STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

COOPERATIVE SERVICES OF FLORIDA, INC.,

Petitioner,

v. **Case No.:** 13-0963BID

DEPARTMENT OF MANAGEMENT SERVICES,

Final Order No. DMS – 14-0007

Respondent,

and

MINNESOTA MULTISTATE CONTRACTING ALLIANCE FOR PHARMACY,

Intervenor.
_____/

FINAL ORDER

PRELIMINARY STATEMENT

On January 15, 2014, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) submitted a Recommended Order (RO) to the Department of Management Services (DMS or Department). The RO indicates that a copy was also served upon counsel for the Petitioner, Cooperative Services of Florida, Inc. (CSF), and counsel for Intervenor, Minnesota Multistate Contracting Alliance for Pharmacy (MMCAP). A copy of the RO is attached as Exhibit A. Pursuant to Section 120.57(3)(e), Florida Statutes, and the notice provided in the RO, parties were allowed to file written exceptions to the RO. On February 7, 2014, CSF timely filed Exceptions to the RO. The DMS and MMCAP responded to the

Petitioners' Exceptions on February 17, 2014. This matter is now on administrative review before the Secretary of the Department for final agency action.

BACKGROUND

On November 1, 2011, the Department issued an invitation to negotiate (ITN) seeking a group purchasing organization (GPO) to provide pharmaceuticals to the State of Florida. Three vendors, CSF, MMCAP and Managed Healthcare Associates, responded and advanced to the negotiations stage. After the negotiations and receipt of the vendors' best and final offers, the Department on January 23, 2013, posted a Notice of Agency Decision stating its intent to award the contract to MMCAP. CSF timely protested the Notice of Intent to Award, and the formal hearing was held on October 2-3, 2013, in Tallahassee, Florida.

THE RECOMMENDED ORDER

In the RO, the ALJ recommends that the Department enter a final order dismissing the Petitioner's bid protest. (RO p. 24). The ALJ concludes that the Petitioner failed to prove by a preponderance of the evidence that DMS violated its governing statutes, rules and policies or the ITN and that the intended award to MMCAP is not clearly erroneous, contrary to competition, arbitrary or capricious. (RO p. 22-23)

STANDARD OF REVIEW FOR ADOPTION OR MODIFICATION OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2012); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62-63 (Fla. 1st DCA 2007).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health,* 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.,* 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So. 2d 622, 623 (Fla. 1st DCA 1986); *Walker v. Bd. of Prof'l Eng'rs*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006).

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.,* 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009)*; Collier Med. Ctr. V. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So.2d 485, 486-87 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health,* 805 So. 2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cty.*, 746 So. 2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). Considerable deference should be

accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible." *Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So. 2d at 609.

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So. 2d 540, 542 (Fla. 4th DCA 2003). An agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, however, even

when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2012); *Barfield* 805 So. 2d at 1011-12; *Fla. Public Employee Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON EXCEPTIONS FILED BY PETITIONER

Having considered the DOAH pleadings, the transcript of the proceedings, exhibits entered into evidence, and the exceptions filed by the Petitioner and the responses to the exceptions, the undersigned finds as follows with regard to the exceptions filed by the Petitioner:

Exception 1

Petitioner takes exception to Finding of Fact 17, in which the ALJ found that MMCAP met the minimum mandatory requirement of having an annual pharmaceutical purchase volume of at least one billion dollars within the past two years. In an endnote to this paragraph, the ALJ stated that "CSF's position that MMCAP does not meet the criteria is rejected." (Recommended Order n.1)

CSF argues that the ALJ's factual finding in paragraph 17 is not supported by competent substantial evidence because it claims Rose Jacobs Svitak, Manager of the Knowledge and Financial Management Unit for MMCAP, gave "unrebutted" testimony that MMCAP's sales volume for the two-year period was only $615 million and to meet the required threshold, it included purchases from wholesalers. Exception 1 is a re-argument of evidence concerning MMCAP's responsiveness, which the ALJ considered and rejected in her Recommended Order.

CSF's arguments fail because they are inconsistent with the totality of Ms. Svitak's testimony. On direct examination, Ms. Svitak testified that MMCAP's pharmaceutical purchase volume exceeded one billion dollars and it was proper to include other pharmaceutical products with a National Drug Code, such as over the counter items, anti-neoplastic agents, and anti-inflammatories. (Tr. 459-60) Similarly, Kenneth Greco, CSF's Vice President of

Pharmaceutical Services testified that over the counter items would have been included in calculating CSF's annual pharmaceutical purchase volume. (Tr. 226)

Ms. Svitak further explained that the $615 million dollar figure identified in Petitioner's Exhibit 75 was presented at a conference unrelated to the solicitation of this proceeding. Those figures, Ms. Svitak continued, did not represent the entirety of MMCAP's annual pharmaceutical purchase volume because it included only brand and generic pharmaceuticals. (Tr. 473-74)

Ms. Svitak explained that MMCAP included purchases from wholesalers in calculating its annual pharmaceutical purchase volume because those purchases were of products with prices negotiated by MMCAP. (Tr. 475) GPOs do not purchase anything directly; instead, they negotiate prices for clients by contracting with manufacturers and wholesalers. (Tr. 475) Purchases from a wholesaler that are "off contract," meaning they were not part of the contracted list of drugs with MMCAP, still have prices that have been negotiated by MMCAP due to discounts associated with MMCAP's payment terms and volume. (Tr. 474-75) Consequently, those purchases are attributable to MMCAP and are appropriately included in its annual pharmaceutical purchase volume. (Tr. 475-76) In addition to Ms. Svitak's testimony, Intervenor's Exhibit 16, which was admitted without objection, provides further documentary evidence that MMCAP meets the purchase volume requirement.

Finally, Addendum No. 3, *Message Board Responses*, of the ITN, item # 21, contains the following question: "Can the annual purchase volume minimum requirement in question 2.12.1.1.2 include any distribution or **wholesale purchase volume**?" The Department's answer to this question is "Yes." *See* Joint Ex. 2, p. 61 (bate stamp)(emphasis supplied) On December 5, 2011, CSF was provided a point of entry to challenge the Department's determination that wholesale purchase volume can be included in responding to section 2.12.1.1.2. *Id.* at p. 57 (bate

stamp) CSF did not protest this item, so challenge to the inclusion of wholesale purchase volume is waived. However, even if the issue was not waived, the Department's clear intent of what can be included in the purchase volume, as set forth in the question and answer, is consistent with the ALJ's RO and is not consistent with, and in fact, negates CSF's theory that "Allowing MMCAP's inclusion of purchases from wholesalers, when the requirement of the ITN focused instead on the ability of a GPO to meet this requirement, is not supported by logic or fact." (Exceptions p. 8)

Competent substantial evidence supports the ALJ's ruling that MMCAP met the minimum mandatory requirement of at least one billion dollars in annual pharmaceutical purchase volume over two years. CSF is rearguing the weight of the evidence presented, which is precluded by law.

Because there was competent substantial evidence supporting the ALJ's factual findings, the agency cannot set them aside. *Walker*, 946 So. 2d at 605. The evidence CSF cites does not permit overturning the ALJ's contrary findings. *Arand*, 592 So. 2d at 280. Therefore, based on the foregoing, the Petitioner's Exception 1 is denied.

Exception 2

Petitioner takes exception to Finding of Fact 22, in which the ALJ found that MMCAP notified DMS by email that it was constitutionally prohibited from complying with the indemnification requirements in the Invitation to Negotiate ("ITN"). Petitioner also takes exception to Finding of Fact 23, in which the ALJ found that DMS released Addendum No. 2, which eliminated the ITN's indemnification requirements of the original ITN for governmental entity GPOs such as MMCAP. CSF argues that the ALJ's factual findings in paragraphs 22 and 23 are not supported by competent substantial evidence. According to CSF, there was no

evidence in the record to support the claim that MMCAP qualifies as a governmental entity prohibited by its governing laws to provide indemnification in accordance with Addendum No. 2, and it was improper to simply accept MMCAP's "word" on this point.

Exception 2 is a re-argument of evidence concerning MMCAP's responsiveness, which the ALJ considered and rejected in her Recommended Order. CSF's arguments fail because there was competent substantial evidence supporting the ALJ's finding.

Initially, CSF's exception is based on the faulty premise that MMCAP has the burden of proof to show that it is a governmental entity. It is well established that the petitioner has the burden of proof in these proceedings. Fla. Stat. § 120.57(3)(f). CSF's arguments are inconsistent with the evidence presented. MMCAP's claim that it is a government entity is supported in documentation provided to, and accepted by, the Department during the ITN, the exhibits in evidence, and by sworn testimony at the final hearing.

To assert that *no* evidence was presented concerning MMCAP's status as a governmental entity is simply untrue. CSF Exhibit 23 is an email from an MMCAP representative asserting that it could not comply with the indemnification requirements, as part of the State of Minnesota, because of constitutional prohibitions. This email was submitted to DMS during the course of the ITN and was later admitted into the record at the hearing as evidence that MMCAP was a governmental entity. Likewise, Joint Exhibit 2, *Notice of Solicitation Invitation to Negotiate*, clearly sets forth that MMCAP is a governmental entity and is both statutorily restricted from providing indemnification. *See* JE 2, pp. 218-221 (bate stamped)

Alan Dahlgren, the Managing Director at MMCAP, testified that MMCAP is "a governmental GPO that is housed within the State of Minnesota, specifically the Department of Administration, which reports up to the Governor of Minnesota." (Tr. 483-84) Moreover,

"employees of MMCAP are State of Minnesota employees." (Tr. 485) CSF Exhibit 23 also constitutes evidence that MMCAP is a governmental entity constitutionally prohibited from providing indemnification.

The record is replete with competent substantial evidence that MMCAP is a governmental entity prohibited from providing indemnification. CSF contends that it was improper for DMS and the ALJ to accept MMCAP's "word" on this point, but fails to provide any legal basis for this statement and ignores the sworn testimony and documentary evidence admitted into evidence. As the petitioner, CSF has the burden of proof on this issue in this proceeding, and it has failed to meet that burden.

CSF cites *County of Martin v. Minn. Counties Ins. Trust*, 658 N.W.2d 598 (Minn. App. 2003) to support its argument that the Minnesota Joint Powers Act allows MMCAP to provide indemnification. This argument is not persuasive. *County of Martin* is inapposite dealing with an entirely different statutory scheme and legal issue.

Because there was competent substantial evidence supporting the ALJ's factual findings, the agency cannot set them aside. *Walker*, 946 So. 2d at 605. The evidence CSF cites does not permit overturning the ALJ's contrary findings. *Arand*, 592 So. 2d at 280. Therefore, based on the foregoing, the Petitioner's Exception 2 is denied.

Exception 3

Petitioner takes exception to Finding of Fact 26, in which the ALJ found that at the hearing, MMCAP proved that its charter had recently been amended to allow MMCAP to work with any wholesaler. The ALJ also found that MMCAP was prepared to work with the wholesaler eventually selected by the State of Florida in a future procurement. CSF argues that the ALJ's factual finding in paragraph 26 is not supported by competent substantial evidence

because the amended charter was not introduced into evidence and it did not address MMCAP's ability to perform the contract at the time of the initial solicitation.

Exception 3 is a re-argument of evidence concerning MMCAP's responsiveness, which the ALJ considered and rejected in her Recommended Order. CSF's arguments fail because the ALJ's finding was supported by competent substantial evidence.

The testimony to which CSF takes exception is the testimony CSF itself elicited on cross examination, to which no party objected and on which the ALJ justifiably relied. (Tr. 498-99). It is improper for a party to object to the ALJ's reliance on evidence that party itself proffered when no one objected to its admissibility at the time of the hearing. The ALJ weighed the credibility of Alan Dahlgren as a witness and found him credible, and his testimony was based on his personal knowledge; therefore, her finding that MMCAP's charter had been amended due to his testimony concerning the matter should stand.

The ALJ's finding that MMCAP's amended charter allowed them to work with any wholesaler is entirely relevant to the determination at the time of the notice of intended decision that MMCAP was a responsible vendor capable of carrying out the contract. As part of the Best and Final Offer ("BAFO"), MMCAP certified that it would comply with all conditions of the contract (as negotiated in its Statement of Work) and terms of the ITN. (CSF Ex. 40) It is entirely reasonable for the negotiation team to accept the binding promise of vendors as proof they will comply with the eventual contract requirements. MMCAP's charter had the ability to be amended at the time of the notice of intended decision, and the charter's amendment by the time of the hearing affirms MMCAP's promise during the solicitation that it would comply with all contract conditions.

The ALJ's factual findings are also supported by the testimony of Alan Dahlgren, who testified that MMCAP consulted with legal counsel, Minnesota's Chief Procurement Officer, and the Commissioner of the Department of Administration, who all confirmed that MMCAP had the ability to contract with a Florida-selected wholesaler. (Tr. 528-29). The Governor of Minnesota also confirmed that MMCAP will be able to contract with the State of Florida. (TR. 525, MMCAP Ex. 17)

CSF's argument that the charter would prevent MMCAP from fulfilling the contract conditions is faulty given that MMCAP's contracting ability as a Minnesota governmental entity is controlled by procurement laws and not its charter; so stated simply, MMCAP's charter does not prevent it from contracting in conformance with the ITN's requirements. (Tr. 513-14, 528) Even if the charter did control, CSF's argument is also questionable since the section cited as requiring use of an MMCAP-approved wholesaler refers to states with "membership agreements" with MMCAP, as opposed to direct state term contracts with separate terms. (CSF Exhibit 6, Article III Section 3; CSF Exhibit 65, No. 2(E)) Under the proposed contract, the State of Florida would not be a member of MMCAP and would therefore not be obligated to sign the membership agreement requiring an MMCAP-contracted wholesaler. Additionally, MMCAP demonstrated that the provision cited by CSF can be, and has been, waived. For instance, MMCAP's contract with the State of Texas demonstrates MMCAP was able to waive the portions of its charter requiring that the state select an MMCAP-contracted wholesaler due to Texas conducting its own wholesaler procurement. (Tr. 487-88, 513-14, 525-26, 528-29)

Because there was competent substantial evidence supporting the ALJ's factual findings, the agency cannot set them aside. *Walker*, 946 So. 2d at 605. The evidence CSF cites does not

permit overturning the ALJ's contrary findings. *Arand*, 592 So. 2d at 280. Therefore, based on the foregoing, the Petitioner's Exception 3 is denied.

Exception 4

Petitioner takes exception to Finding of Fact 28, in which the ALJ found that Jasper Watkins resigned on September 2, 2010 from MMCAP's advisory board in advance of the ITN's release in order to avoid a potential conflict of interest, but continued to receive MMCAP's newsletter through 2012. Petitioner also takes exception to Finding of Fact 29, in which the ALJ found that Mr. Watkins served on the Evaluation Team, which advanced all three potential vendors to the negotiation stage, was appointed to the Negotiation Team, participated in several strategy sessions, then was removed before negotiations started and played no further role in the ITN. In summary, CSF contends in its Exceptions that "the ALJ's finding that Watkins' resignation from MMCAP's advisory board prevented a conflict from occurring is not supported by competent substantial evidence as it ignores relevant and material evidence presented, and in fact conflicts with his removal from the ITN process, as documented in Paragraph 29." (Exceptions p. 12)

Exception 4 is essentially a re-argument of evidence concerning Jasper Watkins' supposed conflict of interest, which the ALJ considered and rejected in her Recommended Order. Notwithstanding this, CSF's arguments do not form a legal basis for an exception because the ALJ's findings are supported by competent substantial evidence. CSF is essentially disagreeing with the ALJ's interpretation of evidence and asking to substitute its own factual findings. Competent substantial evidence supported the ALJ's factual findings in paragraphs 28 and 29, including: Alan Dahlgren's testimony that Watkins resigned from MMCAP's advisory board in advance of the ITN's release to avoid any potential conflicts (Tr. 519, 523); Mr.

Watkins' resignation email given over a year in advance of the ITN's release (Tr. 526-27; MMCAP Exhibit 10); and Dahlgren's testimony that Watkins' continued receipt of the MMCAP newsletter was an administrative oversight rather than an intentional inclusion. (Tr. 523)

Petitioner presented no evidence of any actual conflict of interest from Watkins' minimal involvement in the ITN; CSF merely pointed to other evidence that the ALJ rejected as indicating a conflict of interest. Especially disturbing is CSF's mischaracterization of the quotation from Ms. Kelly Scott's memorandum. (Exceptions p. 12, CSF Ex. 57) ("Kelly Scott acknowledged that 'changes likes this can be very impactful' on the ITN process.") It is clear that Ms. Kelly's concern about the removal of Mr. Watkins was not because of any conflict of interest, but her concern was because the timing of his removal, its effect on the appointment of a new negotiator on the eve of the negotiation sessions and the loss of Mr. Watkins' expertise as he was identified by the Department of Health as its most qualified person to participate in the ITN. (CSF Ex. 57)

Because there was competent substantial evidence supporting the ALJ's factual findings, the agency cannot set them aside. *Walker*, 946 So. 2d at 605. The evidence CSF cites does not permit overturning the ALJ's contrary findings. *Arand*, 592 So. 2d at 280. Therefore, based on the foregoing, the Petitioner's Exception 4 is denied.

Exceptions 5 & 6

Petitioner takes exception to the portion of Finding of Fact 32 which stated that "[a]t various instances during the negotiation meetings, the Negotiation Team members properly discussed matters outside the ITN." (RO p. 12-13) Petitioner also takes exception to Finding of Fact 35, in which the ALJ found that during the recommendation of award meetings on October

26 and 29, 2012, "[t]he Negotiation Team focused on the selection criteria of the ITN 'as refined during the negotiations.'" (RO p. 13-14)

CSF argues there is no competent substantial evidence to support these factual findings because the recordings and transcripts of the "negotiation meetings," unlike the "recommendation meetings," were not introduced into evidence. CSF additionally argues that the ALJ's factual findings are not supported by competent substantial evidence because (i) they contrast evidence in the recommendation meeting transcripts demonstrating that the Negotiation Team members relied on matters outside the ITN in making their decision, (ii) pricing should have been considered a neutral factor rather than as support for choosing MMCAP, and (iii) there was no competent substantial evidence to support the Negotiation Team members' concern over CSF's ability to obtain contracts.

Exceptions 5 and 6 are a re-argument of the propriety of the Negotiation Team's recommended award. Petitioner made this argument concerning the negotiation sessions and recommendation meetings at hearing, as well as in its Proposed Recommended Order. The ALJ having considered the arguments and evidence rejected this argument in her Recommended Order. CSF's arguments fail because the ALJ's findings are supported by competent substantial evidence and should therefore not be rejected or modified.

Competent substantial evidence supports the ALJ's finding that the Negotiation Team members properly discussed matters outside the ITN. Dr. Brandon Brantley, Public Health Pharmacy Bureau Chief with the Department of Health, testified that the Negotiation Team met with the GPOs three times a week for months to discuss and ask questions of them. (Tr. 436) CSF itself acknowledges that the Team did this by discussing matters outside the ITN "during the negotiation sessions, when the Negotiation Team asked questions to learn about the ITN and

inquired as to matters outside of the ITN." (Exceptions p. 13) CSF's attorney specifically asked Dr. Brantley: "And isn't it true that you did consider matters outside the scope of the ITN during the **negotiation session**?" (Tr. 442) (emphasis supplied) This question was objected to and was overruled by the ALJ. CSF's counsel persisted and used CSF Exhibit 81 to refresh Dr. Brantley's recollection that matters outside the ITN were discussed. (Tr. 444-46) CSF's Exhibit 81, as well as Exhibits 79 and 80 are styled "In re: Negotiation Team Meeting." It is reasonable for the ALJ to infer[1] that the Negotiation Team learned of and spoke about such matters during the "negotiation meetings" even though the ALJ omitted the word "team" from her description in paragraph 32 of the RO.

Specifically, as to Exception 6, competent substantial evidence supports the ALJ's finding that the Negotiation Team focused solely on the selection criteria in recommending the award to MMCAP. Each member of the negotiation team present at the hearing testified that he did not rely on criteria outside the ITN in making his decision to recommend the award. (Tr. 303, 382, 407, 415, 437-38, 444, 448) David Bennett, Purchasing Specialist Supervisor, Category Manager for IT Hardware with DMS, testified that he reminded Dr. Brantley that he could not consider matters outside the ITN in recommending the award. (Tr. 303) Cliff Nilson, DMS Bureau Chief of the Services Bureau, despite voting for CSF and against MMCAP, still testified that all the Negotiation Team members based their decision to award on the selection criteria and not matters outside the ITN. (Tr. 382-83) Dr. Stephen Whitfield, Pharmaceutical Services Director with the Department of Corrections, testified that he only considered the selection criteria in making his decision of recommended award and did not consider things outside the scope of the ITN. (Tr. 407, 415) Dr. Brantley also testified that while he mentioned

[1] *See Florida Evidence Code* § 90.301(3) ("Nothing in this chapter shall prevent the drawing of an inference that is appropriate.")

extraneous matters during the recommendation meetings, he did not base his decision on anything other than the selection criteria, as required by the ITN. (Tr. 437-38, 444, 448) Dr. Brantley's testimony certainly supports the ALJ's finding that the Negotiation team properly discussed matters outside the ITN.

The testimony of the Negotiation Team members is supported by the recommendation meeting transcripts. (CSF's Ex. 80-81) In the meeting on October 26, Dr. Brantley mentioned services MMCAP had provided under the current arrangement that were not included as part of the ITN. (CSF Ex. 80, p. 29-31) However, at the October 29 meeting, Dr. Brantley clarified that his comments about MMCAP's extra services were expressions of frustration at the restrictions of the ITN. In response to a comment that the ITN prevented the Negotiation Team from considering those outside services as part of the award criteria, Dr. Brantley agreed, stating that the ITN had "certain constraints that prevent us from being flexible enough to consider options, you know, in terms of the vendors." (CSF Ex. 81, p. 10-12) He clearly recognized that he could not consider such criteria in recommending the award and felt constrained by this restriction because he did not base his decision on factors he would otherwise consider. (Tr. 448)

CSF's second argument that pricing should have been a neutral factor rather than support for the decision to award to MMCAP fails to articulate an adequate basis for rejecting or modifying the ALJ's findings of fact. CSF acknowledges that price was part of the selection criteria. It is therefore entirely appropriate for the team to use pricing as a basis for recommending the contract be awarded to MMCAP. To argue that pricing was part of the selection criteria and yet should not be used in determining who should receive the award is illogical. As set forth in DMS's Response to Exception 7, CSF waived the ability to challenge pricing as part of the selection criteria when it failed to file a protest within 72 hours of its

release in accordance with Section 120.57(3)(b), Florida Statutes. There is also competent substantial evidence that the pricing analysis was sound and in accordance with industry standards. (Tr. 194, 462-63, 552-54; DMS Ex. 26, p. 87-88)

CSF's third argument that there was no competent substantial evidence supporting the Negotiation Team's concern over CSF's ability to obtain contracts fails to articulate an adequate legal basis for rejecting or modifying the ALJ's findings of fact. As the petitioner in the proceeding, CSF did not carry its burden of proof. CSF simply failed to show that the Negotiation Team's concerns were invalid. There is competent substantial evidence supporting the Negotiation Team members' concern over CSF's ability to obtain contracts. A financial analysis shows the difference between CSF and MMCAP for already-contracted pharmaceuticals was approximately 800 pharmaceuticals. (CSF Ex. 10) The Team had concerns not solely over CSF's ability to obtain contracts, but its ability to quickly obtain contracts. (Tr. 440-42) While there were no studies or reports confirming that CSF would not be able to timely obtain contracts, there were also no studies or reports confirming that CSF would be able to timely obtain contracts. (Tr. 441) Dr. Brantley's testimony and the financial analysis constitute competent substantial evidence that CSF has failed to refute.

As the petitioner in the proceeding, CSF has the burden of proof. The ALJ weighed all the documentary evidence, testimony, and the credibility of witnesses and rejected all of CSF's arguments. The petitioner is essentially attempting to re-try its case and asking the agency to find alternate facts, but the agency does not have the authority to do so. Even if the record contains evidence contrasting an ALJ's factual finding, the agency may not overturn that finding as long as it was based on other competent substantial evidence. *Arand*, 592 So.2d at 280.

Therefore the ALJ's findings must stand, *Rogers*, 920 So. 2d at 30; *Walker*, 946 So. 2d at 605, and the Petitioner's Exceptions 5 and 6 are denied.

Exception 7

Petitioner takes exception to Conclusion of Law 54, in which the ALJ concluded that CSF waived the right to protest the ITN price analysis by not challenging it within 72 hours of its release as required by section 120.57(3)(b), Florida Statutes. CSF argues that while the challenge to the first pricing analysis had been waived, the challenge to second pricing analysis was not waived. The second pricing analysis, CSF argues, was not conducted pursuant to a formal addendum with notice of the vendors' protest rights or used against CSF until the recommendation of award to MMCAP. CSF also argues that price was a neutral factor and should not have been used as a basis to award to any GPO.

Exception 7 is re-argument of the utility of the pricing analysis, which the ALJ considered and rejected as waived in her Recommended Order. Notwithstanding this, CSF's arguments fail. In rejecting or modifying a conclusion of law, the agency must state its reasons with particularity and make a finding that its substituted conclusion is as or more reasonable than the ALJ's conclusion. § 120.57(1)(l), Florida Statutes (2012). CSF's conclusions are not as or more reasonable than the ALJ's, so the ALJ's conclusions should stand.

CSF's arguments in this Exception are inconsistent. It states:

> CSF did not challenge the initial pricing analysis (and in fact, was the lowest price GPO). Nor did it challenge the methodology of the second analysis. Rather, CSF contended that while pricing is generally an important element in a solicitation, the evidence in the instant record established that the pricing exercises, as 'snapshots in time,' did not truly inform the Negotiation Team as to which vendor would ultimately be able to secure the lowest priced pharmaceuticals for the state going forward." (Exceptions p. 24-25) Therefore, "reliance on the results of the second pricing

> analysis- while giving no consideration to the first analysis- to award the contract to MMCAP was arbitrary." (Exceptions p. 25)

CSF appears to argue that while it did not challenge the methodology or ultimate purpose of the first pricing exercise or the methodology of the second exercise, it wishes to challenge the ultimate use to which the second exercise was put, despite such use being identical to the first exercise. Additionally, CSF simultaneously argues that the ITN pricing was useless and should not have been utilized as criteria; nevertheless, they then argue the first ITN pricing exercise should have weighed in favor of CSF as the lowest bidder.

The ALJ based her conclusion on findings of fact supported by competent substantial evidence in the record that the pricing methodology utilized in the ITN was in accordance with industry standards. (Tr. 194, 462-63, 552-54; DMS Exhibit 26, p. 87-88) In Finding of Fact 34, to which CSF did not take exception, the ALJ found that "DMS had the vendors participate in the [pricing exercises] analysis to show the best overall pricing and to demonstrate whether the vendor would be able to aggressively work on behalf of the state to maintain best pricing in the constantly changing pharmaceutical market." (Recommended Order p. 13) Conducting a pricing analysis using "snapshots in time" is consistent with the specifications of the original ITN that went unchallenged. CSF has indeed waived the right to protest. § 120.57(3)(b), Florida Statutes (2012)

The petitioner has failed to show that their substitute conclusion of law is as or more reasonable than the ALJ's conclusion of law. The petitioner has failed to provide the Department with a sufficient legal basis for rejecting or modifying the ALJ's conclusion of law. § 120.57(1)(l), Florida Statutes (2012). Therefore, based on the foregoing, the Petitioner's Exception 7 is denied.

Exception 8

Petitioner takes exception to Conclusion of Law 58, in which the ALJ concluded that DMS acted in compliance with its governing rules, policies, and the ITN specifications, as well as acting in conformity with Senate Bill 2002 (SB 2002) and Chapter 287, Florida Statutes. CSF argues this conclusion is incorrect because the Negotiation Team did not award the contract based on the selection criteria, as set forth in Exception 6.

Exception 8 is essentially a re-argument of the propriety of the Negotiation Team's recommendation of award, which the ALJ considered and rejected in her Recommended Order. Notwithstanding this, CSF's argument fails for the same reasons stated in DMS's Response to Exceptions 5 and 6 above.

The petitioner has failed to show that their substitute conclusion of law is as or more reasonable than the ALJ's conclusion of law. The petitioner has failed to provide the Department with a sufficient legal basis for rejecting or modifying the ALJ's conclusion of law. § 120.57(1)(l), Florida Statutes (2012) Therefore, based on the foregoing, the Petitioner's Exception 8 is denied.

Exception 9

Petitioner takes exception to Conclusion of Law 59, in which the ALJ concluded that section 78 of SB 2002 does not prohibit MMCAP from applying for the GPO contract, as it simply requires specific terms and conditions to which MMCAP must comply. CSF argues that SB 2002 prohibits DMS from awarding the contract to MMCAP, citing to the language of SB 2002 and to CSF Exhibit 32- a report titled PS2.

Exception 9 is a re-argument of the legislative intent of the proviso language in SB 2002, which was considered and rejected by the ALJ in her Recommended Order. Notwithstanding

this, CSF's arguments fail for several reasons. As set forth in DMS's Proposed Recommended Order, SB 2002 is an implementing bill for the Florida Legislature's General Appropriations Act, valid for one year and codified only in Laws of Florida, not Florida Statutes. Substantive directions for the expenditure of funds are unconstitutional in the General Appropriations Act. SB 2002 does not constitute a "statute" as contemplated by Chapter 287, Florida Statutes, and its provisions expired in 2012, well before negotiations for this ITN ended. *See Brown v. Firestone*, 382 So. 2d 654 (Fla. 1980); *Graham v. Firestone*, Circuit Court of the Second Judicial Circuit, #82-1703, Leon County Florida, 1982.

Even if SB 2002 were a "statute," DMS complied with its provisions. CSF's argument that the proviso language prohibits an award to MMCAP is misleading. According to CSF, "Section 78 clearly mandates that the *state* 'shall terminate its relationship with MMCAP.'" (Exceptions p. 29) (emphasis supplied). In fact, the last sentence of section 78 states, "Upon approval of the Legislative Budget Commission, **the Department of Health** shall terminate its participation in the Minnesota Multistate Contracting Alliance for Pharmacy." (Joint Exhibit 1) (emphasis supplied). CSF's statement substituting "state" for "the Department of Health" erroneously equates the Department of Health as the State of Florida. SB 2002 mandated that the **Department of Health**, not the Department of Management Services or the State of Florida, to terminate its participation in MMCAP. The Department of Management Services has no relationship with MMCAP other than through this new and different procurement. It is through the Department of Health that Florida participates under a participation agreement with MMCAP. Courts are instructed to look no further than the plain language of a statute in determining legislative intent when the statute is clear and unambiguous. *City of Miami Beach v. Galbut*, 626 So. 2d 192, 193 (Fla. 1993). DMS has complied with the

clear and unambiguous language of SB 2002, so Conclusion of Law 59 should not be rejected or modified.

CSF's statement also erroneously equates participation in MMCAP with any and all relationships with MMCAP. SB 2002 mandated that the Department of Health terminate its *participation*, not any and all relationships, with MMCAP. Currently, there is no contract with MMCAP; instead, Florida and MMCAP are operating pursuant to a joint powers agreement allowing cooperative purchasing. (CSF Exhibit 31). Florida, through the Department of Health, participates as a member of MMCAP along with a coalition of other states, according to the terms set out in the Joint Powers Agreement. This agreement consistently refers to member states as "participating states." (CSF Exhibit 31). Upon approval from the Legislative Budget Commission, the Department of Health is able to terminate this agreement.

Separately, DMS can enter into a contract constituting an entirely new relationship with MMCAP governed by the terms of the ITN, which complied with SB 2002, and would be entirely different than the terms of the previous joint powers arrangement (for example, allowing for transparent pricing, purchases outside the contract, and assisting Florida with a formulary or preferred drug list, for example). To ignore the Legislature's word choice and interpret the language of SB 2002 as much broader than its plain meaning would be contrary to established case law. *Miami Beach*, 626 So. 2d at 193.

Finally, to accept CSF's argument would mean that the Legislature intended to single out and exclude a particular vendor from a competitive procurement. The Department is charged by the Legislature to coordinate the purchase of commodities and contractual services for the state. *See* Fla. Stat. § 287.032(1). The polestar by which the Department carries out its legislative mandate is as follows:

> **The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically**; and that documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in the process by which commodities and contractual services are procured. It is essential to the effective and ethical procurement of commodities and contractual services that there be a system of uniform procedures to be utilized by state agencies in managing and procuring commodities and contractual services; that detailed justification of agency decisions in the procurement of commodities and contractual services be maintained; and that adherence by the agency and the vendor to specific ethical considerations be required.

Fla. Stat. § 287.001 (emphasis supplied). To read into proviso language that it is legislative intent to exclude a potential vendor is in direct conflict with the concept of fair and open competition.

Because the ALJ's interpretation of SB 2002 is consistent with the plain meaning of its language, CSF's arguments fail. The petitioner has failed to show that their substitute conclusion of law is as or more reasonable than the ALJ's conclusion of law. The petitioner has failed to provide the Department with a legal sufficient basis for rejecting or modifying the ALJ's conclusion of law. § 120.57(1)(l), Florida Statutes (2012) Therefore, based on the foregoing, the Petitioner's Exception 9 is denied.

Exception 10

Petitioner takes exception to Conclusion of Law 60, in which the ALJ concluded that the Evaluation Team determined all three vendors had the capability to perform the contract by meeting the minimum mandatory requirements in the ITN. CSF argues that this conclusion is incorrect because MMCAP was not a responsive vendor, as set forth in Exceptions 1 and 2. CSF also states that Watkins voted MMCAP as responsive while on the Evaluation Team.

Exception 10 is re-argument of evidence concerning MMCAP's responsiveness, which the ALJ considered and rejected in her Recommended Order. CSF's arguments fail for the same reasons stated in DMS's Responses to Exceptions 1, 2, and 4. The petitioner has failed to show that their substitute conclusion of law is as or more reasonable than the ALJ's conclusion of law. The petitioner has failed to provide the Department with a sufficient basis for rejecting or modifying the ALJ's conclusion of law. § 120.57(1)(l), Florida Statutes (2012) Therefore, based on the foregoing, the Petitioner's Exception 10 is denied.

Exception 11

Petitioner takes exception to Conclusion of Law 61, in which the ALJ concluded that MMCAP was a responsive and responsible vendor that met the minimum mandatory requirements. The ALJ also concluded that MMCAP's amended charter allowed it to work with a non-contracted wholesaler, and MMCAP did not need to indemnify the state because of Addendum No. 2. CSF argues that this conclusion is incorrect because MMCAP was not a responsive and responsible vendor, as set forth in Exceptions 1 and 2. CSF also argues that MMCAP did not qualify as a governmental entity as defined in Addendum No. 2, as set forth in Exception 3.

Exception 11 is re-argument of evidence concerning MMCAP's responsiveness, which the ALJ considered and rejected in her Recommended Order. CSF's arguments fail for the same reasons stated in DMS's Responses to Exceptions 1, 2, and 3. The petitioner has failed to show that their substitute conclusion of law is as or more reasonable than the ALJ's conclusion of law. The petitioner has failed to provide the Department with a sufficient legal basis for rejecting or modifying the ALJ's conclusion of law. § 120.57(1)(l), Florida Statutes (2012). Therefore, based on the foregoing, the Petitioner's Exception 11 is denied.

Exception 12

Petitioner takes exception to Conclusion of Law 62, in which the ALJ concluded that the negotiations in the ITN were handled properly and that DMS made the award based on the proper selection criteria. CSF argues that this conclusion is incorrect because DMS relied on selection criteria outside the ITN in making its award, as set forth in Exceptions 5 and 6.

Exception 12 is re-argument of the propriety of the Negotiation Team's recommended award, which the ALJ considered and rejected in her Recommended Order. CSF's arguments fail for the same reasons stated in DMS's Responses to Exceptions 5 and 6. The petitioner has failed to show that their substitute conclusion of law is as or more reasonable than the ALJ's conclusion of law. The petitioner has failed to provide the Department with a sufficient legal basis for rejecting or modifying the ALJ's conclusion of law. § 120.57(1)(l), Florida Statutes (2012). Therefore, based on the foregoing, the Petitioner's Exception 12 is denied.

Exception 13

Petitioner takes exception to Conclusion of Law 65, in which the ALJ concluded that the final selection criteria the Negotiation Team chose provided best value to the state. CSF argues that while it agrees with the ALJ's statement, it disagrees with any implications or conclusions that the Negotiation Team followed the selection criteria. CSF has failed to articulate a legal basis for an exception. Since CSF agrees that the selection criteria provided the best value to the state, it is actually objecting to the Findings of Fact and Conclusions of Law in Exceptions 5, 6, and 12 regarding the Negotiation Team rather than anything contained within Conclusion of Law 65. Notwithstanding this, CSF's arguments concerning the propriety of the Negotiation Team's recommended award fail for the same reasons stated in DMS's Responses to Exceptions 5, 6, and 12. The petitioner has failed to show that their substitute conclusion of law is as or more

reasonable than the ALJ's conclusion of law. The petitioner has failed to provide the Department with a sufficient legal basis for rejecting or modifying the ALJ's conclusion of law. § 120.57(1)(l), Florida Statutes (2012). Therefore, based on the foregoing, the Petitioner's Exception 13 is denied.

Exception 14

Petitioner takes exception to Conclusions of Law 67, 68, and 70, in which the ALJ concluded that the Intent to Award to MMCAP was not contrary to DMS's governing statutes, rules, policies, or ITN specifications and that DMS's actions were not clearly erroneous, contrary to competition, or arbitrary or capricious. CSF argues, as set forth in all its previous Exceptions, reasons as to why these conclusions are incorrect. CSF's arguments fail for the same reasons stated in DMS's previous ruling on the exceptions. The petitioner has failed to show that their substitute conclusions of law is as or more reasonable than the ALJ's conclusions of law. The petitioner has failed to provide the Department with a sufficient legal basis for rejecting or modifying the ALJ's conclusions of law. § 120.57(1)(l), Florida Statutes (2012). Therefore, based on the foregoing, the Petitioner's Exception 14 is denied.

Exception 15

Petitioner takes exception to Conclusion of Law 69, in which the ALJ concluded that Watkins' minimal participation in the ITN did not demonstrate any conflict of interest or prejudice, so the ITN was not contrary to competition. CSF argues that Watkins' involvement tainted the ITN as set forth in Exception 4.

Exception 15 is essentially a re-argument of evidence concerning Jasper Watkins' supposed conflict of interest, which the ALJ considered and rejected in her Recommended Order. CSF's arguments also fail for the same reasons stated in DMS's previous ruling on

exception 4. The petitioner has failed to show that their substitute conclusion of law is as or more reasonable than the ALJ's conclusion of law. The petitioner has failed to provide the Department with a sufficient legal basis for rejecting or modifying the ALJ's conclusion of law. § 120.57(1)(l), Florida Statutes (2012). Therefore, based on the foregoing, the Petitioner's Exception 15 is denied.

CONCLUSION

Having considered the applicable law and being otherwise duly advised, it is **ORDERED** that:

A. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference.

B. The Formal Written Protest is DENIED and Petition for Administrative Hearing filed by Cooperative Services of Florida, Inc., is DISMISSED.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 28th day of February, 2014.

STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

Craig J. Nichols

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NOTICE OF RIGHT TO APPEAL

This order constitutes final agency action. Judicial review of this proceeding may be instituted by filing a notice of appeal with the filing fee prescribed by law in the District Court of Appeal, pursuant to Section 120.68, Florida Statutes, and a copy with the Agency Clerk of the Department of Management Services, 4050 Esplanade Way, Tallahassee, Florida 32399-3000. Such notice must be filed within thirty (30) calendar days of the date this order is filed in the official records of the Department of Management Services, as indicated in the Certificate of Clerk. Review proceedings shall be conducted in accordance with the Florida Rules of Appellate Procedure.

Certificate of Clerk:

Filed in the office of the
Clerk of the Department of
Management Services on this 28th
day of February, 2014.

Celynna Southall for
Michael Sivilla, Agency Clerk

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