

**BEFORE THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA**

|                                     |   |                                 |
|-------------------------------------|---|---------------------------------|
| <b>AT&amp;T CORP.,</b>              | ) | Board Agenda Item No. F-53      |
|                                     | ) | January 20, 2015                |
| Petitioner,                         | ) | DOAH Case No. 14-1024BID        |
|                                     | ) |                                 |
| vs.                                 | ) | RFP No. 4-P-081-WH              |
|                                     | ) | (IP Wide Area Network Services) |
| <b>BREVARD COUNTY SCHOOL BOARD</b>  | ) |                                 |
|                                     | ) |                                 |
| Respondent.                         | ) |                                 |
|                                     | ) |                                 |
| and                                 | ) |                                 |
|                                     | ) |                                 |
| <b>BRIGHT HOUSE NETWORKS, LLC.,</b> | ) |                                 |
|                                     | ) |                                 |
| Intervenor.                         | ) |                                 |
| _____                               | ) |                                 |

**FINAL ORDER**

This bid protest case was referred to the Division of Administrative Hearings ("DOAH"). The assigned Administrative Law Judge ("ALJ") submitted a Recommended Order to the Agency, Brevard County School Board ("Board"), recommending that the School Board enter a final order withdrawing the intended award to Bright House Networks ("Bright House") due to its inappropriate actions in changing its pricing in direct response to AT&T Corp.'s ("AT&T") oral presentation and reject all proposals for this RFP. The Recommended Order of October 1, 2014, entered herein is incorporated by reference. Timely exceptions to the Recommended Order were filed by Petitioner, AT&T, and Intervenor, Bright House. Timely responses to the exceptions were also filed by both parties.

In a Section 120.57(1) proceeding an agency's Final Order is entered after a hearing is held, evidence is received, and the ALJ has submitted a Recommended Order. It is the ALJ's function to consider the evidence presented, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. Goss v. District School Board of St. Johns County, 601 So.2d 1232 (Fla. 5th DCA 1992). The general rule of deference to the ALJ's findings of fact is that an agency may reject or modify a finding of fact only if the finding is not supported by competent, substantial evidence. The agency has no authority to reweigh conflicting evidence. Section 120.57(1)(I), Florida Statutes. See e.g. Heifetz v. Department of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

The agency may adopt the ALJ's findings of fact and conclusions of law in a recommended order. The agency may reject or modify the ALJ's conclusions of law and interpretations of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretations of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusions of law or interpretation of administrative rule and must make a finding that its substituted conclusions of law or interpretation of administrative rule is as or more reasonable than

that which was rejected or modified. Section 120.57(1), Florida Statutes.

The notation "TR" refers to the transcript of the final hearing and page number.

The notation "PET" refers to the number assigned to Petitioner, AT&T's, exhibits in the record. The notation "JT" refers to the number assigned to the parties' joint exhibits in the record.

The merits of the exceptions will now be addressed.

**EXCEPTIONS OF INTEVENOR, BRIGHT HOUSE NETWORKS**

Bright House excepts in whole or in part to the ALJ's findings of fact in paragraphs 8, 11, 12, 21, 22, 24, 25, 26 and 27 of the Recommended Order.

Bright House also excepts in whole or in part to the ALJ's conclusions of law in paragraphs 34, 36, 38 and 39 of the Recommended Order.

Bright House also excepts to the ALJ's Recommendation on pages 16 and 17 of the Recommended Order.

**EXCEPTIONS OF PETITIONER, AT&T CORP.**

AT&T excepts in whole or in part to the ALJ's findings of fact in paragraphs 16 (incorrectly identified as paragraph 17), 18 and 20 of the Recommended Order.

AT&T excepts in whole or in part to the ALJ's conclusions of law contained in paragraphs 33, 36, 37, 38 and 39 of the Recommended Order.

AT&T also excepts to the ALJ's conclusions of law and recommendation in paragraphs 31 through 40 of the Recommended Order due to the ALJ's failure to make the legal conclusion that Bright House waived any objection it may have had to the form of the Board's solicitation (RFP) or the terms of the RFP providing for "best and final fee schedules", a two step process that included down-selection and "BAFO" pricing by failing to challenge that provision, or any other provision of the solicitation of RFP within 72 hours after the posting of the solicitation as required by Section 120.57(3)(a) and (b), Florida Statutes.

AT&T also excepts to the ALJ's conclusions of law in paragraph 40 of the Recommended Order due to the ALJ's failure to bar Bright House's "expert" witness from testifying at the final hearing due to Bright House's failure to disclose the witness in a timely manner.

AT&T also excepts to the ALJ's conclusions of law in paragraph 40 of the Recommended Order due to the ALJ's failure to award attorney's fees against Bright House. Further, AT&T excepts to that part of the ALJ's recommendation to reject all proposals for the RFP.

RULINGS ON INTERVENOR, BRIGHT HOUSE NETWORK'S,  
EXCEPTIONS TO RECOMMENDED ORDER

Exception 1: "Bright House did not obtain any "unauthorized" unfair competitive advantage relating to the oral presentation pricing changes."

Bright House takes exception to the ALJ's findings of fact in paragraphs 8, 11, 24, 25 and 27 as well as what Bright House describes as findings of fact contained in conclusions of law in paragraphs 34 and 36.

Bright House asserts that there was not a "scintilla" of evidence presented at the final hearing to support the ALJ's finding that Bright House received an unfair competitive advantage at the oral presentations by viewing AT&T's presentation and best and final pricing and changing its pricing in direct response.

Contrary to Bright House's claim there was an abundance of evidence presented that supports the ALJ's finding that Bright House obtained an unfair competitive advantage through its actions during the oral presentations. In the Recommended Order the ALJ found:

The events that transpired at the oral presentations led to the protest filed by AT&T. As previously noted, AT&T was scheduled to begin its presentation at 8:30 a.m.

The AT&T team arrived timely for the demonstration and noted that members of the Bright House group were present in the room where the presentations were to be made. AT&T sought assurances that the Bright House presence would not adversely impact the chances of AT&T to receive the contract. It never occurred to the Board's selection

committee that Bright House might receive an unfair advantage by being able to view the AT&T demonstration before their presentation would be offered. (Paragraph 8 of Recommended Order)

When Bright House heard the final fee schedule AT&T was proposing had changed in the interim, Bright House quickly did a spreadsheet to reduce its prices below those proposed by AT&T. It is undisputed that in the time between the two presentations, Bright House modified its oral presentation to include information drafted in response to the AT&T oral presentation. (Paragraph 10 of Recommended Order)

As the weighted value for pricing was the heaviest weighted criteria, Bright House obtained an unfair advantage by changing its proposal after hearing and seeing the fee schedule proposed by AT&T. (Paragraph 11 of the Recommended Order)

When asked by a Selection Committee member if Bright House had changed its pricing after seeing AT&T's fee schedule, Bright House dodged the question and answered "We have been socializing pricing frankly all throughout in evaluating our position". (JT EX 14, page 93)

Bright House did not readily admit it had made changes to its presentation after viewing and hearing AT&T's presentation. (Paragraph 26 of Recommended Order)

In this case, Bright House took an unfair advantage of the situation and enjoyed a competitive edge not afforded AT&T. (Paragraph 34 of Recommended Order)

Based upon these findings of fact the ALJ made the following conclusion of law:

It is concluded that the intended award to Bright House must be withdrawn based upon the inappropriate actions of the vendor in changing its pricing in direct response to the AT&T presentation. It is contrary to fair and competitive processes to allow a vendor to modify its presentation after viewing another vendor's pricing.

(Paragraph 39 of Recommended Order)

The ALJ's findings of fact in paragraphs 8 and 25 are supported by competent, substantial evidence. (TR 73-75; 236-38; 241-42; 249-50; 288-89).

The ALJ's findings of fact in paragraph 11 are supported by competent, substantial evidence. (TR 161-62; 383-84; 392-93; 374; JT EX 1,5).

The ALJ's findings of fact in paragraphs 24 and 27 are supported by competent, substantial evidence. (TR 136-39-; 140-44; 146-49; 150-51; 168; 203-04; 205-11; 213-15; 221-22; 252; 289; 360-61; 383-84; JT EX 15 and 16)

The ALJ's conclusions of law in paragraphs 34 and 36 that Bright House took an unfair advantage of the situation and enjoyed a competitive edge not afforded to AT&T is correct and supported by the record. (record citations in response to exceptions to paragraph 24 are incorporated by reference herein; see also TR 297-302; JT EX 18, 4 and 11)

Exception 1 is denied.

**Exception 2. Where Bright House was in no "superior position" as a result of the oral presentation process, the award should not be overturned.**

Bright House excepts to the ALJ's conclusions of law in paragraph 38 to the extent it implies the selection committee's consideration of pricing is a basis to nullify the intended award

to Bright House.

The record evidence makes it clear, as the ALJ so found, that Bright House obtained an unfair advantage by changing its proposal after hearing and seeing the fee schedule proposed by AT&T and that its actions were inappropriate, unfair and contrary to competition.

The ALJ also found that it never occurred to the Board's selection committee that Bright House might receive an unfair advantage by being able to view the AT&T demonstration before making its own and that the selection committee did not authorize the changes Bright House made to its oral presentation and pricing in response to AT&T's presentation. (Paragraphs 8 and 25 of Recommended Order)

The ALJ's conclusions of law in paragraph 38 to the extent it implies the selection committee's consideration of pricing is a basis to nullify the intended award to Bright House is correct and supported by the record. (record citations in response to exceptions to paragraph 24 incorporated by reference herein; See also TR 252-89; 331; 360-61; 380-84; JT EX 14, page 142; JT EX 18, No. 8; PET EX 4, page 64)

Exception 2 is denied.

**Exception 3: "The Board did not change its award mid-protest" or "rescind the proposed award to Bright House".**

Bright House takes exception to the ALJ's finding of fact in paragraph 12 and the ALJ's conclusions of law described as a



"finding of fact" by Bright House in paragraph 36 to the extent they "find that the Board decided to change its award mid protest and announced its intention to rescind the proposed award to Bright House and give it to AT&T".

Bright House's exceptions are without merit. The evidence in this case, as well as the School Board's position in the Joint Pre-Hearing Statement, makes it abundantly clear that the Board, through its agents, announced its intention to rescind the proposed award to Bright House and to give the contract to AT&T.

The un-rebutted testimony of the Board's witnesses at the final hearing established that neither the selection committee or the Board's purchasing agents knew that Bright House had changed its pricing during the oral presentation in response to AT&T's pricing. The evidence is irrefutable that it was only through discovery before the final hearing that the Board discovered what Bright House could of and should have disclosed at the oral presentation, that it changed its pricing in direct response to AT&T's disclosure of its best and final price.

The Board's intention to rescind the proposed award to Bright House and award the contract to AT&T due to Bright House's misconduct was clearly communicated to Bright House during the discovery process, through the Board's Joint Pre-Hearing Stipulation and throughout the final hearing. As the Board's Purchasing Director, Cheryl Olsen, testified at the final hearing,

the truth of what happened finally came out at the depositions of Bright House's agents wherein they admitted what they had done.

Bright House's argument that there had not been proper disclosure and clear point of entry for Bright House to contest the Board's decision is both factually and legally incorrect. (TR 297-302; JT EX 18 (Answers to Interrogatories Nos. 4 and 11))

Exception 3 is denied.

**Exception 4: "The ALJ has used the wrong standard to recommend overturning the Board's proposed action, and the correct standard compels that it be affirmed."**

Bright House excepts to the ALJ's conclusion of law in paragraph 39 that states "the intended award to Bright House must be withdrawn".

In the Recommended Order the ALJ set forth in detail the misconduct and improper actions of Bright House during the oral presentation.

The ALJ minces no words in correctly describing Bright House's actions as inappropriate and contrary to fair and competitive processes. In short, the ALJ applied the correct law to the facts and properly determined that the intended award to Bright House must be withdrawn due to Bright House's misconduct. (Paragraphs 34; 39 of Recommended Order)

Exception 4 is denied.

**Exception 5: Bright House did not act "inappropriately" in response to AT&T's presentation.**

Bright House takes exception to paragraph 39 "to the extent its use of the word "inappropriate" could be read to suggest Bright House engaged in disqualifying conduct". Bright House also excepts to paragraph 26 "to the extent it might be read to suggest that Bright House had something to hide in adapting its presentation after learning from AT&T's presentation the Board's interpretation of the RFP in this case".

Bright House's Exception 5 is in large part a re-argument of its Exception 4. The ALJ's findings of fact that Bright House acted improperly, inappropriately and contrary to competitive processes are correct and supported by competent, substantial evidence. (see record citations in Board's response to Exception 4)

No rational person could conclude that what Bright House did in this case (secretly changing its price in direct response to AT&T's presentation and failing to disclose that it had done so when challenged by members of the selection committee) amounts to ethical behavior, fair play or good faith competition.

Further, as the ALJ so found and as stated in response to Exception 4 above, neither Bright House or AT&T challenged the terms and conditions of the RFP or the term "best and final fee schedule" as stated in Section 5.0 of the RFP. (paragraphs 4 and 23

of Recommended Order) Therefore, any objection or challenge to the specifications of the RFP have been waived by Bright House and AT&T or any other vendor. Section 120.57(3)(b), Florida Statutes; Capeletti Bros., Inc. v. Department of Transportation, 499 So.2d 855 (Fla. 1<sup>st</sup> DCA 1986), rev. denied, 509 So.2d 1117 (Fla. 1987) (protests to specifications not filed within 72 hours of posting are waived); Care Access PSN, LLC v. State of Florida Agency For Health Care Administration, Case No. 13-4113BID (Fla. DOAH 2014) (failure to file a protest operates as a waiver of the right to seek relief based upon the specification); Optiplan, Inc. v. School Board of Broward County, 710 So.2d 569 (Fla. 4<sup>th</sup> DCA 1998) (statutes 72 hour rule valid despite allegations of constitutional infirmity of specifications); CTS America v. Department of Highway Safety and Motor Vehicles, et al., Case No. 11-3372BID (Fla. DOAH 2011). (72 hour rule upheld despite allegations that proposal violated state statute)

Having waived any objection or challenge that the best and final fee schedule, BAFO process or any other provision in the RFP was unlawful, Bright House cannot make that challenge now.

Exception 5 is hereby denied.

**Exception 6: "AT&T was a non-responsive proposer entitled to no relief in this protest".**

Bright House takes exception to the ALJ's finding of fact in paragraph 21 that AT&T was "responsive and responsible".

The ALJ heard the testimony of the parties to this proceeding and reviewed the RFP, both the AT&T and Bright House proposals and the other record evidence.

The ALJ correctly found, as did the Board's selection committee, that both the AT&T and Bright House proposals to the RFP materially met the terms and conditions of the RFP and that both vendors were responsible and responsive as described in the RFP. The ALJ's finding of fact in paragraphs 21 is correct and supported by competent substantial evidence. (TR 83-91; 484-85; JT EX 2 and 3; JT EX 14, page 111)

Exception 6 is denied.

**Exception 7: "AT&T failed to file the bond required by law".**

Bright House excepts to the ALJ's finding of fact in paragraph 22 that AT&T "submitted the appropriate bond as required by law and Section 3.45 of the RFP".

It is settled law that the failure to file an appropriate bid protest bond is not jurisdictionally fatal to an aggrieved bidder's ability to pursue a bid protest. ABI Walton Insurance Co. v. State of Florida, Depart. Of Management Services, 641 So.2d 967 (Fla. 1<sup>st</sup> DCA 1994; Accord, General Electric v. Dept. of Transportation and Florida Drawbridges, Inc., 689 So.2d 1273 (Fla. 1<sup>st</sup> DCA 2004).

In this case, AT&T provided a bid protest bond which strictly complied with the instructions to bidders in the RFP and the

Board's purchasing director's letter to AT&T's agents. (JT Exhibits 1, 7 and 21).

The Board accepted AT&T's protest bond and found it complied with the RFP and applicable law. Bright House lacks standing to challenge the Board's determination that AT&T filed a good and sufficient bond. Nor did Bright House challenge the bond requirements of the RFP. (Paragraph 4 of Recommended Order) Therefore, any objections by Bright House to the bond specifications have been waived. Section 120.57(3)(b), Florida Statutes.

The ALJ found as a matter of fact that AT&T submitted the appropriate bond as required by law and Section 3.45 of the RFP. (Paragraph 22 of Recommended Order) The ALJ's finding of fact in paragraph 22 is correct and supported by competent, substantial evidence.

Exception 7 is denied.

**Exception 8: "AT&T's bid protest was not timely filed".**

Bright House excepts to the ALJ's finding of fact in paragraph 22 that AT&T timely filed its bid protest in this case.

The ALJ correctly found that AT&T timely filed its bid protest.

Florida Administrative Code Rule Section 106.103 provides the method for calculating time periods for administrative proceedings.

The ALJ correctly applied the rule to the evidence in determining

that AT&T's bid protest was timely.

It is most interesting that counsel for Bright House relied on the same method as AT&T for calculating filing deadlines in administrative proceedings when filing Bright House's exceptions to the Recommended Order. (see Attorney Rollini's Oct. 13, 2014, letter to Brevard Public School's Superintendent Brian Binggeli)

Exception 8 is denied.

**Exception 9: "Bright House's expert witness was timely disclosed."**

Bright House excepts to the ALJ's conclusions of law in paragraph 40 to the extent it could be read as a finding that Bright House failed to timely disclose its expert witness, Tom E. Lewis.

An examination of the record in this case clearly shows that Bright House disclosed its expert witness as late as possible before the final hearing. The final hearing was scheduled for July 10 and 11, 2014. (see Amended Pre-Hearing Order)

Bright House first disclosed that it would call an expert witness by e-mail to counsel at 5:00 P.M., Thursday, July 3, less than one day before the 4<sup>th</sup> of July holiday weekend. This protest had been pending for approximately five months, the final hearing having been postponed twice at the request of Bright House counsel.

Based upon the record the ALJ correctly concluded that Bright House failed to disclose its expert witness in a timely manner.

However, as the ALJ stated Bright House's failure "was of no consequence or prejudice to AT&T as the testimony was largely discounted and deemed unpersuasive." (Paragraph 40 of Recommended Order)

Exception 9 is denied.

**Exception 10: "The recommended remedy of rejection of Bright House's proposal is not supported by the necessary law or facts of this case".**

Bright House excepts to the ALJ's "ultimate recommendations at pages 16 to 17 of the Recommended Order" in which the ALJ recommended rejection of all proposals, including Bright House's, which were submitted in this RFP.

In an administrative proceeding it is the ALJ's function to consider the evidence presented, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based upon competent substantial evidence. Goss v. District School Board of St. Johns County, (Fla. 5<sup>th</sup> DCA 1992)

In this case the ALJ conducted a final hearing over two days and heard the testimony of nine witnesses called by the parties.

After hearing the evidence and considering the parties' post hearing submissions, the ALJ found the following facts relating to Bright House's actions during and after the oral presentations before the selection committee:



When Bright House heard the final fee schedule AT&T was proposing had changed in the interim, Bright House quickly did a spreadsheet to reduce its prices below those proposed by AT&T. It is undisputed that in the time between the two presentations Bright House modified its oral presentation to include information drafted in response to the AT&T oral presentation. (Paragraph 10 of Recommended Order)

As the weighted value for pricing was the heaviest weighted criteria, Bright House obtained an unfair advantage by changing its proposal after hearing and seeing the fee schedule proposed by AT&T. (Paragraph 11 of Recommended Order)

It never occurred to the Board's selection committee members that Bright House might receive an unfair advantage by being able to view the AT&T demonstration before their presentation would be offered. (Paragraph 8 of Recommended Order)

Allowing Bright House to change its presentation in response to the AT&T presentation gave it an advantage not extended to AT&T. (Paragraph 24 of Recommended Order)

The selection committee did not authorize the changes Bright House made to its oral presentation in response to AT&T's presentation. (Paragraph 25 of Recommended Order)

Bright House did not readily admit it had made changes to its presentation after hearing and viewing the AT&T presentations. (Paragraph 26 of Recommended Order)

Once the Board discovered that Bright House changed its presentation and fee schedule in response to the AT&T proposal, it announced its decision to rescind the proposed award to Bright House and give the contract to AT&T. (Paragraph 12 of Recommended Order)

In this case, Bright House took an unfair advantage of the situation and enjoyed a competitive edge not afforded to AT&T. (Paragraph 34 of Recommended Order)

It is concluded that the intended award to Bright House must be withdrawn based upon the inappropriate actions of the vendor in changing its pricing in direct response to the AT&T presentation. It is contrary to fair and competitive processes to allow a vendor to modify its

presentation after viewing another vendor's pricing.  
(Paragraph 39 of Recommended Order)

The ALJ's findings of fact and conclusions of law that Bright House's actions as set forth above constituted misconduct and were inappropriate and contrary to fair and competitive processes are correct and supported by competent, substantial evidence. Therefore, that part of the ALJ's recommendation that the intended award to Bright House must be withdrawn and its proposal rejected is accepted.

Further, Bright House's argument that the ALJ had no jurisdiction or authority to recommend a rejection of Bright House's proposal is without merit.

Throughout this proceeding AT&T has demanded that Bright House be disqualified and its proposal rejected due to its misconduct. The Board joined in that position after discovery revealed what the ALJ subsequently found happened here. To say that remedy was not requested by any party or tried with the consent of all the parties is incorrect.

Exception 10 is denied.

**RULINGS ON AT&T'S EXCEPTIONS TO RECOMMENDED ORDER**

**Exception 1: "Best and Final Pricing as Part of the Request For Proposed Procurement Process."**

AT&T excepts to the ALJ's findings of fact in paragraphs 17, 18, 20 of the Recommended Order.

As for AT&T's exceptions to paragraphs 17, 18 and 20, the ALJ's findings of fact are supported by competent, substantial evidence in the record. (TR 49-113; 230-303; 323-395) AT&T's exceptions to paragraphs 17, 18 and 20 are denied.

AT&T also excepts to the ALJ's conclusions of law in paragraphs 33, 36, 37, 38 and 39 of the Recommended Order that the two-step pricing described by the RFP conflicts with the plain and unambiguous language of the law; that the RFP cannot be read to allow submittals that would amend or supplement that already opened; that the Board's attempt to employ a hybrid process of RFP and ITN is not allowed by law; that the plain and ordinary reading of the statute (Section 120.57(3)(f), Florida Statutes) prohibited AT&T and Bright House from changing the pricing schedules at oral presentation. Neither vendor should have been allowed to do so; more critical, however, is the prospect of negotiating with one vendor and, should that not work out to the Board's satisfaction, the intention to negotiate with the other. The acquisition process used by the Board does not contemplate that type of negotiation; it is further concluded that allowing AT&T to modify its price was contrary to the law governing the RFP process.

AT&T's exceptions to the ALJ's conclusions of law in paragraphs 33, 36, 37, 38 and 39 as set forth above are granted.

An agency may reject or modify the ALJ's conclusions of law and interpretations of administrative rules over which it has substantive jurisdiction. (Section 120.57(1), Florida Statutes)

In this case Section 120.57(3)(f), Florida Statutes, cited by the ALJ must be construed in harmony with the Board's power to engage in competitive procurement in accordance with administrative rules promulgated by the Florida Department of Education in F.A.C. 6A-1.012(1)(e) which authorizes school districts to utilize Requests For Proposals (RFPs) as well as other methods of competitive solicitation for the purchase of goods and services.

The interpretation of Department of Education Administrative Rule 6A-1.012(1)(e), F.A.C., as well as the Board's own purchasing policy adopted in conformance with the DOE rule is a matter over which the Board has substantive jurisdiction as relating to its field of expertise. Nothing in Rule 6A-1.012(1)(e), F.A.C., prohibits the use by a school district of a two-step pricing process or "BAFO" (best and final offer) in an RFP.

In this case the RFP clearly provided for oral presentations and best and final pricing. The BAFO was a part of the RFP process, not a submission made after the bid or proposal opening which would amend or supplement the bid or proposal.

Indeed, the ALJ found as a matter of fact that neither AT&T or Bright House knew the pricing that each other had included in their initial submission and that none of the pricing schedules were made

public until the oral presentations. (Paragraphs 11 and 28 of Recommended Order)

This was not a case of an agency allowing a supplement or amendment to a bid after the bid is made public or allowing a non-responsive bidder to supplement a non-conforming bid or proposal to cure a defect. (See e.g., Harry Pepper and Associates, Inc. v. The City of Cape Coral, 352 So.2d 1190 (Fla. 2<sup>nd</sup> DCA 1977))

There is no Florida Appellate Court decision that construes Section 120.57(3)(f) to prohibit a two-step or BAFO pricing process in an RFP.

There are also no reported DOAH decisions that interpret Section 120.57(3)(f) the way the ALJ did in this case.

There are several DOAH decisions that approve a two-step pricing process in an RFP by agencies (including school districts). See, e.g. Humana Dental Insurance Company/Comp Benefits Company v. Lee County School Board, Case No. 10-984BID (Fla. DOAH 2010) (District could have followed a two-step pricing process had it specified such a process in the RFP); Enpower, Inc. v. Tampa Bay Water and S.W. Water, LLC, Case No. 99-339BID (Fla. DOAH 1999) (ALJ upholds a multi-step procurement process that, after submissions to an RFP included interviews, simultaneous negotiations, a request for binding offers and a subsequent request for best and final offers ("BAFO's"), all of which were specified in the RFP).

**Exception 2: Bright House waiver of RFP requirements.**

AT&T excepts to the Recommended Order to the extent that the ALJ failed to make the legal conclusion that Bright House had waived any objection it may have had to the form of the Board's solicitation (RFP vs. ITN or any other form of proposal), and to the terms of the RFP itself, including the provision that required "best and final fee schedule" for the oral presentation. AT&T therefore excepts to the ALJ's conclusions of law and recommendation paragraphs in their entirety.

As discussed in the Board's response to Bright House's Exception 5 and 7 and AT&T's Exception 1 above, the ALJ found in paragraphs 4 and 23 of the Recommended Order that neither Bright House or AT&T challenged the terms and conditions of the RFP or the term "best and final fee schedule" in the RFP's specifications or any other term or condition of the RFP.

The Board accepts the ALJ's findings of fact in paragraphs 4 and 23 and is therefore free to make its own conclusion of law that any objection or challenge to the RFP and its terms, conditions and specifications have been waived by both Bright House and AT&T and any other vendor. Section 120.57(3)(b), Florida Statutes; Capeletti Bros., 499 So.2d 855 (Fla 1<sup>st</sup> DCA 1986); Optiplan, Inc., 710 So.2d 569 (Fla. 4<sup>th</sup> DCA 1998); Care Access PSN, LLC, Case No. 13-4113BID (Fla. DOAH 2014); CTS America, Case No. 11-3372BID (Fla.

DOAH 2011)

Exception 2 is granted.

**Exception 3: Failure to award attorney fees to Petitioner.**

AT&T excepts to the ALJ's failure to award it attorney's fees against Bright House in paragraph 40 of the Recommended Order. The award of attorney's fees in an administrative proceeding under Chapter 120, Florida Statutes, for a party's conduct in litigating the case is a matter reserved to the ALJ's sound discretion, not a matter for the agency to determine. Procacci Commercial Realty, Inc. v. Department of Health and Rehabilitative Services, 690 So.2d 603 (Fla. 1<sup>st</sup> DCA 1997)

Exception 3 is denied.

**Exception 4: Failure to bar expert witness.**

AT&T excepts to the ALJ's failure to bar Bright House's expert witness. (Paragraph 40 of Recommended Order) The Board addressed this issue in response to Bright House's Exception 9, which response is incorporated herein by reference.

Exception 4 is denied.

**Exception 5: Recommendation concerning AT&T's proposal.**

AT&T excepts to that part of the ALJ's recommendation in pages 10 and 17 of the Recommended Order that recommends that the Board enter a final order rejecting all proposals. AT&T argues that the Board should accept AT&T's proposal in its entirety, including AT&T's best and final offer.

As discussed in response to AT&T's Exception 1 above, the Board may reject or modify the ALJ's conclusions of law over which the Board has substantive jurisdiction. Section 120.57(1), Florida Statutes

The Board's ruling on AT&T's Exception 1 is incorporated herein by reference.

Exception 5 is granted

**IT IS THEREUPON ORDERED THAT:**

A. The ALJ's findings of fact in the Recommended Order are adopted and incorporated in this Final Order by reference.

B. The ALJ's conclusions of law in the Recommended Order are approved and adopted in this Final Order except the conclusions of law in paragraphs 33, 36, 37, 38 and 39 that the two-step pricing and best and final pricing ("BAFO") process utilized in the RFP are prohibited by Section 120.57(3)(f), Florida Statutes.

The Board finds that the oral presentation and best and final pricing process contained in the RFP did not violate Section 120.57(3)(f). The RFP clearly provided for best and final pricing ("BAFO"). The BAFO was part of the RFP process and not a submission made after the bid on proposal opening which would amend or supplement the bid or proposal or that would allow a non-responsive bidder to supplement a non-conforming bid or proposal to



cure a defect.

The BAFO process employed by the Board in this RFP gave both AT&T and Bright House an opportunity to review their initial submittals (which were not disclosed to either Bright House or AT&T or any member of the public) and "sharpen their pencils" to provide the Board with their best and final price.

In this case, the BAFO process resulted in AT&T reducing its initial pricing by \$327,000 per year, which over the three year term of the contract will save the Board and the taxpayers \$981,000 (or \$1,625,000 if the Board exercises its option to extend the contract for two (2) additional years).

The Board finds that it has substantive jurisdiction over the application of Section 120.57(3)(f) and Department of Education Rule 6A-1.012(1)(e), F.A.C., to its own purchasing policy and that this is a matter within the Board's field of expertise. The Board also finds that its interpretation of the statute and administrative rule is supported by and consistent with controlling Florida appellate court case law and other DOAH decisions cited in the Board's ruling on AT&T Exception 1.

The Board finds that its substituted conclusions of law and interpretation of administrative rule herein are as or more reasonable than that of the ALJ in the Recommended Order.

The Board also finds that both Bright House and AT&T, and any other proposer, waived any objection or challenge to the two-step

pricing and BAFO process contained in the specifications of the RFP. (Paragraphs 4 and 23 of Recommended Order)

The failure of a proposer or bidder to object to or challenge the terms, conditions or specifications contained in an agency's solicitation within 72 hours of posting constitutes a waiver of the right to object in any proceeding thereafter. Capeletti Bros., Inc. v. Department of Transportation, 499 So.2d 855 (Fla. 1<sup>st</sup> DCA 1986), rev. denied, 509 So.2d 1117 (Fla. 1987); Optiplan, Inc. v. School Board of Broward County, 710 So.2d 569 (Fla. 4<sup>th</sup> DCA 1998).


C. Bright House's improper and inappropriate conduct in changing its pricing in direct response to AT&T's presentation are acts that are contrary to competition and requires that Bright House be disqualified from this competitive solicitation and the intended award to Bright House be withdrawn.

D. The Board finds that the contract to provide the Brevard County School District IP Wide Area Network Services pursuant to RFP No. 4-P-081-WH should be and is hereby awarded to AT&T at its best and final pricing as the only remaining responsive and responsible proposer.

DONE AND ORDERED this 20th day of January, 2015, in Viera,  
Brevard County, Florida.

THE SCHOOL BOARD OF  
BREVARD COUNTY, FLORIDA

By:

  
AMY KNEESSY, Chairman

Filed with the Clerk in the  
Office of the Superintendent  
this 20th day of January, 2015.

RIGHT TO APPEAL

Parties to this Final Agency Action are hereby advised of their right to seek judicial review of this Final Agency Action pursuant to Section 120.68, Florida Statutes, and Florida Rules of Appellate Procedure 9.030(b)(1)(C) and 9.110. To initiate an appeal, one copy of a Notice of Appeal must be filed, within the time period stated in the Florida Rule of Appellate Procedure 9.110, with the Clerk of the School Board of Brevard County, 2700 Judge Fran Jamieson Way, Viera, Florida 32940. The second copy of the Notice of Appeal, together with the filing fee, must be filed with the appropriate District Court of Appeal.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by Electronic Mail to the persons named below on this 22 day of January, 2015:

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