STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

XEROX STATE AND LOCAL SOLUTIONS, INC.,

Petitioner,

vs. Case No. 14-2798BID

DEPARTMENT OF REVENUE,

Respondent,

and

SYSTEMS AND METHODS, INC.,

Intervenor.
_____/

RECOMMENDED ORDER

Pursuant to Notice, this cause came on for formal hearing before Diane Cleavinger, a designated Administrative Law Judge of the Division of Administrative Hearings, on August 6 and 7, 2014, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Eduardo S. Lombard, Esquire
W. Robert Vezina, III, Esquire
Megan Reynolds, Esquire
Andrew Foti, Esquire
Vezina, Lawrence and Piscitelli, P.A.
413 East Park Avenue
Tallahassee, Florida 32301

For Respondent: Cindy Horne, Esquire
Jeffrey Kelly, Esquire
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668

For Intervenor: Karen D. Walker, Esquire
Mia McKown, Esquire
Holland and Knight, LLP
Post Office Drawer 810
Tallahassee, Florida 32302-1809

STATEMENT OF THE ISSUE

The issue in this proceeding is whether the Respondent's intended award of Invitation to Negotiate (ITN) 13/14-01 was contrary to the Department's governing statutes, rules or policies; contrary to the solicitation specifications; and was clearly erroneous, contrary to competition, arbitrary or capricious.

PRELIMINARY STATEMENT

On August 27, 2013, Respondent, Department of Revenue (DOR or Department), issued Invitation to Negotiate 13/14-01, entitled "State Disbursement Unit." On December 2, 2013, replies to the ITN were submitted. The vendors submitting replies were Xerox State and Local Solutions, Inc. (Xerox), and Systems and Methods, Inc. (SMI). On May 19, 2014, DOR posted its intent to award the contract to Intervenor, SMI.

By Formal Written Protest dated June 2, 2014, Xerox timely protested DOR's intended decision to award the contract to SMI. On June 16, 2014, the matter was forwarded to the Division of

Administrative Hearings (DOAH). That same day SMI filed a Petition to Intervene which was granted by Order issued June 23, 2014.

Prior to hearing, Xerox's Motion for Leave to File Amended Formal Written Protest Petition was granted by Order dated August 1, 2014. Additionally, Xerox's Motion for Leave to File Second Amended Formal Written Protest Petition was granted in part by Order dated August 16, 2014, but denied as to paragraphs 74 through 82 of the Second Amended Petition since said paragraphs were untimely challenges to the ITN specifications.

At hearing, Joint Exhibits 1 through 12 were admitted into evidence. Xerox called four witnesses to testify: John Kinneer, Steve Updike, John Polk, and Michael Deckelman. Xerox's Exhibits numbered 1, 2, 4, 5, 10 through 16, portions of Exhibit 17[1/], Exhibit 32, portions of Exhibit 40 not related to scoring, and Exhibits 46 through 54 were admitted into evidence. Xerox also proffered Exhibits 6, 8, 31, 33 through 39, portions of Exhibit 40 related to scoring, and Exhibits 41 through 45. DOR called two witnesses to testify: Thomas Mato and Clark Rogers. Additionally, DOR's Exhibit 5 was admitted into evidence. SMI did not present any witness testimony. However, SMI Exhibits 1 through 3 were admitted into evidence.

The three-volume Transcript was filed with DOAH on August 22, 2014. Petitioner and Intervenor filed Proposed Recommended Orders on September 4, 2014. Respondent filed its Proposed Recommended Order on September 3, 2014. After Proposed Recommended Orders were filed, the case was placed in abeyance due to an action in Circuit Court involving Florida's Sunshine Law. Thereafter, DOR filed a Motion to remove the case from abeyance. The Motion was granted and the case proceeded to this Recommended Order which considered the parties earlier-filed Proposed Recommended Orders.

FINDINGS OF FACT

1. The Department is designated by section 409.2257, Florida Statutes (2014), as the Title IV-D agency for the State of Florida. As such, it is responsible for the administration of the Child Support Enforcement program that is required in all states by the Federal Social Security Act. See § 409.2577, Fla. Stat.

2. As part of its duties under chapter 409, the Department is authorized to solicit proposals from, and to contract with, private contractors to develop, operate, and maintain a state disbursement unit (SDU). The SDU is responsible for processing, collecting and disbursing payments for most child support cases in Florida. The current contractor for the SDU is Xerox whose contract will expire on February 28, 2015.

3. In general, Florida procurement law provides a continuum of competitive procurement processes running from invitations to bid, through requests for proposals, to invitations to negotiate. Invitations to bid are used where specifications can be stated with certainty with the primary issue being price. Invitations to negotiate, on the other end of the procurement spectrum, are used to purchase services when state agencies need to "determine the best method for achieving a specific goal or solving a particular problem." § 287.057(1)(c), Fla. Stat. (2014).

4. In essence, an ITN contains the process a state agency follows in awarding a contract and the criteria to which a vendor should reply in order to be considered responsive to the ITN. Under an invitation to negotiate and even though a reply must be responsive to the invitation, specifications generally are more fluid and less mandatory. Price, while important, is negotiable. Indeed, an agency may "reply shop" the terms, including price, of one vendor's reply against a competitor's reply in seeking revisions to that vendor's reply. As such, contract price is a more fluid concept under an ITN and is not the primary consideration in an ITN.

5. In this case, the Department was seeking a solution for processing, collecting and paying child support payments based on a negotiated per transaction rate resulting from such SDU services plus negotiated service costs associated with the

operation of the SDU. In fact, contracting for a transaction-rate-based price was one of the prime considerations under this ITN because the Department felt it could gain significant contract savings by utilizing a transaction-rate-based pricing scheme in its negotiations. Towards that end, the Department issued Invitation to Negotiate 13/14-01 on August 27, 2013, soliciting service solutions for the operation of the SDU.

6. Prior to receiving replies to the ITN, the Department issued seven addenda to the ITN, provided several replacement pages to the ITN and answered numerous vendor questions regarding the ITN.

7. After the release of the ITN and the seven addenda, there was no protest filed pursuant to section 120.57, Florida Statutes, regarding the ITN's specifications. As such, any objection to those specifications was waived by Petitioner and Intervenor.

8. In this case, the ITN required a vendor's reply to be in a particular format. Specifically, the ITN required that a vendor's reply consist of two components presented in two multiple-tabbed binders: the Administrative/Technical Reply (Technical Reply) and the Cost Data Reply (Cost Reply). Technical Replies were to contain non-cost information such as corporate capability, proposed solution technical components, quality assurance and monitoring, and a variety of attachments.

Cost Replies were to contain a vendor's Transaction Rate, Baseline Compensation, Reimbursable Costs, and other cost-related information as specified by the ITN. Vendors were not permitted to disclose any cost information in the Technical Reply.

9. Additionally, the ITN required that a 15-page "Requirements Response Location Form" be completed and provided by the vendor in its ITN reply. The form listed the section numbers of the essential criteria of the ITN and the pages of the ITN on which each criterion could be found. The form also contained blank spaces adjacent to each referenced criteria where the vendor was to list the sections and pages of the vendor's reply that responded to each of the referenced criteria in the requirements response form.

10. Relevant to this case, Section 1 of ITN 13/14-01 contained general definitions of terms used in the ITN. Under Section 1, a "Responsive Reply" was defined as "[a] Reply submitted by a responsible Vendor that conforms in all material respects to the solicitation." A "Minor Irregularity" was defined as "[v]ariations of terms and conditions from the Invitation to Negotiate which do not affect the price of the Reply or give the Vendor an advantage or benefit not enjoyed by the other Vendors or do not adversely impact the interests of the State." Additionally, the Department reserved the right to waive minor irregularities in a vendor's reply.

11. ITN Section 2.4 provided: "The FDOR intends to negotiate with one or more Vendors who are compliant with the mandatory compliance items identified throughout this document."

12. ITN Section 2.5 addressed Desired vs. Mandatory Requirements and Actions:

> Within the ITN the use of "shall" or "must" indicates a mandatory requirement or mandatory action. The FDOR may consider failure to meet a mandatory requirement to be a material deficiency, in which case the FDOR may reject the Reply and not consider it further, or FDOR may have the option to score that requirement with a zero (0). (emphasis added).
>
> The use of "should" or "may" indicates a desired requirement. The FDOR will not reject a Reply just because it fails to meet a desired requirement and may result in a lower score for that requirement.

13. Clearly under the ITN, the mandatory nature of a requirement did not result in the criteria also being material since the Department could consider failure to meet a mandatory requirement to be a material deficiency or allow the vendor to move to the evaluation phase with the materiality of such criteria to be addressed by the evaluators during scoring.

14. ITN Section 3.1.9, titled "Material Requirements Compliance Review," addressed the ITN's pro-forma review for responsiveness and provided:

> 3.1.9.1 Each Vendor shall submit a Reply that conforms in all material respects to this solicitation. Material requirements of

> the ITN are those set forth as mandatory or those that affect the competitiveness of Replies. All Replies will be reviewed to determine if they are responsive.
>
> 3.1.9.2 The FDOR will conduct a Material Requirements Compliance Review of all Replies submitted in response to this ITN. This review does not assign scores, but is simply a pass/fail review. Replies that do not meet all material requirements of this ITN; fail any of the mandatory requirements in this ITN; fail to timely respond to Reply Qualification Requests (see Section 3.1.10); fail to provide the required/requested information, documents, or materials in the Reply and/or during the Reply Qualification Process; or include language that is conditional, or takes exception to terms, conditions and requirements, shall be rejected as non-responsive and not considered further.
>
> 3.1.9.3 The FDOR reserves the right to determine whether a Reply meets the material requirements of the ITN.

15. Additionally, Section 3.1.10 of the ITN provided that the Department was to initially review each reply "to determine a Vendor's compliance with the requirements of the ITN not directly related to the Technical Specifications and Cost Data of the ITN." (emphasis added). A checklist titled "Material Requirements Compliance Review" was used to determine the responsiveness of a reply. The checklist items are not at issue here. Importantly, per the ITN criteria, the material responsiveness review was a review of the form of a reply and not

a review of the substance of the same. Indeed, deficient replies could be cured as part of the "Reply Qualification Process."

16. After the responsiveness review, an Evaluation Committee chosen by the Department would score the Administrative/Technical Volume for each vendor in accordance with the evaluation criteria in the ITN. Towards that review, the vendor was required to complete and submit the "Requirements Response Location Form" as part of its reply. As indicated earlier, the response location form listed the section numbers of the essential criteria of the ITN and the pages of the ITN on which each criterion could be found. The form's criteria references matched the criteria references in the score sheets to be used by the individual evaluators to score a vendor's reply. Further, the evaluation committee used the location form to locate information within a vendor's reply. In evaluating replies, the committee members were not expected to hunt down information in a vendor's reply outside what was provided by a vendor on its response location form. Thus, the form is a very good indication of the materiality or importance of a particular ITN criteria since those criteria were the ones on which a vendor's reply was to be evaluated.

17. Relevant to this case, Section 7.13.1.1 of the ITN required that a letter of commitment for a surety bond be

submitted with a vendor's cost reply. There was no prescribed format or wording for this letter.

18. Additionally, Section 12 of the ITN contained a table titled "Attachments and Submittals." According to Section 12, the table listed a variety of documents "to be completed and included in Volume One: Administrative/Technical as indicated[.]" However, the table clearly listed documents that the ITN, in other sections, required to be in Volume Two, the Cost Data Reply. In fact, the table itself only indicated who should complete a document. It did not indicate whether a document was required, for responsiveness purposes, to be submitted with a reply. The "as indicated" language, referenced above, referred to other sections within the ITN to determine if such documents should be submitted and in what volume they should be submitted. Other than referral to other sections of the ITN, Section 12 did not require that any document listed in its table be attached to the ITN.

19. Two of the documents listed in Section 12 of the ITN were "Incident Control Policy and Procedures" and "Change Management Policy and Procedures." In the column of the table titled "Attachment" these two documents were listed as "Vendor's Documents." However, unlike the other documents listed in the Section 12 table, these two documents had no attendant requirement in other sections of the ITN stating that the two

documents should be provided or where in a vendor's reply the two documents should be placed.

20. The Department's responses to October 24, 2014, vendor questions 18 and 19 regarding these documents were that the two documents referred to the vendor's corporate documents and that a copy of such documents were required to be submitted with a vendor's "proposal." Except for the Department's responses, there were no written addenda amendments to the ITN document making such submission mandatory or indicating in what section of the vendor's multi-tabbed response the documents should be included. Further, no addenda amendments were made to the response location form to cover these documents. Similarly, no addenda amendments were made to the evaluator's score sheets to cover or evaluate these documents. Thus, despite the use of the word "required" in the Department's response to questions 18 and 19 and in view of the lack of any amendments to the ITN in relation to these responses, the evidence demonstrated that submission of these two documents with a vendor's reply was only desired by the Department and was not mandatorily required under the ITN for purposes of responsiveness.

21. Section 12 of the ITN also listed Attachment G, "Individual Contractor Security and Agreement Form." The form was to be "completed" by the vendor and subcontractors. As discussed above, inclusion in the Section 12 table did not

indicate whether a document was required for responsiveness purposes to be submitted with a reply. Those criteria were found elsewhere in the ITN.

22. Notably, the provision of the standard contract which would emerge from this ITN required the security form be executed by subcontractors within five days of signing the contract. More importantly, Section 6.6 of the ITN stated that Attachment G "should" be executed and submitted with a vendor's reply. As such, the document's attachment was not mandatorily required for responsiveness purposes, but was only desired by the Department at this point in the ITN process since the winning vendor and its subcontractor's must provide the document within five days of signing the contract.

23. The ITN further provided in Section 10.3.2 that upon completion of the Administrative/Technical evaluation, the Cost Data Volume would be publicly opened and scored.

24. Relevant to this case, the ITN addressed renewal cost and renewal of any future contract in Section 7.4 of the ITN. Section 7.4 stated, in pertinent part:

> **RENEWALS**
> The FDOR reserves the right to renew any Contract resulting from this ITN. Renewals shall be subject to the terms and conditions set forth in the original Contract and subsequent amendments, . . .
>
> Vendors shall include the cost of any contemplated renewals in their Reply, . . .

25. In substance the section tracked the language of section 287.057(13), Florida Statutes, making any renewal subject to the same terms and conditions, including price, as the original contract. The statute also requires that the "price" of any "services to be renewed" be provided in a vendor's reply. However, if a separate renewal price was not provided in a vendor's reply, any renewals would be at the price of the original contract since under the ITN the original price would be the renewal price for section 287.057(13) purposes.

26. On the other hand, Section 7.4 of the ITN deviated from the statute's language and required that the "cost" of any "contemplated renewals" be included in the vendor's reply. Such cost information was not part of the criteria requirements listed for the ITN on the "Requirements Response Location Form" and was not part of the requirements to be evaluated by the evaluation committee.

27. Question 39 posited by SMI on September 18, 2013, asked about the handling of renewal cost information in the vendor replies to the ITN. The Department's response to question 39 was that "renewal rate information" "should" "please" be provided in summary form in the cost volume of the vendor's reply to the ITN. Additionally, the Department's response stated that renewal cost information was not to be "scored" as part of the transaction rate. Clearly, the Department in its response viewed this "rate

information" as related to the transaction rate, which was one of several costs used to calculate total compensation under the ITN. The Department's explanation or interpretation of Section 7.4 has a reasonable basis since renewal of the contract was statutorily restricted to the same terms and conditions of the original contract, making such renewal cost information immaterial. Additionally, the renewal information was not part of the scoring criteria that permitted a vendor to move through the negotiation process under the ITN and was not required in order for a vendor to be responsive to the ITN. In essence, the Department's response made the provision of renewal cost information a non-essential criteria of the ITN. Non-compliance with such criteria can be waived by the Department as a minor irregularity.[2/]

28. ITN Section 10.3.2.1.4 provided:

> Only cost submitted in the prescribed format will be considered. Alternate cost models will not be considered for scoring purposes. Vendors selected for negotiations will be provided the opportunity to present alternate costing structures.

"Alternate cost models" referred to models that did not use a transaction-based rate such as a fixed price model or did not use the format for calculating compensation required by the ITN.

29. Part of the format for vendor cost replies included Attachments K (Transaction Rate Cost Form), L (Baseline Compensation Form), M (Reimbursable Cost Form), N (Unknown,

Unanticipated, and Unspecified Tasks Cost Form), and O (Total Compensation Form). Additionally, after questions posed by the vendors, the Department supplied an estimate of the number of transactions it predicted might be processed by the SDU under the contract. The estimate provided by the Department was 69,425,110 transactions and was based in part on an assumed percentage increase in actual transactions that occurred under the current contract in 2012.

30. Attachment K was the form used by a vendor to explain and report the per-transaction rate that the vendor would charge the Department for each transaction it processed through the SDU. The form required disclosure of the costs the vendor included in determining its transaction rate. The form was required to be signed by a representative who could bind the vendor.

31. Relative to Attachment K under the ITN, neither the method used nor the costs included by a vendor to calculate its transaction rate was prescribed by the ITN criteria. There was no requirement that the Department's estimated number of transactions of 69,425,110 be used in calculating the vendor's transaction rate. The Department only supplied such estimates as information to the vendor. In fact, a vendor was free to use its own assumptions regarding the estimated number of transactions that might be processed through the SDU in its calculation of its transaction rate. The method of rate calculation did have to be

explained. However, once calculated, the vendor's transaction rate was carried over to line "B" on Attachment L which, as discussed below, ultimately filtered through to a contract price and commensurate price of services that might be renewed in Attachment O.

32. Attachment L was the form used to calculate the baseline compensation cost for the vendor. The initial form did not require that the Department's estimate of 69,425,110 transactions be used in the calculation of the baseline compensation cost. After questions from the vendors and internal discussions within the Department, Attachment L was revised to require that the Department's estimated number of transactions be used on that form. Notably, the Department did not revise Attachment K to require the use of the estimate when it revised Attachment L. The formula used to calculate Projected Baseline Compensation on Attachment L required the vendor to multiply its transaction rate from Attachment K by the Department's estimated transactions of 69,425,110. The requirement to use the Department's estimated number of transactions on Attachment L normalized the vendors' baseline compensation calculation so that an apples-to-apples comparison of baseline compensation could be made between vendors. Once calculated, the projected baseline compensation cost calculation was carried over to a line item in Attachment O, which form calculated the total projected SDU

compensation, the cost factor used in awarding points to evaluate a vendor's reply.

33. Attachment M was the form on which a vendor was to submit estimates of actual costs the vendor anticipated it would expend for performing the contract. Although not specified, presumably the costs listed by the vendor on Attachment M would be those not used in the vendor's Attachment K transaction rate calculation. Additionally, ITN specifications Sections 7.10.4.3 and 10.3.2.3 provided that all vendors "shall execute and submit Attachment M: Reimbursable Costs." The term "execute" simply means to complete.

34. Within Attachment M, a list of several anticipated cost categories (facilities rent/lease, postage, e-disbursement, post office box fees, etc.) were provided by the Department. There were also several blank fields for additional cost categories contained on the form. The specifically-listed cost categories were those categories the Department, in its experience, anticipated a vendor might incur and for which it would reimburse a vendor. The use of the phrase "will reimburse" in relation to these anticipated cost categories did not make the reporting of such costs mandatory given the format of Attachment M and the instructions later provided on the form discussed below. Such anticipation only indicated interest by the Department in those expense categories but did not create a requirement that those

specific expenses were required to be estimated by a vendor for purposes of responsiveness to the ITN in order to move forward in the evaluation and negotiation process.[3/] Indeed, such costs or expenses were intentionally negotiable under the ITN.

35. Following this list, a box to provide the amount of each reimbursable cost and ultimate total was provided at the end of Attachment M. Notably, except for two of the anticipated cost categories, the box did not include any of the anticipated costs listed earlier in Attachment M. The two cost categories that were listed in the reimbursable cost box were "Facilities Rent/Lease" and "CSR Salary Expenses." Both these cost categories had blank fields where the vendor was required to fill in an amount in the reimbursable cost box at the end of Attachment M. Additionally, the instructions for executing the box clearly stated that amounts for these two categories must be provided. As indicated, the other anticipated costs contained on Attachment M were not specifically listed in the reimbursable cost box. Only blanks, labeled as "(other)," where amounts for vendor "proposed" costs could be reported were contained within the box. Given the format of this form and the instructions at the top of the reimbursable cost box, amounts for anticipated cost categories listed in Attachment M, other than the two required cost categories in the box, were not required to be proposed by the vendor in completing Attachment M and, as

indicated earlier, such amounts were not required in order for a reply to be responsive to the ITN. As with the other forms, the total from the reimbursable cost box was carried over to a line item in Attachment O.

36. Attachment O was the form used to calculate the total projected SDU compensation that constituted the vendor's proposed contract price. The proposed price was also the price for services which may be renewed since, unless the vendor proposed a different renewal price, this was the original price proposed as a term of the initial contract.

37. Section 10.3.2 sets forth the formula for scoring the Cost Data Volume of a vendor. The formula was:

> ***Total Available Cost Points x Amount of Lowest Response Cost/Vendor's Reply Cost***

(emphasis in original).

38. The ITN further stated:

> "Each Vendor's Cost Data points will be added to their Administrative/Technical score to obtain the Vendor's Total Reply Score. The Vendor's Total Reply Score will be used to determine which Vendors the FDOR will Negotiate with."

Thus, the vendor with the lowest cost would receive the maximum points available for its Cost Data Volume with all other vendors receiving a portion of the total available Cost Data points proportionate to the difference between their proposed cost and that of the vendor with the lowest cost. Notably, lower cost

points did not disqualify a vendor from selection for negotiation. Similarly, a lower Total Reply Score did not disqualify a vendor from selection for negotiation because the goal in an ITN procurement is to develop a range of vendor replies for negotiation.

39. The ITN, in Section 11.3, provided broad discretion to the Department regarding the manner in which negotiations would be conducted, including obtaining revised offers from vendors. The section reserved to the Department the right to:
(a) negotiate with one or more, all, or none of the vendors;
(b) eliminate any vendor from consideration during negotiations as deemed to be in the best interest of the State; and
(c) conduct negotiations sequentially, concurrently, or not at all.

40. Sections 3.1.19.1 and 11.5 of the ITN provided that at the "conclusion" of negotiations, the Department would post a Notice of Intended Agency Decision, as determined to be in the best interest of the State. However, this language must be read in conjunction with Section 11.4 of the ITN that authorized the Department's negotiation team to request a Best and Final Offer (BAFO) from one or more vendors with which the Department concluded negotiations. The section reserved to the Department the right to "request additional BAFO; reject submitted BAFO; and/or move to the next vendor" after a BAFO had been submitted

and negotiations concluded. Additionally, Section 2.6.9 contemplates that discussions, i.e. negotiations, regarding the form and language of the final contract would continue after the Notice of Intent to Award was posted. Section 2.6.9 states:

> The FDOR anticipates initially addressing any contract terms and conditions or concerns during the Negotiation process and then continue discussions post award.

Given this language, the Department, in its judgment and acting in the best interest of the state, may post an intended award prior to the complete conclusion of negotiations and finalization of the contract with a vendor.

41. In this case, SMI and Xerox both timely submitted a reply to the ITN. Each reply contained a Volume I: Administrative/Technical; and a Volume II: Cost Data. Both vendors submitted a completed Requirements Location Response Form and had information contained in their reply relative to the references contained in that form. As indicated earlier, under the ITN's pro forma responsiveness review, the substance of each vendor's reply was not a determining factor in whether a vendor's reply was responsive to the ITN for purposes of being accepted and moving forward in the ITN process.

42. John Kinneer was a purchasing analyst with the Department. He served as the procurement officer and as a negotiator with respect to the ITN. Mr. Kinneer reviewed the

technical replies submitted by Xerox and SMI for pro-forma responsiveness to the ITN sufficient to move forward in the ITN process. In compliance with the ITN, he checked the Material Requirements form for both vendors and checked that each vendor had some information in its technical reply relative to the response form. Per the ITN, he did not check the substance of that information. In this case, the evidence demonstrated that both replies met the preliminary responsiveness requirements of the ITN and properly moved forward in the ITN process to the evaluation phase.

43. The Department appointed an evaluation team of seven persons to evaluate and score the Technical Replies. The Committee consisted of Shannon Herold, Barbara Johnson, Connie Beach, Stan Eatman, Beth Doredant, Mark Huff, and Craig Curry. Under the ITN, the evaluation team was tasked with analyzing the substance of each reply and scoring them accordingly with any issues regarding the quality or responsiveness of a vendor's reply to be addressed in that evaluator's scoring. Each evaluator reviewed and independently scored each vendor's reply according to the criteria listed in the "Requirements Response Location Form."

44. In this case, both replies contained a surety letter of commitment as required by Section 7.13.1.1 of the ITN. SMI's letter was from OneBeacon, the apparent bonding agent in the

letter. Indeed, there was no evidence that OneBeacon was not a bonding company. The letter indicated that OneBeacon intended to provide a bond to SMI and that SMI qualified for such a bond in an amount sufficient to meet the requirements of the ITN. Xerox's letter of commitment was also from an apparent bonding company and stated only that the bonding company was "prepared to write the required performance bond" in an unspecified amount and "subject to standard underwriting conditions." While one may quibble about the language used in both Xerox's and SMI's letters, the evidence showed that both letters were not simply letters of reference from a bonding company but were letters of commitment from such companies and were intended as such by those bonding agents. Moreover, the language of both letters was acceptable to the Department as meeting the requirements of the ITN. As such, both Xerox and SMI were responsive to the surety commitment requirements of the ITN.

45. Xerox's reply also attached a copy of its Corporate Change Control Policy and Procedures and a copy of its Corporate Incident Control Policy. These documents were developed by Xerox over several years of being in the business of providing SDU services. They were not developed in relation to this ITN and the evidence did not show that Xerox was disadvantaged either monetarily or otherwise by producing these documents for the ITN.

On the other hand, SMI did not attach such documents. Instead, SMI summarized the substance of its policy and procedures in Tabs 3, 10 and 13 of its Technical Reply and included a copy of SMI's corporate Security Plan encompassing the incident and control policies of SMI. The quality of SMI's reply was evaluated by the evaluation committee members and scored according to the criteria relevant to the ITN. Further, the evidence demonstrated that failure to attach these two documents would not adversely affect any vendor or impair the procurement process since a vendor ultimately was required to agree to adopt the Department's incident control and change management policies and procedures. Moreover, as indicated earlier, the documents were not part of the responsiveness requirements under the ITN. Therefore, SMI's reply was responsive without the attachment of these two documents. However, assuming such documents were required, the evidence demonstrated that the lack of copies of specific documents titled in a certain way was a minor irregularity which the Department reasonably waived since SMI summarized the information relevant to these documents in its reply. Such waiver was not clearly erroneous, contrary to competition, arbitrary, or capricious.

46. Additionally, Xerox submitted with its reply an executed Attachment G, Individual Contractor Security Agreement Form, for both itself and its proposed subcontractors. SMI

submitted an executed Attachment G for itself but did not submit the attachment for its proposed subcontractors. The form was not submitted for SMI's proposed subcontractors because its subcontractors could not access the Department's online procurement library to determine what they would be agreeing to by signing the form. The inaccessibility of the procurement library was not the fault of SMI or its subcontractors but was due to the Department's failure to provide the policies referenced. Additionally, the Department's Standard Contract required Attachment G to be provided within five business days of contract execution. The evidence did not demonstrate that SMI's failure to include an executed Attachment G for its subcontractors constituted a material deviation from the ITN. Further, as indicated above, Attachment G was not a mandatory provision of the ITN for responsiveness purposes. As such, SMI's reply was responsive on this criterion.

47. However, even assuming Attachment G was required under the ITN, the quality of SMI's reply was evaluated by the evaluation committee members under the relevant criteria. The evidence did not demonstrate that SMI obtained an unfair competitive advantage by not including this form in its reply since any subcontractor would have to submit the executed form after contract execution as required by the Department's Standard Contract. Additionally, the evidence did not demonstrate that

the procurement process was undermined by the lack of a subcontractor Attachment G in SMI's reply. Therefore, the lack of such a document in SMI's reply was reasonably waived by the Department as a minor irregularity and such waiver was not clearly erroneous, contrary to competition, arbitrary, or capricious.

48. The evaluation team completed scoring of the vendor's technical replies around January 17, 2014. Xerox scored 969 points and SMI scored 943 points. The difference of 26 points was not shown by the evidence to be significant since both vendors were experienced and well qualified to perform the services required to operate the child support State Disbursement Unit.

49. After the technical replies were evaluated and scored, the initial Cost Data replies of each vendor were opened and the total costs read aloud at a public meeting. The initial cost replies were reviewed by Mr. Kinneer to ensure the replies were mathematically accurate and that the cost forms were used. He did not review or consider the substance of the cost numbers included on those forms or the narratives in the cost replies. The substance of the cost replies was left for consideration by the negotiation team.

50. Xerox's proposed total compensation for years 1 through 5 of the contract was $84,920,072.00. SMI's proposed total compensation for the same period was $47,996,387.00, approximately $36 million less than Xerox's proposed compensation. Neither vendor submitted a separate price for renewal of the SDU services contract. Therefore, for purposes of section 287.057(13), Florida Statutes, the "price" for the "services to be renewed" was the amount stated above for that vendor. Both Xerox and SMI were responsive for purposes of the statutory requirement of section 287.057(13).

51. Xerox also submitted a brief summary of renewal cost in its introductory letter to its cost reply. In essence, Xerox did not anticipate any renewal cost associated with future renewal of the contract. SMI, also, did not anticipate any renewal cost associated with future renewal of the contract, but did not submit a statement to that effect. However, as discussed above, such cost information was not part of the criteria requirements listed for the ITN on the "Requirements Response Location Form" and was not part of the requirements to be scored by the Department for purposes of the cost reply. The evidence demonstrated that the information was immaterial to the Department in evaluating these replies. Further, the evidence did not demonstrate that failure to summarize such renewal cost information would adversely affect any vendor or impair the

procurement process. Under this ITN and the facts of this case, the failure to provide such non-essential cost information constituted a minor irregularity and was appropriately waived by the Department. The Department's action in that regard was not unreasonable and was not clearly erroneous, contrary to competition, arbitrary, or capricious.

52. The evidence showed that both vendors filled out Attachments K, L, M, N, and O. Relative to Attachment K, Transaction Rate, both vendors completed the form based on their unique assumptions regarding the appropriate transaction rate. Neither vendor used the Department's estimated transaction amount of 69,425,110 transactions. Xerox claimed that its assumptions took into consideration the Department's estimate and that such consideration was buried in its ultimate calculation. However, Xerox's mathematical explanation of its transaction rate calculation on its Attachment K does not reflect that it used the Department's estimate in its calculation. In general, the explanation of its transaction rate contained in its reply reflects that Xerox based its transaction rate on the current contract price minus the annualized costs contained in its Attachment M, divided by the actual number of transactions Xerox processed in 2012 and discounted by 12% to produce a transaction rate of 1.150 for the ITN. Clearly, Xerox did not use the Department's estimate in its calculation and, instead, based its

transaction rate on the current contract price, a method the Department warned vendors against using.

53. Similarly, SMI did not use the Department's estimated transaction number in its calculation of its transaction rate on Attachment K. SMI based its proposed rate of .497 on its own historical transaction volumes from other states. The estimated number of transactions used by SMI was 45,066,694 transactions. For unknown reasons, the detailed explanation of the amount of transactions used by SMI was placed on Attachment L. However, the explanation was not used on Attachment L and did not impact the calculation contained on Attachment L. Such misplacement was immaterial to the ITN and had no impact on the ultimate result in Attachment O. As such, the misplaced explanation did not render SMI's Attachment K non-responsive to the ITN and both Xerox and SMI were responsive to the ITN regarding Attachment K.

54. Likewise, the misplaced explanation of SMI's transaction volume did not render SMI's Attachment L non-responsive to the ITN since it was immaterial to that Attachment. Further, the evidence demonstrated that both Xerox and SMI used the Department's estimated transaction volume on Attachment L as required by the ITN. Therefore, both Xerox and SMI were responsive to the ITN regarding Attachment L.

55. Relative to Attachment M, Reimbursable Costs, both vendors supplied cost amounts for rent and CSR salaries as

required by Attachment M. However, neither vendor supplied all of the cost amounts listed in Attachment M's list of anticipated costs. SMI did not supply amounts for postage associated with certain services, post office box fees, foreign bank fees, and hand-signed paper check stock costs. Xerox did not supply amounts associated with SDU mass mailings as listed in cost category two for postage-related items on Attachment M and did not submit an amount for telecommunications cost. As discussed earlier, except for two of the anticipated cost categories of rent and CSR salaries, the ITN did not require that amounts be supplied for those categories in order for a reply to be responsive to the ITN. Therefore, both Xerox and SMI were responsive to the ITN regarding Attachment M.

56. Both Xerox and SMI submitted a responsive Attachment O which included line items from Attachments K through N. Attachment O formed the basis for awarding points based on the lowest cost. As indicated earlier, Xerox's proposed total compensation for years 1 through 5 of the contract was $84,920,072.00. SMI's proposed total compensation for the same period was $47,996,387.00.

57. Under the ITN, the cost replies were scored according to the ITN specifications in Section 10.3.2 and the formula contained therein. SMI received a total of 660 points as the low cost reply. As the second lowest cost reply, Xerox received 376

points as a proportion of the total 660 points received by SMI. Both vendors' scores were added to their technical scores. SMI received a combined Total Reply score of 1603 points for its reply. Xerox received a combined Total Reply Score of 1346 points for its reply. As responsible and responsive vendors, both Xerox and SMI were selected to participate in the negotiation phase of the ITN, where, under the ITN, the criteria and terms of the ITN became negotiable. Further, the evidence did not demonstrate that either the evaluation scores or the Total Reply Scores impacted the ITN process beyond qualifying the vendors to participate in the negotiation process.

58. The Department formed a Negotiation Team consisting of Thomas Mato, Clark Rogers, Nancy Luja, Max Smart, Steve Updike, John Kinneer, and Bo Scearce.

59. Several meetings of the Negotiation Team were held during which the team evaluated Xerox's and SMI's replies, posed written questions to the vendors and discussed technical issues with technical experts. Face to face negotiating sessions between the team and the vendors were also held, as well as meetings to discuss technical issues with the parties. Additionally, two rounds of separate demonstrations of a vendor's proposed system and solution were given to the Negotiation Team by Xerox and SMI. The Negotiation Team only observed the demonstration of each vendor in the first such meeting. During

the second demonstration by each vendor, the Negotiation Team observed the demonstration and asked questions of the vendor. Based on these demonstrations and meetings, the team elected to request revised replies from both vendors. At some point prior to submission of the revised offers and per the ITN, the team communicated to Xerox that, if it wished to stay competitive in the ITN process, it should bring its price closer to that of SMI. The team also communicated its desire to SMI that costs from the anticipated cost list on Attachment M that SMI had not included in its initial reply should be included on that form.

60. With that information from the Negotiation Team, Xerox and SMI submitted revised cost replies. Xerox's Total Projected SDU Compensation dropped from $84,920,072.00 to $48,200,000.00. Its transaction rate was reduced from $1.150 to $.525. Its Attachment M cost estimate increased from $5,081,195.50 to $9,926,119.00. SMI's Total Projected SDU Compensation increased from $47,996,387.00 to $49,500,000.00. Importantly, its transaction rate remained the same at $.497. Its Attachment M cost decreased from $13,492,107.00 to $12,433,125.00.

61. After reviewing the revised replies, the Negotiation Team elected to continue to conduct negotiations with SMI first. Such vendor selection was appropriate under the ITN since its transaction rate remained lower than Xerox's transaction rate and

the team preferred SMI's solution for a variety of legitimate reasons to Xerox's solution.

62. Additional negotiations were conducted with SMI, resulting in additional terms and conditions. After several such negotiation meetings, the evidence showed that the substantive part of the negotiations, including price and scope of work, had concluded with only final contractual language remaining. As such, the Negotiation Team requested a Best and Final Offer (BAFO) from SMI.

63. On May 14, 2014, SMI submitted its BAFO. SMI's Total Projected SDU Compensation increased from $49,500,000.00 to $50,700,000.00. Its transaction rate dropped slightly to $.495 and its Attachment M cost increased from $12,433,125.00 to $13,740,152.09.

64. The BAFO was acceptable to the negotiation team and would, along with SMI's technical reply, become part of the Department's standard contract under the ITN. The team reasonably concluded SMI's management team was superior, and its solution was more customer friendly, intuitive, efficient, and innovative. The Negotiation Team documented its reasons for selecting SMI in a memorandum to the procurement file.

65. On May 19, 2014, the Department posted its Notice of Intended Award to SMI. The evidence did not demonstrate that the award violated section 287.057, Florida Statutes, since that

section only requires that negotiations be "conducted" prior to an intended award of a contract. Notably, the award is only intended and is not final since the Department under Sections 3.1.19.2 and 7.3 is not required to enter into a contract if such a document cannot be finalized. Indeed, the statutory language of section 287.057(4) and the ITN in Section 2.6.9 permit continued negotiation and finalization of a contract after the Notice of Intended Award.

66. In this case, the evidence demonstrated that the negotiations between the negotiation team and SMI resulted in a meeting of the minds regarding the services that SMI would be performing and the price for those services. Further, the evidence showed that the negotiations had concluded in all substantial respects prior to posting of the Notice of Intent to Award the contract to SMI. What remained for the Department and SMI to accomplish was the finalization of the contract assembly by inserting the BAFO, Technical Reply, and price into the contract language; insertion of a start date; and work on implementation issues such as invoices and background screening of employees. Given these facts, the evidence demonstrated that the point at which the Department elected to post its Notice of Intended Award was reasonable since the substantive parts of the negotiations were complete.

67. Ultimately, the evidence in this case did not demonstrate that the ITN process followed by the Department was fundamentally flawed or gave an advantage to one vendor over another. Further, the actions of the Department in this procurement were not contrary to the Department's statutes; contrary to the Department's rules or policies; or contrary to a reasoned interpretation of the ITN specifications. Finally, the evidence did not demonstrate that the Department's actions were clearly erroneous, contrary to competition, arbitrary, or capricious. Given these facts, the protest filed by Petitioner should be dismissed.

CONCLUSIONS OF LAW

68. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. See §§ 120.569 and 120.57, Fla. Stat. (2014).

69. Chapter 287, Florida Statutes, deals with the procurement of commodities and services by state agencies. In this case, the Department utilized an invitation to negotiate as the method for procurement of the contract at issue. Section 287.057(1)(c) describes how a procurement by invitation to negotiate is conducted and provides:

> (c) Invitation to negotiate.--The invitation to negotiate is a solicitation used by an agency which is intended to determine the best method for achieving a specific goal or solving a particular

problem and identifies one or more responsive vendors with which the agency may negotiate in order to receive the best value.

1. Before issuing an invitation to negotiate, the head of an agency must determine and specify in writing the reasons that procurement by an invitation to bid or a request for proposal is not practicable.

2. The invitation to negotiate must describe the questions being explored, the facts being sought, and the specific goals or problems that are the subject of the solicitation.

3. The criteria that will be used for determining the acceptability of the reply and guiding the selection of the vendors with which the agency will negotiate must be specified.

4. The agency shall evaluate replies against all evaluation criteria set forth in the invitation to negotiate in order to establish a competitive range of replies reasonably susceptible of award. The agency may select one or more vendors within the competitive range with which to commence negotiations. After negotiations are conducted, the agency shall award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state, based on the selection criteria.

5. The contract file for a vendor selected through an invitation to negotiate must contain a short plain statement that explains the basis for the selection of the vendor and that sets forth the vendor's deliverables and price, pursuant to the contract, along with an explanation of how these deliverables and price provide the best value to the state.

70. Section 287.012(25) defines a responsive submission to a solicitation as follows: "Responsive bid," "responsive proposal," or "responsive reply" means a bid, or proposal, or reply submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation. A responsive vendor is defined by section 287.012(26) as "a vendor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation." Section 287.012(24) defines a responsible vendor as "a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance." The statutory definition of a responsive vendor does not change whether the procurement method is an invitation to bid, a request for proposals, or an invitation to negotiate.

71. The burden of proof in a competitive-procurement protest rests with the party protesting the agency's intended decision. Section 120.57(3)(f) provides:

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

As such, Xerox must establish whether the Department's action to award the ITN to SMI was contrary to the ITN specifications; contrary to governing statutes, applicable rules, or policies; and was clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat. (2014); Florida Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

72. An agency action will be found to be "clearly erroneous" if the agency's interpretation conflicts with the plain and ordinary intent of the law. See Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004). In such a case, "judicial deference need not be given" to the agency's interpretation. Id. An agency action will be found to be "clearly erroneous" if it is without rational support, and, consequently, the trier-of-fact has a "definite and firm conviction that a mistake has been committed." U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

73. An act is "contrary to competition" if it unreasonably interferes with the objectives of competitive bidding, which are:

> [T]o 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 its various forms; to secure the best values for the county at the lowest possible expense; and to afford equal advantage to all desiring to do business with the county, by

> affording an opportunity for an exact comparison of bids.

Wester v. Belote, 103 Fla. 976, 981, 138 So. 721, 723-24 (1930). See SYSLOGIC Tech. Servs., Inc. v. S. Fla. Water Mgmt. Dist., Case No. 01-4385BID (Fla. DOAH Jan. 18, 2002; SFWMD Mar. 6, 2002).

74. "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, 38-39 (Fla. 1st DCA 2006) and Agrico Chem. Co. v. Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978). Thus, when reviewing a contract award decision to determine whether it is arbitrary or capricious, it must be upheld if the action is justifiable under any analysis that a reasonable person would use to reach a decision of similar weight. As long as the agency has acted in good faith, its judgment should not be interfered with, even if reasonable men could differ and even if the decision may seem erroneous to some persons. Colbert v. Dep't. of Health, 890 So. 2d 1165 (Fla. 1st DCA 2004); State Contracting & Eng'g Corp. v. Dep't. of Transp., 709 So. 2d 607, 610 (Fla. 1st DCA 1998); and Volume Servs. Div. v. Canteen Corp., 369 So. 2d 391, 395 (Fla. 2d DCA 1979) (quoted in System Dev. Corp. v. Dep't of Health & Rehab. Servs., 423 So. 2d 433, 434 (Fla. 1st DCA 1982)). In that regard, the ITN in

Section 3.1.9.3 clearly reserves to the Department the right to determine whether a reply meets the material requirements of the ITN. Additionally, Section 2.7 of the ITN, as well as paragraph 16 of the General Conditions, reserve to the Department the right to waive minor irregularities.

75. In this case, both replies contained a surety letter of commitment as required by Section 7.13.1.1 of the ITN. The evidence showed that both letters were not simply letters of reference from a bonding company but were letters of commitment from such companies and were intended as such by those bonding agents. As such, both Xerox and SMI were responsive to the surety commitment requirements of the ITN.

76. The evidence also showed that Attachment K did not require that the Department's estimated number of transactions be used by a vendor in its transaction rate calculation. Unlike Veolia Transportation Services, Inc. v. Commission for the Transportation Disadvantaged, DOAH Case No. 08-1636BID (DOAH July 9, 2008), where the methodology for the rate calculation by a vendor was required to be used by that vendor in responding to a request for proposal, the Department in this ITN did not require a specific methodology or use of a specific cost estimate by a vendor in calculating its transaction rate on Attachment K. The Department's estimate was only required to be used in the baseline compensation calculation on Attachment L, which use

normalized the baseline compensation calculation so that the Department could make an apples-to-apples comparison of that cost. Thus, the Department's calculation requirements on forms K and L were reasonable and SMI met the requirements of the ITN in completing its Attachments K and L. Morphotrust USA v. Dep't of Transp. and Solutions Thru Software, Inc., DOAH Case No. 12-2917BID (DOAH Dec. 7, 2012; FDHSMV Jan. 7, 2013).

77. In Morphotrust USA v. Department of Transportation and Solutions Thru Software, Inc., the administrative law judge found that the ITN did not impose a mandatory requirement or condition as to the substance of a form, or direct that the pricing form be filled out in a certain way. In reaching the decision, the administrative law judge recognized that while the use of the terms, "shall," "must" and "will" in the solicitation indicated a mandatory requirement or condition, the only portion of the ITN that was mandatory was the requirement that "proposal forms must be submitted with [the] proposal" since it was the only section in the ITN specification that used the mandatory term. Id. at 21. ¶ 79.

78. Like Morphotrust, the ITN required that a vendor submit Attachment M. Except for two categories of costs, the ITN did not require a vendor to seek reimbursements of any costs or to complete the form in a specific way. In this case, both SMI and

Xerox submitted Attachment M, did not deviate from the ITN requirements, and were responsive on this requirement.

79. However, the evidence did demonstrate that SMI's reply deviated from the ITN since it did not contain renewal cost information and did not have an attachment containing copies of SMI's Incident Control Policy and Procedures and Change Management Policy and Procedures. Importantly, not every deviation from an ITN makes a reply non-responsive to the ITN. The court in Robinson Electrical Co. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982), discussed the criteria for determining whether a variance is a material deviation or a minor irregularity and stated:

> Although a bid containing a material variance is unacceptable, Glatstein v. City of Miami, 399 So. 2d 1005 (Fla. 3d DCA), rev. denied, 407 So. 2d 1102 (Fla. 1981), not every deviation from the invitation is material.
>
> In determining whether a specific noncompliance constitutes a substantial and hence non-waivable irregularity, the courts have applied two criteria-first, whether the effect of a waiver would be to deprive the [government agency] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.
>
> In application of the general principles above discussed, sometimes it is said that a

> bid may be rejected or disregarded if there is a material variance between the bid and the advertisement. A minor variance, however, will not invalidate the bid. In this context a variance is material if it gives the bidder a substantial advantage over the other bidders, and thereby restricts or stifles competition. 10 McQuillan, Municipal Corporations § 29.65 (3d Ed. Rev. 1981) (footnotes omitted); see Harry Pepper & Associates, Inc. v. City of Cape Coral, (Fla. 3d DCA 1982).

80. In that regard, section 287.057(13), Florida Statutes, grants an agency the authority to renew a contract under certain conditions and requires that a reply to an invitation to negotiate provide the "price" of the "service to be renewed." Section 287.057(13) states:

> Contracts for commodities or contractual services may be renewed for a period that may not exceed 3 years or the term of the original contract, whichever is longer. Renewal of a contract for commodities or contractual services must be in writing and is subject to the same terms and conditions set forth in the initial contract and any written amendments signed by the parties. If the commodity or contractual service is purchased as a result of the solicitation of bids, proposals, or replies, the price of the commodity or contractual service to be renewed must be specified in the bid, proposal, or reply, except that an agency may negotiate lower pricing. A renewal contract may not include any compensation for costs associated with the renewal. Renewals are contingent upon satisfactory performance evaluations by the agency and subject to the availability of funds . . . . (emphasis added).

81. In Flordia Department of Environmental Protection v. ContractPoint Florida Parks, L.L.C., 986 So. 2d 1260, 1265 (Fla. 2008), the Florida Supreme Court stated:

> This Court has long held that a "statute must be given its plain and obvious meaning." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (quoting A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 137 So. 157, 159 (Fla. 1931)). If the language of the statute is "clear and unambiguous and conveys a clear and definite meaning" there is no need to resort to statutory construction. Id.; accord Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992). In interpreting section 11.066, however, we cannot read subsection (3) in isolation, but must read it within the context of the entire section in order to ascertain legislative intent for the provision. Id. at 455 ("Every statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts." (quoting Fleischman v. Dep't of Prof'l Reg., 441 So. 2d 1121, 1123 (Fla. 3d DCA 1983))). A "statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts" and is not to be read in isolation, but in the context of the entire section. Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 914-15 (Fla. 2001) (quoting Acosta v. Richter, 671 So. 2d 149, 153-54 (Fla. 1996)).

82. Importantly, section 287.057(13) is part of a statutory scheme that provides a continuum of competitive procurement options to the State. As indicated earlier, that continuum runs from invitations to bid, through requests for proposals, to invitations to negotiate. Each of these procurement processes

has statutory requirements associated with it. As part of that statutory scheme and to understand the meaning of the term "price" used in the above-quoted section, subsection (13) must be read in pari materia with the rest of section 287.057.

83. Under sections 287.057(1)(a)2. and (1)(b)3.b., governing invitations to bid and requests for proposals, the "price" for each year of the renewal must be specified in the vendor's submission. In section 287.057(1)(b)3.b., "price" for each year of renewal must also be used to evaluate a vendor's proposal under a request for proposal. Additionally, subsections 287.057(1)(a)3. and (1)(b)3.c. governing invitations to bid and requests for proposals, require that the vendor's submission be evaluated based on the total "cost" for each year of the contract, including renewal years. Importantly, none of the renewal requirements related to evaluation of renewal prices or costs associated with the other procurement methods under section 287.057 are required under subsection (1)(c) of the statute governing invitations to negotiate. Neither price nor cost are defined in chapter 287. However, the use of the terms "price" and "cost" in the same statute indicates that such terms are not synonymous with each other, but have more specific procurement-related meanings.

84. In purchasing, price is not the same as cost. Price is the quantity of one thing, e.g., money, that is exchanged or

demanded in barter or sale for another thing, e.g., SDU services, of which cost is a component. Cost is the monetary value of material, effort, products, resources, etc. which go into producing and delivering a good or service. See "What is Price?" BusinessDictionary.com. Web. 16 Feb. 2015. <http\\www.businessdictionary.com/definition/price.html> and "What is Cost?" BusinessDictionary.com. Web. 16 Feb. 2015. <http\\www.businessdictionary.com/definition/cost.html>.

85. In this case, both vendors stated the price of the service to be renewed in their Attachment O. Like the statute, the ITN, in this case, provided that renewal was to be on the same terms and conditions as the initial contract. Therefore, unless a vendor specified a separate section 287.057(13) "price" for the "service to be renewed," the vendor's original price was the renewal price under both the statute and the terms of the ITN. Since neither vendor specified a separate "price" for the "service to be renewed," the price for such renewal was the proposed contract price in that vendor's Attachment O. As such, both Xerox and SMI met the statutory requirement of section 287.057(13).

86. The ITN did require that renewal costs, not price, be summarized in a vendor's reply. In regards to these costs, the evidence demonstrated that such costs were non-essential to the ITN and were not required for a vendor to be responsive to the

ITN. Given the non-essential nature of this information, the evidence did not demonstrate that any advantage or disadvantage resulted to any vendor as a result of such information not being provided by SMI. Similarly, the evidence did not demonstrate that the competitive procurement process was impaired by SMI not providing this cost information.

87. Further, the initial cost replies were used to score vendors for the purpose of the Department determining the vendors with which it would conduct negotiations. Neither renewal pricing nor costs were used in scoring the vendors' replies. Such scoring demonstrates the insignificance of renewal cost information under the ITN. The evidence did not demonstrate that SMI received a competitive advantage by failing to state in its cost reply that there would be no change in its cost during any renewal period. The evidence did demonstrate that failure to provide such information was a minor deviation from the ITN criteria and could be properly waived by DOR. Juvenile Services Program, Inc. v. Dep't of Juvenile Justice, Case No. 07-1975BID, (DOAH Oct. 31, 2007; OJJ Nov. 30, 2007). Thus, not providing such information was properly waived by the Department. The evidence did not demonstrate that the Department's actions were clearly erroneous, contrary to competition, arbitrary, or capricious.

88. Finally, Xerox contends that the posting of the Department's intended contract award to SMI, before negotiations were concluded, violated Florida law or materially deviated from the ITN specifications. However, section 287.057 does not require that posting of an award decision be held until the conclusion of negotiations with a vendor. Section 287.057(1)(c)4. states, in pertinent part:

> [A]fter negotiations are conducted, the agency shall award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state . . . (emphasis added).

Further, the ITN process provides agencies more discretion in negotiating with vendors than does the RFP process described in section 287.057(b). See Cushman and Wakefield of Fla., Inc. v. Dep't of Mgmt. Servs., DOAH Case No. 13-3894BID, ¶ 102 (DOAH Jan. 24, 2014; DMS Feb. 5, 2014) (ALJ recognized there is no provision under Florida law that prohibits an agency from attempting to maximize the best value to the state and, as a result, rejected an argument that an agency is prohibited from asking vendors to modify their price once a BAFO has been submitted since this would frustrate the agency's ability to maximize the best value for the state). Thus, the statute does not require that negotiations be "concluded" but only that they have been "conducted" prior to the contract award. In that

regard, DOR did not violate the statute by posting its intended award prior to finalization of the contract with SMI.

89. However in this case, the ITN refers to the "conclusion" of negotiations prior to the Negotiation Team requesting a BAFO or posting a notice of intent to award the contract. On the other hand, Section 2.6.9 contemplates that additional discussions regarding the contract could occur after the contract award. Clearly, the reference to the conclusion of negotiations in the ITN does not mean that the contract document itself has been completed.

90. In this case, the evidence demonstrated that extensive negotiations were conducted between the Department's Negotiation Team and SMI prior to posting of the Notice of Intent to Award the contract to SMI. The evidence further demonstrated that the negotiations between the Negotiation Team and SMI resulted in a meeting of the minds regarding the services that SMI would be performing and the price for those services. Further, the evidence showed that the negotiations had concluded in all substantial respects prior to posting of the Notice of Intent to Award the contract to SMI. The evidence did not demonstrate that such posting was contrary to competition, impeded the nature of competitive procurement or created an unfair advantage in the award. Additionally, the evidence did not demonstrate that the timing of the Department's posting of its Notice of Intent to

Award the contract to SMI was contrary to any statute, rule, policy, or ITN specification and was, at worst, a minor deviation from those specifications.

91. Therefore, the Department's interpretation of the ITN as not requiring the contract document itself, including Attachment A to the contract document, to be finalized prior to contract award, as long as the substantive terms and conditions and price have been negotiated, is certainly a rational and reasonable interpretation of its own specifications that should not be disturbed.

92. The evidence did not demonstrate that the Department's intended award of a contract to SMI deviated from governing statutes, applicable rules, or policies of the Department or reasonable interpretations of the ITN specifications. Further, there was no evidence that the Department's decision was clearly erroneous, contrary to competition, arbitrary, or capricious. Therefore, the award of the contract arising out of the ITN to SMI should stand and this protest should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Respondent, Florida Department of Revenue, enter a final order dismissing the protest of Petitioner, Xerox State and Local Solutions, Inc., and approving

the award of the contract to Intervenor, Systems and Methods, Inc.

DONE AND ENTERED this 18th day of February, 2015, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of February, 2015.

ENDNOTES

[1/] Xerox designated the following excerpt from the audio tape: 17:40-20:32. SMI cross-designated the following excerpt to Xerox's Exhibit 17: 17:43-23:38. Xerox then added the following excerpt: 17:39-24:31.

[2/] Statutory requirements such as the requirement in section 287.057(13) cannot be waived by an agency.

[3/] The Department's response to October 24, 2014, vendor question 24 about Attachment O does not clarify whether amounts for the cost items in Attachment M were mandatory since the Department's answer also indicated that Attachment M should include expenses for which the vendor wishes to be reimbursed. Notably, Attachment M was not amended as a result of the Department's response to question 24. Moreover, the Department's response to October 24, 2014, vendor question 53 does not resolve the issue regarding Attachment M costs since the Department's response seemingly made telecommunications costs mandatory by use of the word "shall" in relation to reporting those costs on

Attachment M. Again, Attachment M was not amended as a result of the Department's response to question 53. Thus, Xerox's reply was responsive to the ITN even though it did not include seemingly mandatory telecommunications costs in its reply.

COPIES FURNISHED:

Cindy Horne, Esquire
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668
(eServed)

W. Robert Vezina, III, Esquire
Vezina, Lawrence and Piscitelli, P.A.
413 East Park Avenue
Tallahassee, Florida 32301
(eServed)

Mia L. McKown, Esquire
Holland and Knight, LLP
Post Office Drawer 810
Tallahassee, Florida 32302-1809
(eServed)

Nancy L. Staff, General Counsel
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668
(eServed)

Marshall Stranburg, Executive Director
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668
(eServed)

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.