

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SUN ART PAINTING CORPORATION,            )  
  )  
      Petitioner,                            )  
  )  
vs.    )     Case No. 10-0376BID  
  )  
PALM BEACH COUNTY SCHOOL BOARD,        )  
  )  
      Respondent.                          )  
\_\_\_\_\_                                      )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,<sup>1</sup> before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH), on March 9, 2010, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Robert W. Erikson, Co-owner and Chairman  
Sun Art Painting Corporation  
1966 West 9th Street, Suite A  
Riviera Beach, Florida 33404

For Respondent: Kathelyn Jacques-Adams, Esquire  
School Board of Palm Beach County  
Office of the Chief Counsel  
Post Office Box 19239  
West Palm Beach, Florida 33416-9239

STATEMENT OF THE ISSUE

Whether Respondent's intended rejection of all bids submitted in response to Respondent's solicitation of bids for two separate painting projects (the painting of the exterior of Greenacres Elementary School and the painting of the exterior of South Olive Elementary School) is "arbitrary," as alleged by Petitioner, and if so, what alternative action should Respondent take with respect to these two projects.

PRELIMINARY STATEMENT

On January 25, 2010, Respondent referred to DOAH, a formal written protest of Respondent's announced intention to reject all bids on two separate painting projects advertised in the same Invitation to Bid (ITB): the Greenacres Elementary School exterior painting project (referred to as "Item 1" in the ITB) and the South Olive Elementary School exterior painting project (referred to as "Item 2" in the ITB). In its formal written protest, Petitioner argued that the protested rejection of all bids was "both 'arbitrary' (unsupported by facts or logic) and 'dishonest' (not in a corruption or malfeasance sense, but rather in the failure of duty by not being faithful to law, agency published rules and policies, and explicit solicitation specifications)." According to Petitioner, it had "submitted the lowest responsive bid for both Item 1 and Item 2 under the

ITB" and, consequently, it should be awarded the contracts for both projects.

As noted above, the hearing was held on March 9, 2010. Two witnesses testified at the hearing: Sharon Swan, Respondent's Director of Purchasing; and Robert Erickson, the Co-owner and Chairman of Petitioner. In addition to the testimony of these two witnesses, Petitioner's Exhibits 1 through 7, 9, and 11, and Respondent's Exhibits 1 through 12 and 14, were offered and received into evidence.

Following the conclusion of the final hearing, on March 12, 2010, the School Board, on behalf of both parties, filed an motion requesting that the parties be given 45 days from the date of the filing of the hearing transcript with DOAH to file their proposed recommended orders in this case. The representation was made in the motion that the parties had stipulated to waive the requirement contained in Section 120.57(3)(e), Florida Statutes, that the recommended order in this case be issued within 30 days following DOAH's receipt of the hearing transcript. That same day (March 12, 2010), the undersigned issued an Order granting the parties' request and directing that proposed recommended orders be filed no later than 45 days from the date of the filing of the hearing transcript with DOAH.

Petitioner timely filed its Proposed Recommended Order on May 13, 2010.

On May 14, 2010, Respondent filed a motion "request[ing] a ten (10) day enlargement of time to file its Proposed Recommended Order." In its motion, Respondent stated the following regarding Petitioner's position on the matter:

4. The counsel for the School Board spoke to Robert Erickson, Co-Owner and representative of the Petitioner and he does not object to the above requested ten (10) day enlargement of time provided that the counsel for the School Board agrees not to read the Petitioner's Proposed Recommended Order prior to filing its own Proposed Recommended Order.

5. Counsel for the School Board agrees not to read the Petitioner's Proposed Recommended Order.

On May 17, 2010, the undersigned issued an Order granting Respondent's Motion for Enlargement of Time, with the caveat that, pursuant to the agreement of the parties, counsel for Respondent was not to "read the Petitioner's Proposed Recommended Order prior to filing its own Proposed Recommended Order."

On May 21, 2010, Petitioner filed a motion requesting that it be allowed to amend its previously filed Proposed Recommended Order to correct certain typographical errors identified in the motion. On May 24, 2010, the undersigned issued an Order granting the motion and announcing that "Petitioner's Proposed

Recommended Order w[ould] be considered by the undersigned, as amended."

On May 24, 2010, Respondent filed its Proposed Recommended Order.

#### FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Respondent is a district school board responsible for the operation, control and supervision of all public schools (grades K through 12) in Palm Beach County, Florida (including, among others, Greenacres Elementary School, South Olive Elementary School, and Belvedere Elementary School) and for otherwise providing public instruction to school-aged children in the county.

2. In or around August 2009, Respondent, through its Construction Purchasing Department (Purchasing Department), issued a single Invitation to Bid (ITB) soliciting separate bids for three different painting projects: the painting of the exterior of Greenacres Elementary School; the painting of the exterior of South Olive Elementary School; and the painting of the exterior of Belvedere Elementary School.

3. The bid package contained the following: an Invitation to Bid Bidder Acknowledgement form (PBSD 1186, Rev 2/2001); Special Conditions; Specifications; and Addenda, including a Bid

Summary Sheet, a Drug-Free Workplace Certification (PBSD 0580, New 3/91), a Statement of No Bid, Inspection forms, and a Beneficial Interest and Disclosure of Ownership Affidavit.

4. The Invitation to Bid Bidder Acknowledgement form contained the following provision entitled, "Awards":

AWARDS: In the best interest of the District, the Purchasing Department reserves the right to reject any and all bids and to waive any irregularity or minor technicalities in bids received; to accept any item or group of items unless qualified by bidder; to acquire additional quantities at prices quoted on this invitation unless additional quantities are not acceptable, in which case the bid sheets must be noted "BID IS FOR SPECIFIED QUANTITY ONLY." All awards made as result of this bid shall conform to applicable Florida Statutes.

5. The Invitation to Bid Bidder Acknowledgement form also included "General Conditions, Instructions and Information for Bidders" (General Conditions), among which were the following:

SEALED BIDS: One copy of this executed Invitation to Bid page and Bid Summary page(s) must be returned with the bid in order to be considered for award. All bids are subject to all the conditions specified herein; all General Conditions, Special Conditions on the attached bid documents; and any addenda issued thereto. Any failure on the part of the bidder to comply with the specifications, terms and conditions of this Invitation to Bid shall be reason for termination of contract.

1. EXECUTION OF BID: Bid must contain a manual signature of an authorized representative in the space provided above. Failure to properly sign proposal shall

invalidate same, and it shall not be considered for award. All bids must be completed in ink or typewritten. Corrections must be initialed by the person signing the bid. Any corrections not initialed will not be tabulated. The original bid conditions and specifications cannot be changed or altered in any way. Altered bids may not be considered. Clarification of bids submitted shall be in letter form, signed by the bidders and attached to the bid.

\* \* \*

20. SIGNED BID CONSIDERED AN OFFER: This signed bid shall be considered an offer on the part of the bidder, which offer shall be deemed accepted upon approval by the Board. In case of a default on the part of the bidder after such acceptance, the District may take such action as it deems appropriate including legal action for damages or specific performance.

\* \* \*

25. SPECIAL CONDITIONS: Any and all Special Conditions that may vary from these General Conditions shall have precedence.

6. Among the "Special Conditions" were the following:

A. SCOPE: The purpose and intent of this invitation to bid is to secure firm pricing for Exterior Painting of Greenacres, South Olive, and Belvedere Elementary Schools. The rate shall include all materials and labor for preparation, sealing and painting.

B. AWARD: Time of completion is of the essence. Contract will be awarded to the lowest responsive and responsible bidder(s) for each item as listed on the Bid Summary Sheet.

The District reserves the right to use the next lowest bidder(s) in the event the original awardee of the bid cannot fulfill their contract. The next lowest bidder's price must remain the same as originally bid and must remain firm for the duration of the contract. The anticipated award will be approved by the superintendent designee.

B. MANDATORY SITE INSPECTION: ALL BIDDERS MUST ATTEND PRE-BID WORKSITE WALK-THROUGH. THE WORK DETAILS ARE OUTLINED IN THIS BID AND ANY QUESTIONS WILL BE ANSWERED AT EACH WORKSITE INSPECTION. BIDS WILL NOT BE ACCEPTED FROM ANY BIDDERS THAT HAVE NOT ATTENDED THE SITE INSPECTION FOR THAT PARTICULAR WORKSITE. THIS MANDATORY SITE INSPECTION EXCLUDES ANY AND ALL PAINT MANUFACTURERS AND/OR PAINT DISTRIBUTORS.

\* \* \*

D. BIDDERS RESPONSIBILITY: Before submitting their bid, each bidder is required to carefully examine the invitation to bid specifications and to completely familiarize themselves with all of the terms and conditions that are contained within this bid. Ignorance on the part of the bidder will in no way relieve them of any of the obligations and responsibilities that are part of this bid.

E. SEALED BID REQUIREMENTS: The "INVITATION TO BID" bidder's acknowledgment sheet must be completed, signed, and returned. In addition, the Bid Summary Sheet page(s) on which the bidder actually submits a bid, needs to be executed and submitted with this bid. Bids received that fail to comply with these requirements shall not be considered for award.[<sup>2</sup>]

F. CONTRACT: The submission of your bid constitutes an offer by the bidder. . . .

\* \* \*



Q. USE OF OTHER CONTRACTS: The District reserves the right . . . to directly negotiate/purchase per School Board policy and/or State Board Rule 6A-1.012(6) in lieu of any offer received or award made as a result of this bid, if it is in its best interest to do so. The District also reserves the right to separately bid any single order or to purchase any item on this bid if it is in its best interest to do so.

\* \* \*

HH. POSTING OF BID AND SPECIFICATIONS: Invitation to bid with specifications will be posted for review by interested parties in the Construction Purchasing Department on the date of bid electronic mailing and will remain posted for a period of 72 hours. Failure to file a specification protest within the time prescribed in § 120.57(3), Florida Statutes, will constitute a waiver of proceedings under Chapter 120, Florida Statutes, and applicable Board rules, regulations and policies.

II. POSTING OF BID RECOMMENDATION/TABULATIONS: Bid recommendations and tabulations will be posted in the Construction Purchasing Department, within 10 days of the opening date, and will remain posted for a period of 72 hours. If the bid tabulation with recommended awards is not posted by said date and time, [a] "Notice of Delay of Posting" will be posted to inform all proposers of the new posting date and time.

Any person adversely affected by the decision or intended decision must file a notice of protest, in writing, within 72 hours after the posting. The formal written protest shall state with particularity the facts and law upon which the protest is based. Failure to file a specification protest within the time prescribed in §

120.57(3), Florida Statutes, will constitute a waiver of proceedings under Chapter 120, Florida Statutes, and applicable Board rules, regulations and policies.

OO. BID PROTEST: If a bidder wishes to protest a bid, they must do so in strict accordance with the procedures outlined in F.S. 120.57(3), and Section FF., Lobbying Paragraph 3, of this proposal and School Board Policy 6.14.

Any person who files an action protesting bid specifications, a decision or intended decision pertaining to this bid pursuant to F.S. 120.57(3)(b), shall post with the Purchasing Department, at the time of filing the formal written protest, a bond secured by an acceptable surety company in Florida payable to the School District of Palm Beach County in an amount equal to 1 percent (1%) of the total estimated contract value, but not less than \$500 nor more than \$5,000. Bond shall be conditioned upon the payment of all costs that may adjudged against the protester in the administrative hearing in which the action is brought and in any subsequent appellate court proceeding. In lieu of a bond, a cashier's check, certified bank check, bank certified company check or money order will be acceptable form of security. If, after completion of the administrative hearing process and any appellate court proceedings, the District prevails, it shall recover all costs and charges included in the final order of judgment, including charges by the Division of Administrative Hearings. Upon payment of such costs and charges by the protester, the protest security shall be returned. If the protest prevails, he or she shall recover from the District all costs and charges, which shall be included in the final order of judgment.

Failure to file a specification protest within the time prescribed in § 120.57(3),

Florida Statutes, will constitute a waiver of proceedings under Chapter 120, Florida Statutes, and applicable Board rules, regulations and policies.

\* \* \*

PP. INFORMATION: Any questions by the prospective bidders concerning this invitation to bid should be addressed to Helen R. Stokes, Purchasing Agent, Construction Purchasing . . . , who is authorized only to direct the attention of prospective bidders to various portions of the bid so they may read and interpret such for themselves. Neither Mrs. Stokes nor any employee of the District is authorized to interpret any portion of the bid or give information as the requirements of the bid in addition to that contained in the written bid document. Interpretations of the bid or additional information as to its requirements, where necessary, will be communicated to bidders by written addendum.

7. Site visits to the three schools to be painted were made by prospective bidders on August 13, 2009, following which a First and Final Addendum, dated August 25, 2009, was issued by the School Board. This First and Final Addendum included the following Revised Bid Summary Sheet:

REVISED BID SUMMARY SHEET

THE SCHOOL DISTRICT OF PALM BEACH COUNTY  
Construction Purchasing Department  
3661 Interstate Park Road North Building 200  
Riviera Beach, FL 33404  
Ph: 561-882-1952 Fax: 561-434-8655

EXTERIOR PAINTING OF GREENACRES, SOUTH OLIVE, AND BELVEDERE ELEMENTARY SCHOOLS

SEALED BIDS ARE TO BE SUBMITTED ON  
AUGUST 27, 2009 NO LATER THAN 2:00 P.M.  
TO:

Helen Stokes, Construction Purchasing  
Construction Purchasing Department  
3661 Interstate Park Road North Building 200  
Riviera Beach, FL 33404

Bids will only be accepted from those  
contractors in attendance at the Mandatory  
Site Visit and who are registered with the  
School District of Palm Beach County as a  
Small Business Enterprise. The rate shall  
include paint, preparation, sealing and  
painting per the attached specifications and  
detailed scope of work.

EXTERIOR PAINTING AT GREENACRES, SOUTH  
OLIVE, AND BELVEDERE ELEMENTARY SCHOOLS

ITEM 1: GREENACRES ELEMENTARY SCHOOL

\_\_\_\_\_ TOTAL \$ \_\_\_\_\_  
(PRICE IN WORDS)

ITEM 2: SOUTH OLIVE ELEMENTARY SCHOOL

\_\_\_\_\_ TOTAL \$ \_\_\_\_\_  
(PRICE IN WORDS)

ITEM 3: BELVEDERE ELEMENTARY SCHOOL

\_\_\_\_\_ TOTAL \$ \_\_\_\_\_  
(PRICE IN WORDS)

RE-TEXTURING TEXCOAT \$ \_\_\_\_\_ (Per Sq.  
Ft.)

ADDENDUM ACKNOWLEDGEMENT: I HEREBY  
ACKNOWLEDGE RECEIPT OF \_\_\_\_ ADDENDUMS

CONTRACTOR: \_\_\_\_\_  
Name Date  
\_\_\_\_\_  
Address Current License #  
\_\_\_\_\_  
City, State, Email Address  
Zip  
\_\_\_\_\_  
Phone Fax

8. There were no instructions on the Revised Bid Summary Sheet itself directing that an authorized representative sign the document, nor was there any signature line for such purpose.

9. Bids were submitted by Austro Construction, Inc. (Austro); Dynamic Painting, Inc. (Dynamic); Fleischer's, Inc. (Fleischer's); JIJ Construction Corporation (JIJ); and Petitioner.

10. Austro bid \$83,900.00 on Item 1 (Greenacres Elementary School); \$87,500.00 on Item 2 (South Olive Elementary School); and \$105,500.00 and \$3.50 per square foot for re-texturing on Item 3 (Belvedere Elementary School).

11. Dynamic bid \$55,955.00 on Item 1 (Greenacres Elementary School); \$74,800.00 on Item 2 (South Olive Elementary School); and \$82,900.00 and \$3.00 per square foot for re-texturing on Item 3 (Belvedere Elementary School).

12. Fleischer's bid only on Item 3 (Belvedere Elementary School).<sup>3</sup> Its bid was \$73,000.00 and \$1.25 for re-texturing.

13. JIJ bid \$80,000.00 on Item 1 (Greenacres Elementary School); \$95,000.00 on Item 2 (South Olive Elementary School); and \$95,000.00 and \$1.15 per square foot for re-texturing on Item 3 (Belvedere Elementary School).

14. Petitioner bid \$89,349.00 (or \$33,394.00 more than did Dynamic, the lowest bidder) on Item 1 (Greenacres Elementary School); \$93,885.00 (or \$19,085.00 more than did Dynamic, the lowest bidder) on Item 2 (South Olive Elementary School); and \$94,306.00 and \$3.95 per square foot for re-texturing on Item 3 (Belvedere Elementary School).

15. Of the five Revised Bid Summary Sheets that were submitted in response to the ITB (one each by Austro, Dynamic, Fleischer's, JIJ, and Petitioner), only two, those submitted by Fleischer's and Petitioner, contained the signature of an authorized representative of the bidder. The other three had no signatures on them.

16. All of the "blanks" on each of the five Revised Bid Summary Sheets submitted, including the three sheets without signatures, were filled in and completed, however.<sup>4</sup>

17. Furthermore, each Revised Bid Summary Sheet was accompanied by an appropriately signed Invitation to Bid Bidder Acknowledgement form.

18. Bids were opened on August 27, 2009.

19. As announced on the Bid Tabulation Form that was posted on August 28, 2009, the Purchasing Department recommended that Items 1 and 2 be awarded to Dynamic and Item 3 be awarded to Fleischer's.

20. Petitioner, on or about September 8, 2009, protested the award of Items 1 and 2 to Dynamic on the ground that Dynamic's bids on these items were non-responsive because its Revised Bid Summary Sheet had not been signed by an authorized representative of the company. The award of Item 3 to Fleischer's was not protested by Petitioner or any other bidder.

21. By letter dated September 15, 2009, Sharon Swan, Respondent's Director of Purchasing (and head of the Purchasing Department), advised Petitioner of the following:

We have completed the review of your protest of Bid for "Exterior Painting of Greenacres, South Olive, and Belvedere Elementary Schools," specifically your protest of the recommendation for award for Greenacres and South Olive Elementary Schools, Items 1 & 2 of this bid.

A revised recommendation will be posted later today reflecting a change in our recommendation for Items 1 & 2. The revised recommendation will be to reject all bids on these two items<sup>[5]</sup> and re-bid with revised bid documents which will clarify the ambiguity relating to the requirement to execute the Bid Summary Sheet when no signature line was indicated.

Therefore, I am returning your bank check and closing the file on this protest.

You are invited and welcome to compete on the re-bid of these projects.

22. As promised, a second, revised bid tabulation form was posted that same day (September 15, 2009) containing the following "revised recommendation":

Item[s] 1 & 2: Reject bid Item[] 1 (one) and Item 2 (two) due to an ambiguity in the bid language, SPECIAL CONDITIONS, paragraph E, Sealed Bid Requirements.

Item 3: Fleischer's, Inc.

23. The belatedly perceived "ambiguity" referred to in the Purchasing Department's revised bid tabulation form concerned the intended meaning of the term "executed" in Special Condition E. of the ITB.

24. It had been the Purchasing Department's intent, in using this term in Special Condition E., to require that the Revised Bid Summary Sheet be signed by an authorized representative of the bidder; however, the Purchasing Department had not included a signature line on the Revised Bid Summary Sheet (such as the one appearing on the Invitation to Bid Bidder Acknowledgement form), nor had it specified anywhere in the ITB that the Revised Bid Summary Sheet had to be "signed" (in contrast to the instructions, given in the first sentence of



Special Condition E., regarding the Invitation to Bid Bidder Acknowledgement form).

25. Upon its consideration of Petitioner's protest, the Purchasing Department had come to the realization that it had not clearly communicated to prospective bidders its intent concerning the need for a bidder's "executed" Revised Bid Summary Sheet to bear an authorized representative's signature. Believing that its failure to have done so effected the outcome of the competitive bidding process in the case of both Item 1 and Item 2 (in that, with respect to each of these items, the lowest bidder, as well as all other bidders bidding on these two items with the exception of Petitioner, submitted an unsigned Revised Bid Summary Sheet, making these bidders, in the School Board's view, ineligible for an award), the Purchasing Department decided "to reject all bids [with respect to these two items] and rebid so [the Purchasing Department] could correct this ambiguity" concerning the need for a bidder's "executed" Revised Bid Summary Sheet to be signed.<sup>6</sup>

26. It is this intended action which is the subject of Petitioner's instant protest.

#### CONCLUSIONS OF LAW

27. "Purchases . . . by school districts . . . [must] comply with the requirements of law and rules of the State Board of Education." § 1010.04(1)(a), Fla. Stat.

28. The "rules of the State Board of Education" include Florida Administrative Code Rule 6A-1.012, which requires each district school board to "establish purchasing rules"<sup>7</sup> consistent with, among other things, the following:

\* \* \*

(7) Except as authorized by law or rule, competitive solicitations shall be requested from three (3) or more sources for any authorized commodities or contractual services exceeding \$50,000. . . .

(8) The district school board shall have the authority to reject any or all proposals submitted in response to any competitive solicitation and request new proposals or purchase the required commodities or contractual services in any other manner authorized by this section.

(9) In acceptance of responses to invitations to bid, the district school board may accept the proposal of the lowest responsive, responsible proposer. In the alternative, the district school board may also choose to award contracts to the lowest responsive, responsible bidder as the primary awardee of a contract and to the next lowest responsive, responsible bidder(s) as alternate awardees from whom commodities or contractual services would be purchased should the primary awardee become unable to provide all of the commodities or contractual services required by the district school board during the term of the contract. Nothing herein is meant to prevent multiple awards to the lowest responsive and responsible bidders when such multiple awards are clearly stated in the bid solicitation documents.<sup>[8]</sup>

\* \* \*

(12) Additional exemptions authorized under certain conditions.

(a) The requirements for requesting competitive solicitations and making purchases for commodities and contractual services as set forth in this section are hereby waived as authorized by Section 1010.04(4)(a), F.S., when the following conditions have been met by the district school board:

1. Competitive solicitations have been requested in the manner prescribed by this rule, and

2. The district school board has made a finding that no valid or acceptable firm proposal has been received within the prescribed time.

(b) When such a finding has been officially made, the district school board may enter into negotiations with suppliers of such commodities and contractual services and shall have the authority to execute contracts with such vendors under whatever terms and conditions as the district school board determines to be in its best interests;

(c) If less than two responsive proposals for commodity or contractual services are received, the district school board may negotiate on the best terms and conditions or decide to reject all proposals. The district school board shall document the reasons that negotiating terms and conditions with the sole proposer is in the best interest of the school district in lieu of resoliciting proposals;

\* \* \*

29. In accordance with Florida Administrative Code Rule 6A-1.012, Respondent has adopted "purchasing rules."

30. These "purchasing rules" include the following provisions, among others, found in Palm Beach County School Board Rule 6Gx50-6.14:

1. Delegation of Authority.-- As set forth below, the School Board has delegated authority to the Superintendent or his/her designee to be responsible for the purchase of the commodities and contractual services for the District in compliance with Florida Statutes, State Board of Education Rules, and Board Policy. . . .

\* \* \*

c. Superintendent/Designee

\* \* \*

ii. Apart from the consultant agreements mentioned in paragraph (1)(c)(i), above, (for which the threshold is \$10,000), authority is also vested in the Superintendent or his/her designee to:

\* \* \*

B. approve or reject purchase requisitions and authorize purchase of commodities and contractual services, without regard to dollar amount, when the method used is an Invitation to Bid or competitive quotes and the award is based upon lowest bid or quote from a responsive and responsible bidder meeting specifications (provided that, for purchases in this subparagraph B, prior approval of the Superintendent or Chief Operating Officer is required, and a quarterly report of such purchases over \$15,000 must be provided to the Board);

\* \* \*

2. Maximum Value.-- Pursuant to Fla. Stat. § 1001.51(11)(i), the Superintendent of Schools or his/her designee shall, insofar as possible, propose standards and specifications. He or she shall see that the purchase or contract conforms to those standards and specifications, and shall take such other steps as are necessary to see that the maximum value is being received for any money expended. Insofar as practicable, all purchases shall be based on requisitions, and the Superintendent/designee shall certify that funds to cover the expenditures under the requisitions are authorized by the budget and have not been encumbered . . . .

\* \* \*

b. Bids/Proposals.-- Bids/proposals shall be requested from three (3) or more sources for commodities and contractual services when requisitioning any item or group of similar items exceeding twenty-five thousand dollars (\$25,000) or as otherwise set by the threshold amount in Fla. Stat. § 287.017 for Category Two, except as exempt by State Board of Education Rule 6A-1.012 or other applicable laws. . . .

i. In acceptance of bids, the School Board (or the Superintendent/designee, for purchases delegated to him or her) shall accept the lowest bid from a responsive and responsible bidder.

ii. However, the School Board (and the Superintendent/designee, for purchases delegated to him or her) shall have the authority to reject any or all bids and request new bids.

31. Section 4 of Palm Beach County School Board Rule 6Gx50-6.14, which is entitled, "Protests Arising from the Contract Solicitation or Award Process," provides that the

provisions of Section 120.57(3), Florida Statutes, govern the filing and resolution of such protests.

32. Section 120.57(3), Florida Statutes, sets forth the "procedures applicable to protests to contract solicitation[s] or award[s]" by an "agency," as that term ("agency") is defined in Section 287.012(1), Florida Statutes, which provides that "'agency' means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government."<sup>9</sup> See § 120.57(3)(g), Fla. Stat. ("For purposes of this subsection, the definitions in s. 287.012 apply.").

33. Section 120.57(3), Florida Statutes, provides as follows:

Agencies subject to this chapter shall use the uniform rules of procedure,<sup>[10]</sup> which provide procedures for the resolution of protests arising from the contract solicitation or award process. Such rules shall at least provide that:

(a) The agency shall provide notice of a decision or intended decision concerning a solicitation, contract award, or exceptional purchase by electronic posting. This notice shall contain the following statement:  
"Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes."

(b) Any person who is adversely affected by the agency decision or intended decision<sup>[11]</sup> shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision. With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation. The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based. Saturdays, Sundays, and state holidays shall be excluded in the computation of the 72-hour time periods provided by this paragraph.

(c) Upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.

(d)1. The agency shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of a formal written protest.

2. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of the formal written protest, and if there is no disputed issue of material fact, an informal proceeding shall be conducted pursuant to subsection (2) and applicable agency rules before a person whose qualifications have been prescribed by rules of the agency.

3. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of the formal written protest, and if there is a disputed issue of material fact, the agency shall refer the protest to the division for proceedings under subsection (1).

(e) Upon receipt of a formal written protest referred pursuant to this subsection, the director of the division shall expedite the hearing and assign an administrative law judge who shall commence a hearing within 30 days after the receipt of the formal written protest by the division and enter a recommended order within 30 days after the hearing or within 30 days after receipt of the hearing transcript by the administrative law judge, whichever is later. Each party shall be allowed 10 days in which to submit written exceptions to the recommended order. A final order shall be entered by the agency within 30 days of the entry of a recommended order. The provisions of this paragraph may be waived upon stipulation by all parties.

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



announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding<sup>[12]</sup> 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. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.<sup>[13]</sup>

(g) For purposes of this subsection, the definitions in s. 287.012 apply.

34. The instant bid protest is one "contesting an intended agency action to reject all bids" with respect to two of the three projects advertised by the ITB (specifically, Items 1 and 2). Petitioner is challenging this intended action on the ground that it would be "arbitrary"<sup>14</sup> for the following reasons (as articulated in paragraph 19. of its Proposed Recommended Order):

First, the School Board itself confused the difference between (a) belatedly inferred and speculated "confusion" on the part of some bidders with respect to any

imperfection in the design of the provided Bid Summary Sheet form, and (b) the unequivocally clear and explicit mandates of ITB SPECIAL CONDITIONS paragraphs E. and D. regarding such form's required signature for compliant submission. Second, the School Board concedes that the rejection of all bids for Items 1 and 2 would not be as the result of any need to abandon or modify these projects, but rather the School Board Purchasing Director testified she simply plans to repair such now perceived ITB deficiency and recompile the two projects.

35. To prevail on its protest, Petitioner was required, at the final hearing in this case, to support its claim of "arbitrar[iness]" by a preponderance of the evidence. See Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 415 (Fla. 4th DCA 1974)("As a general rule the comparative degree of proof by which a case must be established is the same before an administrative tribunal as in a judicial proceeding--that is, a preponderance of the evidence. It is satisfied by proof creating an equipoise, but it does not require proof beyond a reasonable doubt."); Spinella Enterprises v. Department of Environmental Protection, Inc., No. 08-3380BID, 2008 Fla. ENV LEXIS 129 \*\*14-15 (Fla. DOAH October 2, 2008)(Recommended Order)("As the protesting party, Spinella must sustain its burden of proof by a preponderance of the evidence."); School Food Service Systems, Inc. v. Broward County School Board, No. 01-0612BID, 2001 Fla. Div. Adm. Hear. LEXIS 2647 \*41 (Fla. DOAH

March 31, 2001)(Recommended Order)("Pursuant to Section 120.57(3)(f), Florida Statutes, the burden of proof rests with the party opposing the proposed agency action. School Food must sustain its burden of proof by a preponderance of the evidence.")(citation omitted); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute. . . .").

36. An intended rejection of all bids is not "arbitrary" merely because it "may appear erroneous" or because "reasonable persons may disagree" with the taking of such action. Groves-Watkins Constructors, 530 So. 2d at 913, quoting, with approval, from Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982). Only if "'it is not supported by logic or the necessary facts,' [or] if it is adopted without thought or reason or is irrational'" will it be deemed "arbitrary." Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006); see also Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA 1998)("An 'arbitrary' decision is one not supported by facts or logic."); and Dravo Basic Materials Company, Inc. v. Department of Transportation, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992)("If an administrative decision is justifiable under any analysis that a reasonable

person would use to reach a decision of similar importance, it would seem that the decision is [not] arbitrary.").

37. "The existence of an ambiguity [in an ITB] constitutes a rational [and therefore non-arbitrary] basis upon which a district school board may lawfully reject all bids and readvertise, but only if such ambiguity has . . . tainted the outcome of the competitive bidding process." J. D. Pirrotta Company v. Palm Beach County School Board, No. 93-2822BID, 1993 Fla. Div. Adm. Hear. LEXIS 5753 \*20 (Fla. DOAH July 7, 1993)(Recommended Order), citing Caber Systems v. Department of General Services, 530 So. 2d 325 (Fla. 1st DCA 1988)<sup>15</sup>; Tropabest Foods, Inc. v. Department of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986); and Robinson Electrical Co., Inc. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982).

38. Such a "taint" would exist if there was a reasonable possibility that the ambiguity had caused the lowest, responsible bidder to submit a bid that was (but would not have been but for the ambiguity) non-responsive. The rejection of all bids under such circumstances would not be "arbitrary."

39. There would be no "taint" (and, consequently, no rational or logical reason to reject all bids), however, if the ambiguity concerned merely a minor or trivial requirement of the ITB, deviation from which would not render a bid non-responsive.

40. "[A]lthough a bid containing a material variance is unacceptable, not every deviation from [an ITB] is material. It is only material [and renders the bid non-responsive] if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, 493 So. 2d at 52. If it does not provide the bidder with such a palpable competitive advantage, it constitutes a minor irregularity that should be waived. See Robinson Electrical Co., 417 So. 2d at 1034 ("[T]he purpose of competitive bidding is to secure the lowest responsible offer and . . . the County may waive minor irregularities in effectuating that purpose."). "There is a very strong public interest in favor of saving tax dollars in awarding public contracts. There is no public interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, where the low bidder did not derive any unfair competitive advantage by reason of the technical omission." Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 3d DCA 1992); see also Overstreet Paving Co. v. Department of Transportation, 608 So. 2d 851, 853 (Fla. 2d DCA 1992)(same).

41. In the instant case, as a justification for its proposed decision to reject all bids with respect to Items 1 and 2, Respondent is relying on an alleged ambiguity in the ITB

concerning the meaning of the phrase "needs to be executed," as used in the second sentence of Special Condition E. of the ITB (in reference to the Revised Bid Summary Sheet). According to Respondent, this language, although intended (by it) to require that the Revised Bid Summary Sheet be signed, did not clearly convey this intent to bidders. Petitioner, for its part, disputes the existence of any alleged ambiguity, arguing that "no reasonable person could misinterpret" Special Condition E.'s "unequivocally clear and explicit" requirement that the Revised Bid Summary Sheet be signed "for compliant submission."

Petitioner attributes the lack of signatures on the Revised Bid Summary Sheets submitted by the other three bidders who bid on Items 1 and 2 (Dynamic, Austro, and JIJ), not to any misunderstanding on their part as to the intended meaning of the "needs to be executed" language in Special Condition E., but rather to these bidders' failure to have complied with the requirement imposed by Special Condition D. that bidders, "[b]efore submitting their bid[s], . . . carefully examine the invitation to bid specifications and . . . completely familiarize themselves with all of the terms and conditions" therein.

42. The undersigned agrees with Respondent that it did not clearly express in the second sentence of Special Condition E. (or elsewhere in the ITB) its intent to require bidders to sign

their Revised Bid Summary Sheets, and that the ITB was ambiguous on this point.

43. Instead of using the word "signed" (as it had in the immediately preceding sentence dealing with the Invitation to Bid Bidder Acknowledgement form: "The 'INVITATION TO BID' bidder's acknowledgment sheet must be completed, signed, and returned") and leaving no doubt that a signature on the Revised Bid Summary Sheet was needed, Respondent, in the second sentence of Special Condition E., merely directed that the Revised Bid Summary Sheet be "executed" before its submission. "Executed" is an "elusive" term whose meaning "depends on context." Sentinel Products Corp. v. Scriptoria, N.V., 124 F. Supp. 2d 115, 119 (D. Mass. 2000); see also In re Estate of Tosh, 920 P.2d 1230, 1232 (Wash. App. 1996) ("Taking this word out of context, the definitions of 'executed' may differ."). "One of the well-known meanings<sup>16</sup> of the verb 'to execute' . . . is 'to complete.'" Perko v. Rock Springs Commercial Co., 259 P. 520, 522 (Wyo. 1927); see also Brown v. State, 674 So. 2d 738, 740 (Fla. 2d DCA 1995) ("The word 'executed' means completion of service on the defendant."); Travelers Insurance Co. v. Chicago Bridge & Iron Co., 442 S.W.2d 888, 895 (Tex. App. 1969) ("The term 'execute' means 'to finish' or 'make complete.'"); and Olson v. Penkert, 252 Minn. 334, 347 n.6 (Minn. 1958) ("The words 'execute' and 'executed' when used in their proper sense convey

the meaning of carrying out some act or course of conduct to its completion, and, when applied to a written instrument, include the performance of all acts necessary to render it complete as an instrument importing the intended obligation and of every act required to give the instrument validity or to carry it into effect or give it the form required to render it valid."). For a document to be "complete[d]" or "executed," it may or may not, depending on the circumstances, need to be signed. E.g., McPherson v. Acco USA, No. 95 C 5888, 1997 U.S. Dist. LEXIS 14520 \*6 n.3 (N.D. Ill. September 12, 1997)("While a contract need not be signed to be valid, it is clear that, where the signatures of the parties is a condition precedent to its completion, no contract will exist until the signatures are obtained. 'Whether the signing of the contract is a condition precedent to its becoming a binding contract usually depends on the intention of the parties.' Although not argued at any length by either side, the Court notes that the provision of signature lines for both parties, in addition to the language of the agreement, indicates that the parties intended that both signatures be present in order to create a binding agreement. Since the agreement was never signed by the Defendant, it was not binding.")(citations omitted).

44. Given the absence of any signature line on the Revised Bid Summary Sheet, it would not have been at all unreasonable



for a bidder, upon carefully reviewing the ITB, to have concluded that all it had to do to "execute" the Revised Bid Summary Sheet was to fill in and complete the blanks on that document and that there was no need for the document to be signed. Cf. Lemons v. Dragmister, No. 3:08-CV-423 JVB, 2010 U.S. Dist. LEXIS 11965 \*6 (N.D. Ind. February 9, 2010)("Requiring a signature without providing a signature line on the form (and barring a federal lawsuit where the inmate fails to sign) would effectively sand-bag unsuspecting inmates, depriving them of their right to seek redress in federal court for violations of their constitutional rights."); and Marks v. Williams, 278 S.E.2d 806, 808 (Va. 1981)("The agreement, moreover, contained no space set aside for Williams' wife's signature. The absence of such a space indicates that the wife's agreement was not a precondition of the contract, . . . ."). The reasonableness of this "no signature required" conclusion (that Dynamic, Austro, and JIJ apparently reached upon their review of the ITB) is even more evident when one considers that the term "signed" was used in the first sentence of Special Condition E. (which gave instructions regarding the Invitation to Bid Bidder Acknowledgement form), but not in the very next sentence of the same Special Condition (which dealt with the Revised Bid Summary Sheet). Cf. Leisure Resorts v. Frank J. Rooney, 654 So. 2d 911, 914 (Fla.

1995)("When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded."); Campbell v. Campbell, 489 So. 2d 774, 777 (Fla. 3d DCA 1986)("Just as it is recognized that the same words used in two parts of an instrument are deemed to mean the same thing in both places, so, as in this case, the use of different language strongly implies that a different meaning was intended.");(citation omitted); and Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So. 2d 515, 518 (Fla. 1st DCA 1984)("The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended.").

45. The foregoing notwithstanding, the "needs to be executed" language in the second sentence of Special Condition E. is also reasonably susceptible to the interpretation that a signature on the Revised Bid Summary Sheet was required. E.g., State v. Fields, 502 So. 2d 5, 6 (Fla. 4th DCA 1986)("'[T]o execute' can also mean 'to sign.'"); and Missouri-Indiana Investment Group v. Shaw, 699 F.2d 952, 954 (8th Cir. 1983)("[I]n popular speech, 'execute' is often used to refer merely to the act of signing a written contract."). Respondent therefore is free to find (as it has preliminarily done, at Petitioner's urging) that the bidders who did not sign their

Revised Bid Summary Sheets (that is, all bidders who bid on Items 1 and 2, except for Petitioner) deviated from the ITB.

46. The question remains whether these deviations were material. If they were not, the ambiguity in the ITB relied upon by Respondent to justify its proposed rejection of all bids on Items 1 and 2 (which ambiguity, no doubt, was responsible, at least in part, for these deviations) would not be (unlike the ambiguity in Caber) a "fatal[]" one reasonably warranting Respondent's taking such action. If, on the other hand, these deviations were material (and therefore non-waivable), Respondent's rejection of all bids on Items 1 and 2 would not be without justifiable reason.<sup>17</sup>

47. Respondent's preliminary determination to reject all bids on Items 1 and 2 was necessarily premised on the view that these deviations were material (thus making all bids on these items other than Petitioner's, including the lowest bid on each item, non-responsive).<sup>18</sup> Petitioner (although disagreeing, incorrectly in the undersigned's opinion, that there was an ambiguity in the ITB concerning whether the Revised Bid Summary Sheet had to be signed) shares Respondent's view that the deviations were material (and that therefore the deviant bids were non-responsive).

48. The undersigned cannot agree that the failure to have placed a signature on the Revised Bid Summary Sheet was a

material deviation from the ITB. Rather, the undersigned finds it was an immaterial variance since it did not give the offending bidders (each of whom submitted, as part of their bid, a signed Invitation to Bid Bidder Acknowledgement form and a Revised Bid Summary Sheet with all of the "blanks" filled in and completed) a competitive advantage over Petitioner, the lone bidder bidding on Items 1 and 2 whose bid did not suffer from this defect. Pursuant to General Condition 20. and Special Condition F. of the ITB, by having submitted bids which included signed Invitation to Bid Bidder Acknowledgement forms, these bidders have made binding offers as to Items 1 and 2 from which they are, by virtue of their not having signed their Revised Bid Summary Sheets, no more able than Petitioner to back out of.

49. Because the mere absence of a signature from the Revised Bid Summary Sheet was an immaterial deviation, it should be waived by Respondent and not result in a finding of non-responsiveness. See Menefee, 163 Cal. App. 3d at 1179 ("Williams involved a 'bid' that was lacking more than a signature; it had neither a total price nor the bidder's name. So Williams can be read narrowly as holding only that a 'bid' cannot be cured if it is not a bid at all. The bid in the present case is distinguishable because the executing signature is the only part that is missing. Even if incorporation of the bid bond signature into the bid is precluded by California law,

the absence of only one signature in an otherwise complete bid should be waivable by the public entity."); Kokosing Construction Co. v. Dixon, 594 N.E.2d 675, 681 (Ohio App. 1991)("Dayton requires that all bids for public contracts contain an affirmative action statement. The record indicates that Shook completed and submitted a five page affirmative action statement but failed to sign it. The city concluded that this omission rendered the bid non-responsive. The trial court concluded to the contrary. We agree with the trial court's finding that the absence of a signature on the affirmative action statement does not constitute a material deviation. This is not the case of a bidder failing to supply the statement. Rather, in this case the bidder, Shook, complied with all material parts of the specification. . . . The absence of the signature simply was not so material as to render the bid non-responsive. The deviation from the published requirement gave Shook no competitive advantage. To hold Shook's bid non-responsive because of this minor deviation from the bid specifications was an abuse of discretion by the city, and the trial court correctly so found.")(citations omitted); Spawglass Construction Corp. v. City of Houston, 974 S.W.2d 876, 885 (Tex. App. 1998)("Under the facts in this case, we find that the failure of CAI to submit a signed signature page with its bid proposal was a waivable defect because: (1) CAI signed the

proposal in three other places with the intent to give validity to its bid, and (2) because the bid and the bid bond are so connected by internal reference to each other, they could be treated as one signed instrument. Appellant's contention that CAI's bid was invalid for lack of a signature on the signature page is overruled."); and Farmer Construction, Ltd. v. State of Washington, 656 P.2d 1086, 1089 (Wash. 1983) ("The bid proposal and the bid bond are each in writing; the two writings are connected with each other by internal reference. Thus, there is a binding offer made by Farmer which it would be bound to honor upon acceptance by the contracting authority. Since Farmer would be bound to its bid, the absence of the written signature of the president of Farmer is not material. As the irregularity of a lack of written signature is immaterial, it may be considered an informality, and under paragraph L of the bid form requirements may be waived by the Department of General Administration.")(citation omitted).

50. It would be without reason or logic (or, in other words, it would be "arbitrary"), as well as contrary to the best interests of the taxpayers (the intended ultimate beneficiaries of the competitive bidding requirements governing the instant procurements<sup>19</sup>), for Respondent to reject all bids on Items 1 and 2 and readvertise these projects based on an ambiguity in the ITB concerning a waivable requirement, non-compliance with which

does not warrant a bidder's disqualification from consideration for award. As was stated in School Food Service Systems, 2001 Fla. Div. Adm. Hear. LEXIS 2647 \*47, "[l]etting authorities must be mindful that rejecting all bids discourages competitive bidding and hence should be the exception in public procurement rather than the rule." The invocation of this "exception" simply cannot be reasonably justified under the facts of this case.

51. In view of the foregoing, Respondent should not reject all bids on Items 1 and 2, but instead should, with respect to each of these items, award a contract to the "lowest responsive and responsible bidder." In determining the "lowest responsive and responsible bidder," Respondent should find that a bidder's failure to have signed its Revised Bid Summary Sheet constituted a minor irregularity not vitiating the bidder's responsiveness.

#### RECOMMENDATION

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

RECOMMENDED that the Palm Beach County School Board take the action described in numbered paragraph 51 above.

DONE AND ENTERED this 27th day of May, 2010, in  
Tallahassee, Leon County, Florida.



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STUART M. LERNER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of May, 2010.

ENDNOTES

<sup>1</sup> All references to Florida Statutes in this Recommended Order are to Florida Statutes (2009).

<sup>2</sup> This last sentence of Special Condition E. did not specifically address a situation where a bid complied, but not in every respect, with the "requirements" of this Special Condition, nor did it limit Respondent's ability to waive any immaterial non-compliance with "these requirements." Cf. Menefee v. County of Fresno, 163 Cal. App. 3d 1175, 1180 (Cal. App. 1985)("[T]he bid form itself contains mandatory language requiring the missing signature. After a blank line over 'signature of Bidder,' the proposal states: 'Note: If bidder is a corporation, the legal name of the corporation shall be set forth together with the signature of the officer or officers authorized to sign contracts on behalf of the corporation; if bidder is a co-partnership, the true name of the firm shall be set forth above together with the signature of the partner or partners authorized to sign contracts in behalf of the partnership; and if the bidder is an individual, his signature shall be placed above. If the signature is by an agent, other than an officer of a corporation or a member of a partnership, a Power of Attorney must be on file with the Owner prior to



opening bids or submitted with the bid; otherwise, the bid will be disregarded as irregular and unauthorized.' It is clear from this language that if an unauthorized person had signed, the bid would be rejected. Here, no one signed the proposal form. Although it may be argued that this should constitute a greater failure to comply with the signature requirements, there is no express statement that an unsigned bid will be rejected. Further, this mandatory language controls the bidder, not the board of supervisors. It requires a bidder to sign his bid, but does not control the board's discretion to waive the requirement.").

<sup>3</sup> Pursuant to Special Condition C. of the ITB, Fleischer's was ineligible to bid on Item 1 (Greenacres Elementary School) and Item 2 (South Olive Elementary School) because it did not attend the "mandatory site inspections" at those schools.

<sup>4</sup> As noted above, there was no signature line on the Revised Bid Summary Sheet.

<sup>5</sup> Ms. Swan has been "delegated authority from the superintendent to reject all bids" in School Board bid procurements.

<sup>6</sup> Similar action was not taken with respect to Item 3 because the "ambiguity" did not affect the outcome of competitive bidding process with respect to that item.

<sup>7</sup> See also § 1010.04(2), Fla. Stat. ("Each district school board . . . shall adopt rules to be followed in making purchases.").

<sup>8</sup> The bid solicitation documents in the instant case clearly indicated that there would be "multiple awards": one for each of the three projects advertised. See Special Condition B. ("Contract will be awarded to the lowest responsive and responsible bidder(s) for each item on the Bid Summary Sheet.").

<sup>9</sup> A district school board is an "agency," as that term is used elsewhere in Chapter 120, Florida Statutes (other than in Section 120.57(3), Florida Statutes). See School Board of Palm Beach County v. Survivors Charter Schools, Inc., 3 So. 3d 1220, 1231 (Fla. 2009)("No one disputes that a school board is an 'agency' as that term is defined in the APA."); Volusia County School Board v. Volusia Homes Builders Association, 946 So. 2d 1084, 1089 (Fla. 5th DCA 2006)("[T]he School Board is an agency subject to the Administrative Procedure Act."); Sublett v.

District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993)("A county school board is a state agency falling within Chapter 120 for purposes of quasi-judicial administrative orders."); and Witgenstein v. School Board of Leon County, 347 So. 2d 1069, 1071 (Fla. 1st DCA 1977)("It was obviously the legislative intent to include local school districts within the operation of Chapter 120."). It is not, however, an "agency," as that term is used in Section 120.57(3), Florida Statutes, since, as a constitutionally-created entity, it does not meet Section 287.012(1)'s definition of "agency." See Dunbar Electric Supply v. School Board of Dade County, 690 So. 2d 1339, 1340 (Fla. 3d DCA 1997)("School boards are constitutional entities created by Article IX, Section 4 of the Florida Constitution. School boards do not fall within the executive branch of the state government."); see also Dealer Tag Agency, Inc. v. First Hillsborough County Auto Tag Agency, Inc., 14 So. 3d 1238, 1240 (Fla. 2d DCA 2009)("We find, however, that the Tax Collector is a constitutional entity created by article VIII, section 1(d) of the Florida Constitution and is not a 'state agency' that is part of the executive branch of the state government. The fact that the Tax Collector is described as an 'authorized agent' of the DHSMV for the provisions of section 320.03 does not make it a state agency for the provisions of chapters 287 and 120."); and First Quality Home Care, Inc. v. Alliance for Aging, Inc., 14 So. 3d 1149, 1152 (Fla. 3d DCA 2009)("Furthermore, Alliance is not a state 'agency' under Florida's procurement statute. Section 120.57(3), Florida Statutes (2008), provides for additional procedures applicable to protests to contract solicitations or awards. Subsection 120.57(3)(g) states that '[f]or the purposes of this subsection, the definitions in s. 287.012 apply.' Part I of chapter 287 governs public procurement of contractual services. Section 287.012(1) provides that 'agency' 'means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government.' Alliance does not fall within this definition as it is not a listed entity. In addition, Alliance is not 'any other unit of organization' because the express language of the statute limits that designation to units of 'the executive branch of the state government.' Clearly, Alliance -- a private corporation -- is not a 'unit of organization' of the State's executive branch. Accordingly, we hold that Alliance is not a state agency pursuant to the definitions of 'agency' as provided in the APA or in the procurement statute."). Accordingly, but

for its incorporation in School Board Rule 6Gx50-6.14, Section 120.57(3) would not be applicable in the instant case.

<sup>10</sup> These "uniform rules of procedure" are found in Florida Administrative Code Rule Chapter 28-110.

<sup>11</sup> "To establish that one is adversely affected [within the meaning of Section 120.57(3), Florida Statutes, and therefore entitled to file a protest pursuant thereto], it must be shown that the proposed action [under challenge] will cause immediate injury in fact; and that the injury is of the type that the pertinent statute was designed to protect." Advocacy Center for Persons With Disabilities, Inc. v. Department of Children and Family Services, 721 So. 2d 753, 755 (Fla. 1st DCA 1998). A protester's lack of standing to file a protest is an affirmative defense that, if not timely raised, is waived. See Krivanek v. Take Back Tampa Political Committee, 625 So. 2d 840, 842 (Fla. 1993). Petitioner's lack of standing to file the instant protest has not been raised as an affirmative defense in the this case.

<sup>12</sup> The "de novo proceeding" that an administrative law judge must conduct pursuant to Section 120.57(3)(f), Florida Statutes, when an "adversely affected" person's protest is referred to DOAH is "a form of intra-agency review. The [j]udge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency" based upon the information that was available to the agency at the time it took such action. State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

<sup>13</sup> This last sentence of Section 120.57(3)(f), Florida Statutes, represents a codification of the holding in Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988) that, where a state agency's decision to reject all bids/proposals is challenged, "the hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly" in making its decision. (Pursuant to Chapter 96-159, Laws of Florida, effective October 1, 1996, the title of DOAH's Hearing Officers was changed to Administrative Law Judge.)

<sup>14</sup> In paragraph 17. of its Proposed Recommended Order, Petitioner withdrew its previously pled claim that this intended action would be "dishonest," leaving only its claim of

"arbitrar[iness]" to be resolved. (Petitioner has not at any time in this proceeding accused Respondent of acting in an "illegal" or "fraudulent" manner.)

<sup>15</sup> In Caber, as in the instant case, the agency had initially announced proposed contract awards, but changed its mind and decided to reject all bids after the proposed awards were protested. Finding that the agency did not exceed its authority "by rejecting all bids after Caber had filed its protests" notwithstanding the mandate of the predecessor of Section 120.57(3), Florida Statutes, that "the agency shall stop the bid solicitation process or the contract award process until the subject of the protest is resolved by final agency action," the Caber court (at 530 So. 2d 325, 337) stated the following:

The pertinent language in section 120.53(5)(c) provides that "the agency shall stop the bid solicitation process or the contract award process until the subject of the protest is resolved by final agency action." We construe this language, as does the Department, to mean that the Department could not continue the bidding process leading toward the award of any contract to other bidders until a bidder's protest had been resolved, but not that the Department was also precluded from immediately rejecting all bids and initiating a new ITB upon discovery of valid grounds for doing so. Therefore, when Caber's first protest revealed serious flaws in the ITB which ultimately required the Department to reject all bids (for reasons we hold were neither arbitrary nor capricious), the pendency of that protest did not deprive the Department of authority to act upon this deficiency in rejecting the bids. There is no limitation in the statutory language restricting the Department's power to immediately reject all bids and start the bid process anew with a valid ITB, rather than locking up the entire process pending hearing on the protest so that nothing could proceed. Once DGS had decided to reject all bids for the reason specified, to first await the outcome of a hearing on Caber's first protest before

taking action would be a complete waste of time and taxpayers' money. Of course, once the decision to reject all bids was announced, Caber was entitled to protest it, as it did, and have the validity of the Department's decision submitted to a hearing under section 120.57. See Couch Construction Co. v. Department of Transportation, 361 So. 2d 172 (Fla. 1st DCA 1978). After the Department's decision to reject had been heard by a hearing officer pursuant to Caber's second protest and determined to be valid under the applicable law, the Department's final order rejecting all bids became fully effective, thus freeing the bidding process to immediately begin anew, absent a stay of that final order.

<sup>16</sup> "Words in an instrument should be given their natural or most commonly understood meaning." Tropabest Foods, 493 So. 2d at 51-52.

<sup>17</sup> This would be true even if these material deviations were not the product of any ambiguity in the ITB, but rather (as Petitioner posits) were the direct result of the non-compliant bidders' carelessness. There would be only one responsive bid each for Items 1 and 2 if these deviations were indeed material, and Florida Administrative Code Rule 6A-1.012(12)(c) authorizes district school boards to reject all bids "[i]f less than two" responsive bids are received in response to a bid solicitation. See also M.H.M.S. Corporation v. Department of Management Services, No. 98-4952BID, 1999 Fla. Div. Adm. Hear. LEXIS 5317 \*11 (Fla. DOAH February 12, 1999)(Recommended Order)("It is not arbitrary for Respondent to reject all bids if there is only one responsive bidder.").

<sup>18</sup> It therefore cannot be said, as Respondent has asserted in numbered paragraph 98 of its Proposed Recommended Order, that "[a]n analysis of whether [non-compliance with the] requirement of a signature was a minor irregularity and therefore should [be] waived is not appropriate as this matter is a rejection of all bids case." Were the lack of a signature on the Revised Bid Summary Sheet determined to be merely a "minor irregularity" and not a material one, Respondent would have no apparent reasonable justification not to waive this "irregularity" and award

contracts for Items 1 and 2 to the "lowest responsive and responsible bidder" (as opposed to rejecting all bids and rebidding).

<sup>19</sup> See, e.g., Miami-Dade County School Board v. J. Ruiz School Bus Service, Inc., 874 So. 2d 59, 62 (Fla. 3d DCA 2004)("[C]ompetitive bidding statutes were enacted for the benefit of taxpayers . . . .").

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.