would appear to put MHM in compliance with the statute. Thus the Secretary will conclude that the exceptions were properly submitted/filed.

Rulings on MHM's Exceptions

Exceptions to the Preliminary Statement

Section 120.57(1)(k), Fla. Stat. (2008), says that an agency need not rule on an exception that does not identify the legal basis for the exception. In this case MHM does fail to identify any legal basis for its claimed exceptions to the Administrative Law Judge's preliminary statement.

The Department **does not rule** on the exception to the preliminary statement and Paragraph Two, which appears to be an objection to the recommended order *en total.*

First Exception: Exception to Finding of Fact 20

MHM is correct that the statement "[t]hroughout Section 5.4 of the RFP the emphasis is on the need for audited financial statements," is not supported by competent substantial evidence. However, the balance of the Finding of Fact is supported by such evidence.

Section 5.4 provides that proposers with audited financial statements must provide the audited statements. *Trial Exhibit 1, p. 59.* An entity without an audited financial statement is required to provide ". . . other financial

documentation sufficient to provide the same information as is generally contained in an audited statement. . ." Further, Section 5.4 provides that all documentation would be reviewed by a Certified Public Accountant, ". . . and should, therefore, be of the type and detail regularly relied upon by the certified public accounting industry in making a determination or statement of financial capability." *Id.* Thus there was a need to provide a high degree of proof of financial viability.

This Exception is **Granted** only to the extent set out herein.

Second Exception: Exception to Finding of Fact 22

MHM takes issue with the finding that it was, ". . . fully aware that it could have difficulty meeting the financial ratios before the Department issued the RFP."

This finding is supported by competent, substantial evidence. Susan Ritchey of MHM specifically testified,

> We knew that, historically, the department had used financial criteria and sometimes financial ratios, and if – we were concerned that, if there was a ratio pass/fail, you get thrown out, that the transaction that we were considering might trigger one of those ratios that we could get thrown out. *T., Vol 1, p. 88.*

Later in her testimony she again stated that they had historically realized that they could have a problem with the ratio. *T., Vol. 1, p. 142.*

This exception is **denied**.

Third Exception: Exception to Findings of Fact 26 – 28 and Conclusion of Law 69

The essence of these findings are as follows:

Finding of Fact 26 states in its conclusion that once it was determined that MHM had a negative equity of $22 million dollars, there was no way for MHM to pass the critical requirement that it have a debt-to-tangible-net-worth of less than or equal to five to one, a whole number.

Finding of Fact 27 says that the "Debt to tangible net worth" criteria, was meant to be "debt to net worth." The Administrative Law Judge found that Mr. Law, the Department' CPA, performed a more advantageous computation of debt to net worth, resulting in a more favorable ratio for all proposers.

Finding of Fact 28 notes that the correct number to be used is "-2.16" rather that Mr. Law's figure of -1.77. That is because the correct number is based only on MHM's audited financial statement of September 30, 2008. But the Administrative Law Judge went on to point out that either way, MHM still failed the criteria, because as of the date of the RFP, MHM had a negative net worth of $24,785,000.00 as of the end of its fiscal year on September 30, 2008.

These Findings of Fact are supported by competent substantial evidence. MHM in fact had a negative net worth of $24,785,000.00 in its September 30th,

2008 audited financial statement. *Trial Exhibits, Tab 28, Exhibit 13, Identified as Petitioner's Composite Exhibit 1, p. 000249.* As to Finding of Fact 26, Mr. Law testified that MHM's current ratio was so far off it was an immediate fail. *T. Vol. 4, p. 423.* He also stated that MHM had too much debt, and that it was too risky for the Department. *T. Vol. 4, p. 423.*

Finding of Fact 27 is supported by competent substantial evidence. Mr. Law testified he used the calculation of all liabilities (debt) divided by all net worth, which, he said, made it easier to pass the ratio. *T., Vol. 4, p. 447.* This is actually the formula to be used according to the RFP. *Exhibit 1, p. 59, Section 5.4(b).*

Finding of Fact 28 is also supported by the record. Mr. Law testified that the "-1.77" number was an error. *T. Vol. 4, p. 439.* He said he should have used the ratio of -2.163. *T., Vol. 4, p. 455.* But, he said, the number was really irrelevant, because with a $24 million negative equity, it was so far off the chart that MHM failed miserably. *T., Vol. 4, p. 456.* This was based on MHM's balance sheet (meaning the audited statement of September 30, 2008). *T., Vol. 4, p. 456.*

Based on this testimony, Conclusion of Law 69 is reasonable. It essentially indicates that the Department appropriately applied the RFP specifications in reviewing only MHM's most recent audited financial statements. Based on Mr. Law's testimony, this was correct. To test viability the Department needed accurate information, and the most accurate information would come from audited

statements. Why should the Department be required to go beyond what was shown by MHM's own principal accurate financial summary? Why should the Department be required to rely on potentially inaccurate information to cast the fortunes of the taxpayers' money?

This exception is **denied**.

Fourth Exception: Exception to Finding of Fact 32

Ana Ploch testified that the meeting on April 2, 2009 was **publicly** noticed and was open to the public (emphasis supplied). *T., Vol. 3, p. 288.* There is no evidence of the use of the word "proper." However any error in the difference between the two words is harmless, as MHM has failed to allege or prove any prejudice.

This Exception is **Granted**, but deemed to be harmless.

Fifth Exception: Exception to Fact 33

The actual finding was that,

> The intent of the price cap of $70 per month was to achieve a price savings for the Department over what it was then paying for mental healthcare services in Region IV, which was nearly $78.00. The goal of $70 was considered to be **possibly** unrealistic, but the true intent was to keep from exceed the current rate of $78.00" (emphasis supplied).

This finding is supported by competent substantial evidence. Dr. Rahangdale testified that $70 per month was about 20% less than what the current rate was. *Deposition, Dr. Rahangdale, Vol.1, p. 35.* He further testified that Jim Smith, who is in Procurement for Health Services felt that it might be a little too unrealistic to shoot for $70. *Deposition, Dr. Rahangdale, Vol.1, p. 36.* The discussion went back and forth with figures such as $70, $ 75 and $77. Dr. Rahangdale then stated, "Our goal was truly if we could keep from expanding the cost above where we currently were that would certainly help the state greatly." *Deposition, Dr. Rahangdale, Vol.1, p. 36.* Although MHM characterizes this as self-serving, the Administrative Law Judge could certainly find it credible, as indeed she did.

And, since the finding is supported by competent substantial evidence, the conclusion set out in Paragraph Nine of MHM's Exceptions must fail. Accordingly this exception is **denied**.

Sixth Exception: Exceptions to Findings of Fact 34 and 35

Finding of Fact 34 sets out the three prices of the bidders, MHM ($70), CMS ($74.49) and Wexford ($95). Finding of Fact 35 says that CMS also submitted an alternative price sheet, but that that price sheet did not affect CMS's responsiveness or the Department's subsequent decision.

Fact Finding 34 is merely a recitation of the bid awards, so it is really Finding of Fact 35 with which MHM takes issue. However Finding of Fact 35 is supported by competent substantial evidence. Mr. Staney testified that it was not until the process was almost concluded that the Department and his staff realized that CMS had submitted two price proposals. *T. Vol. 3, p. 358.* He Further testified that the Department would have ruled the alternate proposal nonresponsive in any case. *T. Vol. 3, p. 358.* So the Administrative Law Judge correctly found that the alternate price sheet did not affect responsiveness of CMS's proposal or the Department's subsequent decision.

This exception is **denied**.

Seventh Exception: Exceptions to Finding of Fact 37

MHM does not take issue with the actual Finding of Fact. Rather MHM argues as a matter of law the Department should have ranked all proposals, including MHM's non-responsive bid. It is true that Section 6.2.7 says that various factors will be totaled, "to determine the final score of all proposals." However, Section 6.2.7 must be read in conjunction with the balance of Section Six. When that is done, it is clear that "all proposals" means all proposals that were not rejected in a previous phase as being non-responsive. For example, in Section 6.2.4, the RFP states that a proposal will not be responsive unless it meets at least three of the five

minimum acceptable financial standards. This, of course, was where MHM fell short, because the Administrative Law Judge found that MHM did not meet the financial standards; so the Department was justified in deeming its proposal non-responsive. That being the case, there was no requirement to include MHM in the rankings pursuant to Section 6.2.7.

This exception is **denied**.

Eighth Exception: Exceptions to Findings of Fact 38 and 39 and Conclusion of Law 80

Respectfully, MHM has interpreted these findings of fact incorrectly. The Administrative Law Judge specifically recognized Department Procedure 205.002, and found that there was no requirement in that procedure that addressed the "**specific situation**" facing the department in this matter (emphasis supplied).

Procedure 205.002 is the Department's general procurement procedure, and, as such, deals with every kind of procurement from an employee's use of a "P-Card" (Individual Purchase card) to full-blown contract bidding situations. As the Administrative Law Judge correctly noted, Section 205.002(7)(r) deals with a case where the Department receives less than two responsive bids. However, as the Administrative Law Judge pointed out, Sub-section (7)(r) only applies if either

a) The services are available only from a single source or

b) The conditions and circumstances warrant negotiation with **the single responsive bidder**.

Here there was no responsive bidder, and services were clearly available from several sources. There was no responsive bidder because MHM did not meet the financial requirements, and both CMS and Wexler came in above $70. Therefore (7)(r) did not apply.

Since (7)(r) did not apply, and since that is the only section that deals with what happens when there is less that two responsive bids, then the remaining parts of MHM's argument in their exception are without merit. That is because the Department was not required to follow the provisions outlined in 2005.002(7)(r).

And for these same reasons, Conclusion of Law 80 is sound. It simply holds that Section (7)(r)(3), which is the sub-section that specifies when (7)(r) is applicable, does not apply in this situation.

This exception is **denied**.

Ninth Exception: Exception to Finding of Fact 41

The Department is unsure as to what specific objection is being made in this Exception. It appears that MHM is arguing that the Administrative Law Judge should have made an additional finding that the Department had a forth option – namely extend the purchase order.

Such an argument is not relevant to the Finding of Fact. The issue in this case is whether the Department could properly negotiate pursuant to Section 287.057(6). Speculation presented by MHM under this Exception has no bearing on this issue. Moreover, it does not appear that MHM is suggesting that the Finding of Fact as written is not supported by competent substantial evidence.

This exception is **denied**.

Tenth Exception: Exception to Finding of Fact 47

In this Finding of Fact the Administrative Law Judge states that Mr. Smith obtained a complete copy of CMS's proposal, including the price proposal. It is true that the complete proposal would have included the alternate proposal, which quoted a price of $69.93 per inmate per month. However Mr. Staney testified at the hearing that CMS was non-responsive on the first proposal, and that the Department would have ruled CMS nonresponsive on the second proposal in any case. *T. Vol. 3, p. 358.* So while technically the Administrative Law Judge should have said "proposals," it makes no difference to the gist of the Finding of Fact. The point of this Finding is simply that Mr. Smith had a copy of the complete CMS proposal, including pricing information, and that he commenced negotiations. That much is supported by Mr. Staney's testimony, meaning competent substantial evidence supports the finding.

This exception is **denied**.

Eleventh Exception: Exception to Findings of Fact 55 and 58

Mr. Staney testified that it was not until the process was almost concluded that the Department and Mr. Staney's staff realized that CMS had submitted two price proposals. *T., Vol. 3, p. 358.* Further, as pointed out in the determination on the Tenth Exception, *supra.*, p. 12, the Department would have determined the alternate price proposal to be nonresponsive in any case had they known of it at the time of posting of the results in Phase Five. Thus the Department had no reason to post anything other than the one price that it knew about – $74.59, which was non-responsive in any case. Because there is evidence that the Department only knew of the one CMS price at the time, competent substantial evidence supports Finding of Fact 55.

Finding of Fact 58 is also supported. It simply says that that CMS was the highest-ranking proposer after the price opening, once MHM and the University of Miami were excluded due to the nonresponsive nature of their bids. Clearly the evidence shows that was the case.

This exception is **denied**.

Twelfth Exception: Exception to Finding of Fact 62 and Conclusion of Law 81

This Exception is without merit. MHM is simply arguing that it could have, at some point, provided additional evidence to prove that it was financially sound. This argument has nothing to do with this Finding of Fact. The Finding of Fact properly states that Notice was given as required pursuant to Section 287.057(6), and MHM does not argue that this finding is not supported by competent substantial evidence. Clearly the notice gave MHM the point of entry it needed to challenge the Department's decision to award the contract to CMS. That is all this Finding of Fact talks about. The unrelated argument about what MHM might have done at some other, unspecified, time is extraneous to the finding.

In addition, even if the argument were appropriate, MHM has failed to show prejudice. At no point during the protracted proceedings did MHM ever proffer any additional evidence that it might have presented to attempt to prove financial viability. The absence of such a proffer renders the argument meaningless.

This exception is **denied**.

Thirteenth Exception: Exception to Conclusion of Law 65

The question presented in this conclusion is the applicable standard. The Administrative Law Judge quotes Section 120.57(3)(f), *Fla. Stat.* (2008), which contains two standards:

a) In a competitive-procurement protest, other than a rejection of all bids, the standard is whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

b) When the agency rejects all bids, the standard is whether the intended action is illegal, arbitrary, dishonest, or fraudulent.

In this conclusion the Administrative Law Judge found that MHM had not met its burden regardless of which standard was applied. Based on a review of the record and on the language of the statute, the Department finds that this conclusion is a reasonable application of the law.

This exception is **denied**.

Fourteenth Exception: Exception to Conclusions of Law 70, 71 and 73 through 76

These conclusions all deal with the application of Section 287.057(6), *Fla. Stat.* (2008), which in turn says when an agency may negotiate on the best terms and conditions for goods or services. In its entirety, it reads as follows:

> If less than two responsive bids, proposals, or replies for commodity or contractual services purchases are received, the department or other agency may negotiate on the best terms and conditions. The department or other agency shall document the reasons that such action is in the best interest of the state in lieu of resoliciting competitive sealed bids, proposals, or replies. Each agency shall report all such actions to the department on a quarterly basis, in a manner and form prescribed by the department

Conclusion of Law 70 says that MHM did not carry its burden on two allegations that the Department violated this statute:

1) By not terminating the RFP process before negotiating, and;

2) By not posting a notice of intent to negotiate pursuant to the statute before negotiating with CMS.

This conclusion of law is reasonable. As to the second allegation, the statute does not require that any notice be posted before its provisions are invoked. Similarly, there is no requirement for formal termination of the RFP process before moving to use of § 287.057(6). Therefore the Administrative Law Judge was correct in Conclusion of Law 70.

Motorola Inc. v. Department of Management Services, DOAH Case No. 00-2921 BID 2000 WL 1481452 (October 3, 2000), does not mandate that the RFP process be terminated. That simply was the case in *Motorola*. So the statement "upon termination of the RFP, the Department was permitted to pursue

negotiations on the 'best terms and conditions' . . ." is merely fact-driven, not a legal holding which binds this Department.

MHM's reliance on *Department of Lottery v. Gtech*, 816 So. 2d 648, 652 (Fla. 1st DCA 2001), *Rev. Dism.*, 822 So. 2d 1243 (Fla. 2002), is misplaced. *Gtech* is fact-specific to the unique situation presented by the Florida Lottery. In *Gtech* it appears that both the company that won the contract (AWI) and Gtech were responsive bidders, as they were both ranked. The Lottery Department then negotiated only with AWI and reached a contract with AWI.

Gtech does not deal with a situation where there are no responsive bidders, as was the case here. Indeed, there is no mention at all of Section 287.057(6) which clearly was not applicable to the facts in *Gtech*.

Here the Department was faced with the situation where there were no responsive bidders. The legislature provided for that situation by creating Section 287.057(6), and the Department was certainly entitled to rely on its provisions to reach a meritorious contract with a viable company.

MHM points to no provision in the RFP, nor any statutory provision that requires a formal termination of an RFP process once it is determined that there are no responsive bidders. In fact there is none. Rather, as *Motorola Inc.*, *supra.*, p. 16. **does** conclude, under Section 287.057(6), Fla. Stat. (2008),[2] the department

[2] Then § 287.054(4), *Fla. Stat.*

was permitted to pursue negotiations on the "best terms and conditions," and was not subject to strict procedural or technical requirements.

This exception is **denied**.

Fifteenth Exception: Exception to Conclusion of Law 77

Here MHM simply appears to reargue what it presented to the Administrative Law Judge. It has already been pointed out that MHM failed the financial qualifications. Certainly the Department was entitled to avoid risking a multi-year, multi-million dollar contract with an entity of questionable financial standing when a solid source was available. While it is true MHM had succeeded in the past, their financial position was changing, and there was no guarantee they would succeed in the future.

The statement that the Department renewed a separate contract in May of 2009, is somewhat misleading. Mr. Staney testified that the Department exercised a six-month extension of the contract. *T., Vol. 3, p. 326.* Extending a contract for a short period of time is qualifiedly different from renewing a contract for a term of years.

The conclusion of law is reasonable, and this exception is **denied**.

Sixteenth Exception: Exception to Conclusion of Law 78

This Conclusion of Law merely says that the Department documented its reasons for choosing to negotiate on the best terms and conditions as is required by Section 287.057(6), *Fla. Stat.* (2008). Thus it is. That section simply says, "The department . . . shall document the reasons that such action is in the best interest of the state in lieu of resoliciting competitive sealed bids proposals or replies." The statute does not imply when this must be done or in what form.

Mr. Smith's e-mail complies with the statute. The fact he mentions "two responsive proposals is of no import. Dr. Rahangdale testified that, "there were two folks who were responsive in a substantive manner to the RFP . ." *Deposition Dr. Rahangdale, Vol. 1, p. 64.* Thus it is clear that Mr. Smith simply meant two bids that were responsive but for the fact they did not meet the price cap. That this is so is further supported by Dr. Rahangdale's continued testimony that the goal was to try to get the parties as close as they could to the $70 target. *Deposition, Dr. Rahangdale, Vol. 1, p. 65.*

Since Section 287.057(6) only requires a simple statement, and since that was done here, this Conclusion of Law is a reasonable application of the law to the facts.

This exception is **denied**.

Seventeenth Exception: Exception to Conclusion of Law 82

This Conclusion is a reasonable interpretation of the applicable law.

Section 287.057(5), *Fla. Stat.* (2008), requires competitive bidding of certain types of contracts, However, Section 287.057(5)(f), *Fla. Stat.* (2008), excepts some contracts from the competitive-solicitation requirements of the section. One exception is:

> 6. Health services involving examination, diagnosis, treatment, prevention, medical consultation, or administration.

In *University of South Fla. College of Nursing v. Department of Health*, 812 So. 2d 572 (Fla. 2nd DCA 2002), the court held that when this exception applied, then a party complaining they had been cut off from the contracting process had no standing to ask for administrative or judicial remedy. In that case the department of Health did ask providers to submit bids for gynecological services in the service area. Ultimately the department negotiated a contract with one provider. USF complained that it was entitled to a formal administrative hearing, which the department denied. The Second district court of appeal affirmed essentially finding that USF lacked standing to have a hearing.

So it is here. This contract is for health services, and the language of the Section 287.057(5(f)(6), *Fla. Stat.* (2008), is broad enough to include mental health as well as physical health (i.e. **all** health services). So, based on the cited case,

MHM would have no standing here, as the Department could have proceeded as it did simply because its process is exempt under this statute.

Other Exceptions

In this section MHM has grouped several general arguments which need not be addressed here as they do not constitute specific exceptions to either the Findings of Fact or Conclusions of Law of the Administrative Law Judge. Nor do they contain references to the record or any legal basis for the various "exceptions." *See* Section 120.057(1)(k), *Fla. Stat.* (2008), *supra.*, p. 3 (Exceptions must be to specific portions of the order, identify legal basis, or cite to record). For ought it appears, there may be no basis in the record for these "exceptions."

In any case, the Department **does not rule** on these "exceptions."

Determination

Standard of Review

Findings of Fact

An agency may not reject an Administrative Law Judge's findings of fact unless the agency determines from a review of the entire record that those findings were not based on competent substantial evidence, or that the proceedings on

which the findings were based did not comply with the essential requirements of the law. *See* Section 120.57(1)(l), *Fla. Stat.* (2008); *see also*, *Florida Power and Light v. State of Florida, Siting Board*, 693 So. 2d 1025, 1027 (Fla. 1st DCA 1997). Further, an agency many not reweigh the evidence presented at a formal hearing and substitute its findings for those of the Administrative Law Judge. *See, e.g., South Florida Water Management District v. Caluwe*, 459 So. 2d 390, 394 (Fla. 4th DCA 1984). Generally an agency may not add findings of fact to a final order where they are not contained in the recommended order. *See, e.g., Florida Power & Light Co. v. State,* 693 So.2d 1025, 1026 -1027 (Fla. 1st DCA 1997).

Conclusions of Law

An agency may exercise its own judgment and substitute its own conclusions of law for those of the Administrative Law Judge. *See, e.g., Fortune Ins. Co. v. Department of Ins.*, 664 So.2d 312, 314 -315 (Fla. 1st DCA 1995). But if the agency comes to its own conclusions, it must make a finding that its substituted conclusion of law or interpretation of an administrative rule is as, or more, reasonable than that which was rejected or modified. *See* Section 120.57(1)(l), *Fla. Stat.* (2009) *See also, e.g., Colbert v. Department of Health*, 890 So.2d 1165, 1167 (Fla. 1st DCA 2004).

The Department's Determinations

Based on a review of the record and of the recommended order, the Administrative Law Judge's Findings of fact in the recommended order are adopted as the Findings of Fact of this Final Order, as modified herein, and made a part hereof as if fully set forth herein.

The Administrative Law Judge's Conclusions of Law in the Recommended Order are adopted as the Conclusions of Law of this Final Order, and made a part hereof, as if fully set forth herein.

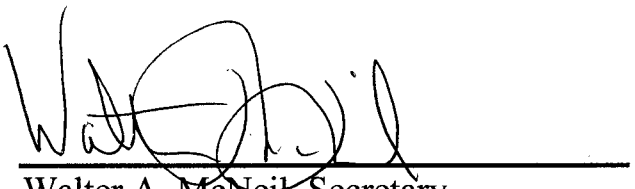
Conclusion

Accordingly, it is **Ordered and Adjudged** that the Recommended Order of the Administrative Law Judge is adopted. It is further **Ordered and Adjudged**, that the contract for mental healthcare services in Region IV is awarded to Correctional Medical Services Inc.. The protest of MHM Correctional Services Inc. is hereby dismissed.

This Order constitutes final agency action. Pursuant to Section 120.68(2), *Fla. Stat.* (2008), judicial review of this proceeding may be instituted by filing a notice of appeal in the district court of appeal in the appellate district where the agency maintains its headquarters, or where a party resides. Such notice of appeal must be filed with the district court of appeal within thirty calendar days of the date this order is filed in the official records of the

Department of Corrections, as indicated in the certificate of the agency clerk below, or further review will be barred.

Done and Ordered this 17 day of August, 2009, in Tallahassee, Florida.



Walter A. McNeil, Secretary
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