STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

URBAN BUILDING SYSTEMS, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-1147BID
	)	
MARTIN COUNTY SCHOOL BOARD,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
PIRTLE CONSTRUCTION COMPANY,	)	
	)	
Intervenor.	)	
_____	)	

RECOMMENDED ORDER

Administrative Law Judge Eleanor M. Hunter conducted a final hearing in this case by video teleconference between sites in Port St. Lucie and Tallahassee, Florida, on April 14, 2010, and May 26 and 27, 2010.

APPEARANCES

For Petitioner: Joseph L. Mannikko, Esquire
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For Respondent: Douglas Griffin, Esquire
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For Intervenor: William C. Davell, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent's preliminary decision to negotiate a contract with Intervenor to provide construction manager at risk services for renovations at two elementary schools is contrary to statutes, rules, policies, or the request for qualifications, in violation of Section 120.57(3)(f), Florida Statutes (2009).

PRELIMINARY STATEMENT

On October 1, 2009, Respondent issued a Request for Qualifications for construction manager at risk services for renovations at two elementary schools. Initially, twelve or thirteen[1] firms responded, including the Petitioner and Intervenor. After an advisory committee first narrowed the list to six, and then to three, the three finalists gave PowerPoint presentations before Respondent. Following the presentations, on December 15, 2009, Respondent ranked Intervenor first and Petitioner second. Petitioner filed an Amended Final Protest dated March 2, 2010, to challenge the ranking. On March 8, 2010, Respondent transferred the case to the Division of Administrative Hearings with a request for the assignment of an administrative law judge to conduct the hearing. Following a telephone conference on March 11, 2010, the case was set for final hearing on April 14, 2010. The final hearing began that

day, but was not concluded until after two more days of hearing on May 26 and 27, 2010.

At the hearing, Petitioner presented the testimony of Ronald Kirschman, Maura Barry-Sorenson, Julian Angel, David L. Anderson, Laurie Gaylord, Susan Hershey, Lori Shekailo, Gary Pirtle, and Jan Hoover. Petitioner's Exhibits 1 (pages 35, 36, 37, 40-42, 63, 66, and 72), 3, 5, 6, 16, 17 (page 2), 20 (page 1), 31, 34, 37, 43-`49 (pages 1 and 2), and 56 (page 5) were received in evidence. Respondent presented the testimony of Jan Hoover and Lori Shekailo. Respondent's Exhibits 1, 3, 13, 14, 17, and 24 were received in evidence.

The Transcript was filed July 8, 2010. Proposed Recommended Orders were filed by Petitioner on July 7, 2010, and by Respondent, joined by Intervenor, on July 8, 2010. Unless otherwise indicated references to Florida Statutes are to the 2009 publication.

FINDINGS OF FACT

1. Respondent Martin County School Board ("Respondent" or "the School Board") operates the public school system established in Martin County, Florida, pursuant to Section 1001.30, Florida Statutes.

2. In 2002, the School Board began using "construction managers at risk" ("CMR") who bid to negotiate contracts for construction projects. If contract negotiations are successful,

the CMR assumes the responsibility for scheduling and coordination in pre-construction planning and during construction, including soliciting bids from subcontractors. The CMR is responsible for the successful, timely, and economical completion of a project. See § 255.103, Fla. Stat. In May 2009, the School Board hired a Director of Facilities who proposed new ranking criteria for CMR services. The School Board approved the criteria at its meeting on July 28, 2009.

3. On October 1, 2009, the School Board issued Request for Qualifications No. 080351-0-2009 (“the RFQ”), for CMR services for renovations to some of the buildings at two public elementary schools, Pinewood and Crystal Lake. The scope of the renovations included approximately 60,000 square feet at Pinewood with an estimated construction cost of $2,975,000, and 80,000 square feet at Crystal Lake with an estimated construction cost of $3,725,000.

4. Twelve firms, including Urban Building Systems, Inc., ("Petitioner" or "Urban") and Pirtle Construction Company, Inc., ("Intervenor" or "Pirtle") submitted timely responses to the RFQ.

5. The RFQ included “Instructions to Proposers” which, in relevant part, described the process as follows:

> The process is outlined in School Board Rule 6330. School Board rules are available on-

line at www.sbmc.org/schoolboard/board-rules.php.

Step 1 - SHORT LISTING. Following receipt of the proposals, the District's Professional Services Advisory Committee (PSAC) shall meet to review and analyze the proposals for the purpose of reducing the number of applicants qualifying for interviews with the PSAC to no more than six (6). The PSAC shall be comprised of one (1) administrator from the Facilities Department, one (1) administrator from the Finance Department, one (1) administrator from the Operations Department, one (1) member designated by the Superintendent, one (1) Board member and one (1) representative from the community. The Director of Facilities will serve as chairperson. If the District receives six (6) or fewer proposals, all applicants will be granted interviews with the PSAC.

The following criteria and point values will be used by the PSAC to determine eligibility for interview:

	Points
1. Letter of Interest (office address on letterhead to help determine "location" points)	0
2. Professional Qualification Statement (PQS)	0
3. Minority Business Certification	0-5
4.. Company History and Structure – documenting capabilities and past record of performance	1-5
5. Location	1-5
6. Previous Work for MCSD	1-5
7. Letter of Intent from a surety company indicating the applicant's bond ability for this project. The surety shall acknowledge that the firm may be bonded for each phase of	10

the project, with a potential maximum construction cost of $8,646,860. The surety company must be licensed to do business in Florida and must have a Best Rating of “A”.

8. Qualification and Experience of Personnel – documenting capabilities, ability and adequacy of personnel	1-10
9. Current Work Load	1-10
10. Related projects similar in scope or amount completed by the applicant, with particular emphasis on school projects.	1-10
11. Project Management Systems	1-10
12. Scheduling Systems	1-10
13. Cost Control Systems	1-10
14. Litigation, major disputes, contract defaults and liens in the last five years.	

Note: see criteria score sheets attached: Exhibit B – Short List for Interviews

Exhibit C – Recommended Rank Order

Up to six (6) firms with the highest ratings will be interviewed by the PSAC.

Step 2 - PROFESSIONAL SERVICES ADVISORY COMMITTEE. The PSAC will reduce the number of qualified applicants to three, and submit a recommended order of preference of these applicants to the Superintendent and School Board. The PSAC’s recommended order of preference is advisory only, and is not binding on the School Board. The PSAC shall apply the following criteria and point values to determine a number rating and recommended rank order:

1. Proposed Minority Business Involvement in Project	0-5

2. Progressive use of technology	0-5
3. Volume of work previously awarded to each firm by the district with the object of effecting am (sic) equitable distribution of contracts among qualified firms	0-5
4. Recent, current and projected workloads	0-5
5. Past Record and Performance	0-5
6. Experience with and Plans to promote local subcontractor participation	0-5
7. Participation in, and promotion of, post-secondary vocational programs	0-5
8. Warranty Services	0-5
9. Project approach and methods – Understanding of Project	0-10
10. Project Schedule and Scheduling tools – Applicants willingness to meet time requirements	0-10
11. Cost Control & Value Engineering Techniques – Applicants willingness to meet budget requirements	0-10
12. Quality Control Techniques	0-10
13. Safety Program	0-10
14. Ability of Professional Personnel	0-10

Applicants will be allowed a total of 45 minutes for the interview with the PSAC.

Suggested:
20 minutes for presentation
15 minutes for questions
10 minutes for closing comments

Step 3 – PRESENTATIONS. The School Board may, in its sole discretion, invite one or more of the three finalists to interview with the School Board prior to the final ranking by the School Board.

Step 4 – FINAL RANKING. The School Board will evaluate qualifications of the three finalists, which evaluation shall include consideration of the written materials submitted by the applicants,

> performance data on file with the District, written materials submitted by other firms or individuals, and the recommendation of the PSAC. Although the Board shall consider the recommendation of the PSAC, such recommendation shall not be binding on the Board, and the Board retains the authority to re-rank the three finalists.
>
> At the conclusion of its evaluation, the Board shall adopt an order of preference for the three finalists it deems the most highly qualified to perform the required services.

6. In addition to the criteria set forth in the RFQ, School Board Rule 6330 IV.A. required the Professional Services Advisory Committee ("PSAC") to "evaluate . . . performance data on file." That evaluation was not done because the School Board failed to maintain any performance data. There is no evidence that scoring and ranking was affected by the lack of performance data.

7. The ("PSAC") met on November 12, 2009, for the “Short Listing” and decided to invite six firms, with the highest number of points, to make presentations to the PSAC. The firms and their corresponding Step 1 points were as follows:

	Firm	Step 1 Points
1.	Morganti	543
2.	Pirtle	541
3.	Suffolk	531
4.	Urban	526
5.	Klewin	510
6.	Weitz	510

8. When the PSAC met on November 23, 2009, to reduce the number of qualified applicants to three and to determine the order of preference, the rankings were as follows:

	Firm	Step 2 Points
1.	Pirtle	436
2.	Klewin	424
3.	Urban	424
4.	Morganti	423
5.	Suffolk	421
6.	Weitz	400

9. The PSAC meeting on November 12, 2009, was not advertised as a public meeting in violation of the "Sunshine Law."

10. The three highest ranking firms from Step 2, Pirtle, Klewin and Urban, made their presentations at a workshop on December 15, 2009, to the following School Board members: Lorie Shekailo, Chair; Susan Hershey, Vice Chair; David L. Anderson; Maura Barry-Sorenson; and Laurie Gaylord. After the workshop, the School Board convened a regularly scheduled meeting on the same evening, and voted to rank Pirtle first, Urban second, and Klewin third. Pirtle was ranked number one by four School Board Members, Ms. Shekailo, Ms. Hershey, Dr. Anderson, and Ms. Gaylord. Urban was ranked number one by one member, Ms. Barry-Sorenson.

11. On February 11, 2010, Urban filed a Notice of Protest and, on February 19, 2010, a Formal Protest of the School

Board's intent to negotiate a contract with Pirtle. After the School Board and Urban were unable to resolve the issues informally, Urban filed an Amended Protest on March 2, 2010.

Step 1 - Short Listing

12. In Step 1, Urban challenged the points awarded for minority business certification, location, and letters of intent for bonding ability. Urban also challenged the fact that firms that had done the most work for the School Board were favored with higher scores in Step 1 in apparent conflict with the statutes, rules, and policies that promote an equitable distribution of work.

13. There was no disagreement that Urban is a certified minority business enterprise ("MBE"), and that Pirtle is not. The RFQ criterion for Step 1 is "minority business certification" with "0-5" points available. Urban urges that scores should be either 0 or 5 points, because a firm either is or is not an MBE. To meet the MBE procurement goal of Section 287.042, Florida Statutes, the RFQ authorized that use of the CMR format in effect on March 1, 2005, but the PSAC used the format developed in 2009.

14. When it met, the PSAC members used guidelines allowing it to award 5 points to a certified minority business, and to award 3 to 4 points if the business had a minority partner. As a result, each of the six members of the PSAC gave Urban 5

points and gave Pirtle 3 points. If Urban is correct, then its score for Step 1 would have remained 526, but Pirtle's would have been 541 minus 18 or 523.

15. Because all other firms, except Urban and West,[2] including all of those selected in Step 1, would have had the same 18-point reduction in their scores, the firms that moved on to Step 2 would have been the same. Urban's claim that Pirtle would have been eliminated from consideration based on a change in the MBE scoring is not supported by the record.[3]

16. Urban's interpretation of the MBE scoring is not supported by other provisions of the RFQ and is contradicted by its claim to be entitled to additional points for its bonding ability. The letter of intent for bonding ability at a specific amount from an A-rated surety is also something that a firm either does or does not have, but there is no choice or range of points available for that criterion. The RFQ provides for 10 points if a firm has the letter and there is no range, so without the letter a firm presumably would have gotten no points.

17. Five members of the PSAC gave both Pirtle and Urban 10 points for having the letters of intent from an A-rated surety company indicating the applicant's bonding ability. One person gave Pirtle 10 points but gave Urban 5 points. Assuming, as previously noted, that the criterion called for either no points

or 10 points, then Urban would have finished Step 1 with 5 additional points, or a total of 531, tied with Suffolk for third place.[4]

18. The criterion for location, which offered a range of 1-5 points in the RFQ, was more specifically refined for the PSAC as follows: 5 points for a Martin County business; 4 points for the Tri-County area; 3 points for Dade, Broward, Orlando, etc. Every member of the PSAC gave Urban, headquartered in Palm City, Martin County, 5 points. Pirtle, headquartered in Palm Beach County, received five scores of 4s and one 3. Urban's claim that Pirtle is located in Broward County and had only recently opened an office in Palm Beach County is not supported by the evidence. Pirtle recently moved from one office in Palm Beach County to another office that is also in Palm Beach County. Pirtle was entitled to an additional point for location from one PSAC member.

Step 2 - PSAC

19. In Step 2, the PSAC narrowed the list to 3 firms. Urban argued that scores from Step 1 should have been carried over to Step 2. That position is not supported by the terms of the RFQ, which authorized differences in criteria for Step 2 with no methodology for incorporating Step 1 scores.

20. Urban challenged, in Step 2 (and again in Step 4 below), the scoring for "volume of work previously awarded to

each firm by the district with the object of effecting an equitable distribution of contracts among qualified firms." Unlike Step 1 scoring, in Steps 2, 3, and 4, the qualified firms that have done the least work for the School Board should be favored.

21. Since the School Board began using CMR contracts in 2002, there have been three different CMRs for three projects at high schools, three different CMRs for four projects at middle schools, and six different CMRs for six projects at elementary schools.

22. In the PSAC's evaluation of the volume of work previously done, Urban received a score of 5 for having done less work than Pirtle, which received a score of 4. Urban maintained that Pirtle should have received zeros from the five PSAC members and would have been eliminated in Step 2, with a score of 416 instead of 436. At the time of the RFQ review, the School Board had five ongoing CMR contracts with five different firms. Pirtle was one of the five. The Chair of the PSAC explained that under the ranking system, a zero should have been reserved for any firm that had two ongoing or pending CMR contracts. Differentiating between firms with one contract and those with more than one contract, is reasonable.

23. The parties stipulated that from late 2003 or early 2004 through December 15, 2009, Pirtle has been awarded a CMR

contract three times for total construction costs of $71,063,746. Urban was awarded one CMR contract for $7,841,814 in construction costs. It is impossible to conclude from total construction costs alone that Pirtle should have been further penalized based on the volume of past and current work. One CMR for Pirtle, to construct Anderson Middle School in 2005, accounted for $33,446,609, or over 47 percent of Pirtle's total CMR projects. Urban has never built a school from start to finish and did not respond to the Anderson RFQ.

24. Pirtle has had a total of seven contracts or amended contracts, as compared to Urban's one. Before the project at issue in this case, Urban and Pirtle had only competed for the same CMR project once, the Pinewood/Seawind RFQ, and Urban was selected. That RFQ provided for "services necessary for the development and phased construction of an additional classroom at Pinewood Elementary, Seawind Elementary and possibly additional classrooms at other elementary schools in the future." The RFQ also advised that "[P]hases may or may not be consecutive. Additional phases may be added by amendment to the CMR pending successful performance and availability of funds." The challenged CMR proposal in this case includes renovations not invited to enter into a contract amendment for this project.

25. Pirtle's seven contracts or amended contracts included four phases of construction at Martin County High under one CMR

contract awarded in 2006. The language in the Martin County High School RFQ providing for subsequent phases was identical to that in the Pinewood/Seawind RFQ. Unlike Urban, Pirtle has been the CMR for all phases at Martin County High, including the cafeteria, the music building, and utilities, for total construction costs of $18,502,726, or another 26 percent of Pirtle's total. Urban maintains that each of these, as a matter of law, should be considered separately in assessing the volume of work previously awarded to Pirtle, further reducing its score. Urban also maintains that the School Board uses "phases" in a manner that violates its governing statutes and rules.

26. Urban claimed that "the School Board's definition of project is contrary to statute" because Section "287.055 defines project as a "fixed capital outlay activity", not several fixed capital outlay activities." In fact, the definition in Section 287.055(2)(f), Florida Statutes, is as follows:

> (f) "Project" means that fixed capital outlay study or planning activity described in the public notice of the state or a state agency under paragraph (3)(a). A project may include:
>
> 1. A grouping of minor construction, rehabilitation, or renovation activities.
>
> 2. A grouping of substantially similar construction, rehabilitation, or renovation activities.

27. Urban also cited as support for its position the State Requirements for Educational Facilities (SREF), as incorporated in Florida Administrative Code Rule 6A-2.0010, and School Board Rule 6330. The School Board Rule, with minor variations, tracks the language of Section 287.055(2)(f), Florida Statutes. The SREF definition is as follows:

> (71) Project. A project can be one or more of the following:
>
> (a) Architectural/Engineering Project. Project in which an architect or engineer translates specific educational requirements into drawings and specifications.
> (b) Construction Project. The process in which a contractor uses plans and specifications to assemble materials, erect a building or structure, or physically modify real property. (Emphasis added.)

28. Based on the language in the statute and rules, and the differences in the past experience of Pirtle and Urban, it is not possible to reach a factual conclusion that the PSAC erred in its consideration of Pirtle's volume of work.

Step 3. Presentations

29. The School Board exercised its discretion to invite the three finalists to make presentations. In a letter dated December 7, 2009, Urban was notified that it was one of three finalist and would be given 30 minutes "to address the fourteen items noted in the RFQ and should reflect emphasis to items with the greatest weight." Urban was notified, in a letter dated

December 9, 2009, that the time for the presentation had been reduced to twenty minutes and that "[t]he presentation should be structured to briefly address the fourteen items noted in the RFQ with emphasis on your firm's capabilities and project conditions." Rather than "briefly address[ing] the fourteen items" as instructed, Urban spent an inordinate amount of its time having company representatives introduce themselves and giving the details of the phasing of one of the projects. Urban, therefore, was unable to complete its presentation.

30. When given an opportunity during questioning to offer more information, Urban said its warranty was "forever" although its written material mentioned a 12-month walk through. One School Board member described the comment as "flippant." By contrast, when Pirtle's attention was called to its representative's apparently mistaken statement that its warranty was 25 months, although their written material showed 24 months, Pirtle's Vice President quickly said it would stand by the 25-month statement.

31. In response to an inquiry concerning apprenticeships, Urban mentioned hiring students and having had one go on to attend the Rinker School at the University of Florida. By contrast, during its presentation, Pirtle noted that 50 percent of the subcontractors on its last project have apprenticeship programs.

32. The criteria for Step 3, as indicated in the letters to the three presenters, were the 14 items listed in the RFQ.

Step 4. Final Ranking

33. Urban alleged that it was prejudiced by the actions of the School Board because Step 2 scores were not carried forward to Steps 3 and 4. Step 2 scores were the basis for the selection of firms competing in Steps 3 and 4. As noted, the School Board members used Step 2 criteria to evaluate the PowerPoint presentations in Step 3 and for final ranking in Step 4.

34. School Board Members differed in how far back they considered "recent" work ranging from "over the years" to two to five years. There is no specific criteria that would dictate a certain period of time. There is no doubt, however, that they were aware of what each firm had done. In their presentations to Respondent, both Petitioner and Intervenor touted their success in performing previous projects for the Respondent and others, and listed the projects. Petitioner listed 11 hard bid projects and one CMR project, emphasizing that it was awarded in 2002. Intervenor listed six projects, both hard bids and CMRs from 1995 through 2005, including Martin County High School.

35. Foremost in the mind of Ms. Barry-Sorenson, who ranked Urban number one, were Urban's MBE certification and that it was a local firm. In addition to these criteria, other School Board

Members mentioned the following: business reputation, professionalism, ability to interact with school staff, sophistication of the approach and presentation, explanation and understanding of the project, depth of qualified personnel, in-house technology staff, mention of the Jessica Lundsford Act, or the general thinking that one firm was more qualified than the other. These factors were not improperly considered. School Board Rule 6330 provides, in relevant part, that the School Board may consider the following:

> E. The evaluation process for professional services shall include, but not be limited to, capabilities; adequacy of personnel; past record; experience . . .

Campaign Contributions

36. Pirtle was awarded its first of its three CMR contracts in late 2003 or early 2004, to renovate Hobe Sound Elementary School. Subsequently, Pirtle or its representatives made two $500 contributions in 2004 and two $500 contributions in 2008 to Dr. Anderson; one $500 contribution in 2006 to Ms. Gaylord; two $500 contributions in 2008 to Ms. Hershey. Pirtle also solicited contributions for Dr. Anderson from its subcontractors, but the record does not indicate the amount of contributions received as a result. Pirtle has given no contributions to Ms. Shekailo who, along with Dr. Anderson, Ms. Gaylord, and Ms. Hershey, ranked Pirtle number one, or to

Ms. Barry-Sorenson, who ranked Urban number one. Pirtle has also given no contributions to Ms. Barry-Sorrenson who ranked Urban number one.

37. Of the last five CMR projects prior to this one, Dr. Anderson ranked five different firms number one, including Pirtle and Urban once each. On the same projects, Ms. Gaylord ranked Pirtle number one twice, and Urban and two other firms number one once. Ms. Hershey and Ms. Shekailo did not rank either Pirtle or Urban number one among competitors for the five CMR projects prior to this one.

38. There is no evidence of a pattern of favoring Pirtle over Urban for reasons other than the criteria established by statutes, rules, policies, and the RFQ.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(3), Fla. Stat.

40. Respondent is an authorized governmental entity allowed to contract for construction management services, as described in Section 255.103, Florida Statutes, using the competitive negation process set forth in Section 287.055, Florida Statutes. See § 1013.45, Fla. Stat.

41. In this case, Petitioner has alleged that the meeting of the PSAC on November 12, 2009, violated Florida's Sunshine

Law, Section 286.011(1), Florida Statutes. In general, the Sunshine Law provides that the public be given reasonable notice of all boards and commissions. If a government action is taken at a meeting that should have been noticed as required by the Sunshine Law, such action is void. Circuit courts are authorized to enforce the Sunshine Law. Under the statute, the Division of Administrative Hearings has no jurisdiction to enforce the Sunshine Law. See Veolia Transportation Services, Inc. v. Commission for Transportation Disadvantaged, et al. Case No. 08-1636BID (Fla. DOAH July 9, 2008; F.O. September 26, 2008); and Kids, Inc. v. Palm Beach County School Bd., Case No. 03-2168BID (Fla. DOAH November 7, 2003; F.O. March 19, 2004.)

42. It is, nevertheless, appropriate to consider whether the review process was tainted by the violation of Subsection 286.011(1), Florida Statutes. Petitioner, as a bidder, has a personal right to raise the issue in an administrative hearing. See Silver Express Company v. Dist. Bd. Of Trustees of Miami-Dade Community College, et al, 691 So. 2d 1099 (Fla. 3rd DCA 1997). According the decision in Silver Express, PSAC meetings were subject to the Sunshine Law.

> In Spillis Candela & Partners, Inc. v. Centrust Savings Bank, 535 So. 2d 694 (Fla. 3d DCA 1988), we stated:
> "The law is quite clear. An ad hoc advisory board, even if its power is limited to making recommendations to a public agency and even if it possesses no authority to

> bind the agency in any way, is subject to the Sunshine Law. The committee here, made a ruling affecting the decision-making process and it was of significance. As a result, it was improper for the committee to reach its recommendation in private since that constituted a violation of the Sunshine Law."

Id at 1101.

43. Unlike the public enforcement of the Sunshine Law in Silver Express, the Petitioner in an administrative hearing has to demonstrate that it was adversely affected by the failure to give notice a public meeting. See Transportation Management Services of Broward, Inc. v. Commission for the Transportation Disadvantaged, et al, 2005 Fla. Div. Adm. Hear. LEXIS 976, Case No. 05-0920BID (Fla. Div. Adm. Hear. April 29, 2005; F.O. August 3, 2005). In this case, however, the evidence established that proper notice was not given for the first PSAC meeting, that Petitioner was one of those selected in Step 1, and that scores from Step One did not carry over to Step 2. For these reasons, it is impossible to conclude that Petitioner has been adversely affected. The only possible remedy, voiding Step 1 scores, would be a meaningless act.

44. Subsection 120.57(3)(b), Florida Statutes, imposes the following requirement on protestors:

> Any person who is adversely affected by the agency decision or intended decision 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. (Emphasis added.)

45. The parties, in their Joint Pre-hearing Stipulation, agreed that Petitioner did not comply with the provisions of Subsection 120.57(3)(b). A decision in this case, therefore, cannot be based on issues which were apparent, but not challenged, before or at the time the RFQ was posted, including whether the School Board should be using CMR contract phases; whether Step 1 scores should have carried over to subsequent Steps; whether the 2005 scoring format should have been used rather than the one developed in 2009; whether a range of points should not have been available in Step 1 for MBE; whether Urban's CMR contract should have been amended for an additional phase.

46. With regard to the remaining issues in this challenge, the burden is on Petitioner, as the protester, to prove by a preponderance of the evidence, that the Respondent acted in a manner proscribed in Section 120.57(3)(f), Florida Statutes, which, in relevant part, is as follows:

> In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. (Emphasis Added.)

47. "[A]gency missteps" that are de minimis and have not disadvantaged the protester do not warrant reversal. See PCA Health Plans of Florida Inc. v. School Board of Broward County, Case No. 95-4559BID (Fla. DOAH December 8, 1995).

48. By virtue of the applicable standards of review, the protester must establish that it has been disadvantaged by the agency's misstep which was: (a) clearly erroneous; (b) contrary to competition; or (c) an abuse of discretion [that is, arbitrary or capricious]." R. N. Expertise, Inc. v. Miami-Dade County School Board, Case No. 01-2663BID (Fla. DOAH February 4, 2002; F.O. March 20, 2002).

49. Those terms, as described in Barton Protective Services, LLC v. Department of Transportation, Case No. 06-1541BID (Fla. DOAH July 20, 2006; F.O. August 21, 2006), are applied to the analysis of a bid protest as follows:

> Agency action will be found to be "clearly erroneous" if it is without rational support and, consequently, the administrative law judge has a "definite and firm conviction

that a mistake has been committed." See U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); see also Anderson v. Bessemer City, 470 U.S. 564, 574 (1985)("Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous."); Legal Environmental Assistance Fund. v. Board of County Commissioners of Brevard County, 642 So. 2d 1081, 1084 (Fla. 1994)("When an agency's construction amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand."); Pershing Industries, Inc. v. Department of Banking and Finance, 591 So. 2d 991, 993 (Fla. 1st DCA 1991) ("It is axiomatic that an agency's construction of its governing statutes and rules will be upheld unless clearly erroneous. If an agency's interpretation is one of several permissible interpretations, it must be upheld despite the existence of reasonable alternatives.")

* * *

An act is "contrary to competition" if it unreasonably interferes with the objectives of competitive bidding, which, it has been said, are: to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids. Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931); and Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

"An action is 'arbitrary if it is not supported by logic or the necessary facts,'

> and 'capricious if it is adopted without thought or reason or is irrational.'" Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34 (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. A 'capricious' action is one taken irrationally, without thought or reason."); 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."). It has been said that "[t]he greater the discretion granted to a contracting officer, the more difficult it will be to prove the [action or] decision was arbitrary and capricious." Galen Medical Associates v. United States, 369 F.3d 1324, 1330 (Fed. Cir. 2004).

50. In the instant case, there can be no disadvantage to the Petitioner from Step 1 scoring because it did not carry over to Step 2, and because Petitioner advanced to Step 2. The issues that remain to be resolved are the following: (1) the absence of performance data; (2) the points awarded to Intervenor for volume of work by the PSAC in Step 2 and the School Board members' consideration of that criterion in Steps 3 and 4; and (3) the influence of campaign contributions on final rankings in Step 4.

51. Respondent had no performance data on file for review, but the lack of that data has not been shown to have affected the outcome.

52. It has not been shown that the PSAC members could not logically and reasonably reserve giving lower points to a bid applicant who had more than one pending or ongoing project.

53. The fact that Respondent's members determined past work of the firms inconsistently, looking back "over the years," from two to five years, or at the last five CME contracts, has not been shown to have had a material impact on the final rankings. Plans of Florida, Inc. v. School Board of Broward County, 1995 Fla. Div. Adm. Hear. LEXIS 4763; Case No. 95-4559BID (Fla. DOAH. December 8, 1995)(Recommended Order) ("The few instances of arbitrary scoring that were actually proved were too few in number to have any material impact on the average scores).

54. School Board Rule 6330 gave wide discretion to consider all legitimate factors with the equitable distribution of work by providing, in relevant part, that:

> One objective shall be to effect an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms and such other factors as may be determined by the Board to be applicable to its particular requirements.

55. If, in fact, campaign contributions had influenced the rankings at the PSAC level, because of the participation of one Board Member on the PSAC, and/or in Steps 3 and 4, then that would not be within Respondent's discretion. Such influence would be clearly erroneous, contrary to competition, and likely, one would expect, lead to an outcome that is arbitrary and capricious. The only basis for the claim that campaigns influenced votes is the fact that lawful campaign contributions were given. That is not evidence of the recipient's dishonesty. Each of Respondent's Members articulated a logical and rational basis for their reactions to the presentations and rankings.

56. In Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So. 2d 1128 (Fla. 1st DCA 1991), the court held that:

> The Hearing Officer need not, in effect, second guess the members of evaluation committee to determine whether he and/or other reasonable and well-informed persons might have reached a contrary result. Rather, a "public body has wide discretion" in the bidding process and "its decision, when based on an honest exercise" of the discretion, should not be overturned "even if it may appear erroneous and even if reasonable persons disagree." Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913, (Fla. 1988) (quoting Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982)). (emphasis in original). "The hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly." Groves-Watkins, 530 So. 2d at 914.

57. Absent a showing of dishonesty and given the wide discretion that must be afforded Respondent, Petitioner has failed to prove by a preponderance of the evidence that the decision to rank Intervenor as the number one CMR was clearly erroneous, contrary to competition, arbitrary, or capricious.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the School Board enter a final order rejecting Urban's protest.

DONE AND ENTERED this 23rd day of August, 2010, in Tallahassee, Leon County, Florida.

ELEANOR M. HUNTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of August, 2010.

ENDNOTES

1/ The Joint Prehearing Stipulation stated that there were thirteen responses, but the record showed twelve responses to the RFQ. See Petitioner's Exhibit 3, page 1.

2/ Because West received four 5s and two 3s, the assumption is that it is an MBE.

3/ The scores for Step 1 with 18 points deducted from all applicants except Urban and West would have been: Amodie 376; Biltmore 444; Jacquin 465; Kaufman Lynn 471; Klewin 492; Pirtle 523; Proctor 476; Morganti 525; Suffolk 513; Urban 526; Weitz 492; and West 452.

4/ The six highest firms and their Step 1 scores would have been: Morganti 543; Pirtle 541; Suffolk 531; Urban 531; Klewin 510; and Weitz 510.

COPIES FURNISHED:

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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.