

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

UNIVERSITY HOTEL AND
LEARNING CENTER, LLC,

Petitioner,

Case No. 14-4661BID

vs.

UNIVERSITY OF CENTRAL
FLORIDA,

Respondent.

_____ /

RECOMMENDED ORDER

D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing on January 8 and 9, 2015, in Orlando, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether the University of Central Florida's (UCF or University's) Notice of Tentative Award of Invitation to Negotiate (ITN) Number 1317ZCSA to KUD International, LLC (KUD), was contrary to UCF's governing statutes, regulations, or policies or to the ITN's specifications.

PRELIMINARY STATEMENT

On September 15, 2014, UCF posted a Notice of Tentative Award stating its intent to award ITN 1317ZCSA to KUD, which submitted the top-ranked offer. University Hotel & Learning Center, LLC (UHLC), which submitted the second-ranked offer, gave notice of its intent to protest the award and timely filed its Formal Protest of the Intended Award. The parties waived the requirement that a final hearing be conducted within 40 days after the filing of the protest. See Fla. Bd. Gov's Reg. 18.002(13).

At hearing, UHLC presented the testimony of seven witnesses. UHLC Exhibits 3 through 26, 28 through 32, 35 through 37, and 45 through 48 were accepted. UCF Exhibits 11, 17, and 18 were received. Finally, Joint Exhibits 1 through 10 were accepted.

A three-volume Transcript of the hearing has been prepared. Both parties filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. UHLC is a Florida limited liability company formed by W.A. "Chip" Headley. He obtained an undergraduate and master's degree from UCF, is a very loyal alumnus, and is a long-time booster of the University. Mr. Headley explained that if KUD's proposal had been "in the ballpark of what the other three proposers had proposed," and was not such a "bad financial deal" for the University, he would have walked away without filing a protest.

2. Mr. Headley formed UHLC in connection with the ITN. UHLC is owned by SRP Hotel Partners, LLC, and J.P. Turner & Company, LLC. SRP Hotel Partners, LLC, in turn is owned by Thomas Lee Group and Simonson Road Partners, LLC. Mr. Headley leads Simonson Road Partners, LLC, a hospitality-focused boutique real estate investment company.

3. UCF is a public research university located in Orlando, Florida. It has a current enrollment of over 60,000 students, making it the second largest university in the United States in terms of student enrollment. Its annual budget is around \$1.4 billion.

B. Events Prior to the Submission of Responses

4. The ITN was released on April 4, 2014. Its objective was to enable UCF to enter into an agreement with a vendor "to

provide a boutique hotel and conference center situated on 11.8 acres immediately adjacent to the UCF academic core." As further explained in section 1.1 of the ITN:

The boutique hotel and conference center will serve as an enhancement to existing academic facilities and will add a desirable service component to the campus. The facility will reflect a design and ambiance congruent with the campus educational and aesthetic objectives.

While the term boutique usually refers to hotels of fewer than 150 rooms, the number of rooms in this facility should be determined by the overall program developed for the site. It will aim to achieve the feel and ambience of a boutique hotel through its design architecture and interiors.

5. The ITN "emphasizes that the Respondent concentrate on accuracy, completeness, and clarity of content." § 3.1.

6. UCF expressly reserved the right not to award based on the highest proposed revenue to UCF. In fact, the ITN makes clear that "UCF is not obligated to make an award under or as a result of this ITN or to award such contract, if any, on the basis of the lowest cost or highest commission offered."

§ 2.8.C. It also reserved the right, at its sole discretion, to "determine whether a deviation [from an ITN requirement] is material." § 2.18.A.

7. Mr. William Merck serves as UCF's Vice President for Administration and Finance. Together with Mr. Greg Robinson,

the University's Purchasing Director, Mr. Merck helped develop the ITN's specifications and wrote the provision that the term boutique usually refers to hotels of fewer than 150 rooms.

8. Mr. Merck was the final decision maker for the ITN. While he could give deference to the initial evaluation committee's scores, he was not bound by them. In fact, the ITN vested him with sole discretion to determine what "is in the best interest of UCF, [and to] then make the final decision whether or not to recommend the award of a contract to a Respondent to this ITN, negotiate with the highest ranked respondent(s), or cancel the ITN." § 2.8.C.

9. After publishing the ITN, on April 29, 2014, Mr. Merck and Mr. Robinson held a mandatory pre-proposal conference for potential respondents to seek clarification on the ITN. UHLC was represented by Mr. Headley at the pre-proposal conference. He sought no clarification on the ITN.

10. At the conference, UCF officials were asked whether there was any desired size for the hotel. Mr. Merck told the attendees that UCF did not want a hotel that was the size of the Marriott World Center, a resort hotel near Disney Land with around 2,000 rooms and several hundred thousand square feet of meeting space. To the contrary, Mr. Merck indicated that he was "looking for something relatively small" in terms of facility size. Given this response, and a reference in the ITN to a

"boutique hotel" with "fewer than 150 rooms," the undersigned has rejected a contention by UHLC that a lack of clarity on the size of the hotel gave KUD a competitive advantage.

11. After the pre-proposal conference, the potential respondents had several weeks to submit written requests for clarification or alteration of any ITN provisions they perceived as unclear or restricting competition. Again, UHLC submitted no clarification requests.

C. ITN Responses

12. On June 24, 2014, UCF received six ITN responses. Mr. Robinson checked to see if the proper boxes were checked on a list of non-negotiable items, but he did not review every section of each proposal for compliance with other provisions. He left all other determinations regarding compliance or non-compliance with the ITN specifications to the evaluators.

13. Two responses were rejected by Mr. Robinson for missing or unacceptable mandatory response forms. The ITN responses by UHLC, KUD, and two others proceeded through the ITN process.

i. UHLC's Response

14. Before preparing its response, UHLC assembled a team capable of developing the project. The proposed hotel will cost several million dollars. UHLC has a placement agreement with J.P. Turner & Company, LLC, committing it to provide the capital

for the project. Other than that agreement, UHLC does not have any other agreements in place for the proposed project.

However, this is true of all other respondents, including KUD.

15. Mr. Headley signed and submitted UHLC's response in his capacity as manager of Simonson Road Partners, LLC, which co-owns SRP Hotel Partners, LLC, which in turn co-owns UHLC. The other co-owner of UHLC is J.P. Turner & Company, LLC, whose 90 percent ownership interest in UHLC "includes an undetermined amount of equity that will be syndicated to retail and/or institutional investors."

16. UHLC's response included its certificate of registration with the Florida Department of State, but not for any other entity.

17. UHLC omitted a conceptual site plan or facility design from its proposal. Instead, it intentionally chose to describe its concept for the proposed hotel in broad terms to promote collaboration with the University. Because the site is located at the main entrance, UHLC wanted the University to be actively involved in its design.

18. In researching the UCF market, UHLC also looked at 11 colleges with on-campus hotels, including the University of Florida, Georgia Tech, and Auburn University. The average size of those hotels was 238 rooms and 27,000 square feet of meeting space. Based on that research, UHLC proposed to develop a hotel

at UCF with 225 to 300 rooms and approximately 25,000 to 40,000 square feet of meeting space. The development would use the entire 11.8-acre tract.

19. Although UHLC prepared a financial pro forma to develop its proposed lease terms, it was designed to be an internal document and included information targeted at potential investors. The ITN did not require a pro forma.

20. UHLC assumed that the hotel would have 225 rooms, an average daily rate of \$149.00 in 2017, a stabilized occupancy of 72 percent, and an average growth rate of three percent. Based on this pro forma, UHLC proposed two lease term options in its response. Under option 1, UHLC would make total payments to the University over 50 years of \$26,175,000.00, including a lump sum payment of \$7.5 million in year one. Under option 2, UHLC would make annual payments in increasing amounts to the University over the course of the lease term totaling \$36,185,000.00 over 50 years. Under both options, UHLC proposed to charge a "UCF Fee" equal to three percent of the daily rate on each occupied room. Over a 40-year period, this would generate an additional \$19,850,000.00 to UCF. Thus, under either option, UHLC proposed a financial return to the University in excess of \$50 million over a 50-year period. This was comparable to the return proposed by two other respondents, but was much higher than the return proposed by KUD.

ii. KUD's Response

21. KUD has 40 years' experience developing projects in the hospitality, convention, education, museum, performing arts, commercial, broadcast, and sports industries.

22. In 2007, KUD managed a large development project for UCF, and a section of KUD's webpage lists a quote attributed to Mr. Merck complimenting KUD's work on that project. However, since that time, KUD has done no other work for UCF.

23. KUD's response was signed and submitted by its executive vice president and includes its certificate of registration with the Florida Department of State, but not for any other entity.

24. A section of KUD's response makes reference to an entity not yet formed, NewCo, LLC, as a potential special purpose entity to be part of the project's future ownership structure, which would be approved or not at UCF's sole discretion.

25. KUD proposes to develop a hotel with 100 to 130 rooms, 15,000 square feet of conference space, a 200-space parking lot, a conceptual site plan and facility elevation, and a market feasibility study to help determine appropriate facility sizing. Notably, it proposes using just 7.4 of the available 11.8-acre site for the project. The remaining acreage would be retained by the University for another purpose.

26. KUD proposed lease payments of \$150,000.00 per year for 50 years, no upfront payment, and no increase in rent over the lease term. In its response, however, it states that:

The value for the land being provided by UCF is a complex issue that revolves around the number of rooms that can be supported by the anticipated market demand. Therefore, a boutique hotel of 100 rooms cannot possibly make the same investment in land than that of a 200 room hotel

We understand, however, that UCF must be able to justify the use of this land against other long term potential uses. Therefore, we have established land payments that have a minimum current value of \$7.5 million dollars over the proposed initial term of the land lease. This value is established as a land lease payment of \$150,000 per year or 1% of the gross operating revenues, whichever is greater. Based on approximately 7.4 acres, this equates to approximately \$1.0 million per acre.

Jt. Ex. 2 at 11.

27. KUD's response included a projected financial pro forma based on 100 hotel rooms, including anticipated revenues, expenses, and net operating income. The response identifies its proposed hotel operator as The Olympia Companies (Olympia), which also operates a boutique hotel called the Alford Inn for Rollins College in Winter Park. Another vendor also identified Olympia as its potential hotel operator.

D. The Evaluation Process

28. To evaluate and score the proposals, Mr. Merck formed an initial evaluation committee composed of a diverse group of University constituents. All seven members met the ITN's qualifications requirements.

29. Section 2.8.C. of the ITN provided that "each evaluation committee member shall function independently of all other persons including, without limitation, the other committee members, and, throughout the entire evaluation process, each evaluation committee member is strictly prohibited from meeting with or otherwise discussing this ITN and any aspect thereof including, without limitation, the offers and their content with any other individual whatsoever." However, evaluators were not told to refrain from conducting internet research on the respondents or their team members.

30. On June 26, 2014, or two days after the filing of the responses, Mr. Merck and Mr. Robinson met with the evaluation committee and provided them with instructions, the ITN, and the four responses to be evaluated. Mr. Robinson briefed the members on how to conduct their evaluations. During the meeting, they reviewed the description of a hotel with a typical size of 150 rooms or less and noted the instruction that the size of the hotel might vary depending on each proposer's project scope.

31. The next day, June 27, 2014, Mr. Robinson emailed the committee members additional related documents, and his cover email included some financial information attributed to the Alford Inn "because boutique hotels are something new for the university. Nobody was really familiar with it." He did not provide this information to any proposer, and there is no evidence that any proposer knew the committee had received this information prior to responding to the ITN.

32. The ITN specified the following weighted criteria for the evaluation committee's scoring:

1. Experience and qualifications in designing and managing hotel/conference center facilities;
2. Proposed financial return to the university through ground rent or other financial benefit;
3. Experience of personnel assigned to the project;
4. Financial viability of the respondent;
5. Overall viability of the concept;
6. Compatibility of the proposed concept with the UCF Campus area; and
7. Conformance with the ITN's preferred conditions and requirements.

§ 2.8.C.

33. As to the proposed financial return, Mr. Merck pointed out that "financial return from a project like this, when it's on the university, is important, it's meaningful, but that's not the primary driver in the decision or in the goal we were seeking with the hotel." The University's current annual budget

of \$1.4 billion puts this statement in perspective. Mr. Merck's main desire was to get a "quality product," which outweighed everything else, including financial return, in the solicitation. Therefore, the financial return only accounted for 20 percent of the total awardable points, while the other six criteria combine for a total of 80 percent.

34. After the evaluation committee completed its review, scored the proposals, and ranked KUD as number one, Mr. Merck concluded that KUD's response "looked very good" based on its partial use of the available land; the conceptual site plan and facility elevation; a "very conservative base case" financial pro forma based on 100 hotel rooms; a clear project team identification, including a "very important" hotel operator; and a suggested market feasibility study, which he found impressive. In contrast, he considered UHLC's response oversized as to the facility, vague as to its proposed conceptual idea and hotel operator, and lacking substance as to some of its numbers. Thus, he decided that KUD should be selected for pre-award negotiations, which eventually led to UCF's decision to award the contract to KUD.

E. Grounds Raised by Petitioner

35. In the parties' Joint Pre-Hearing Stipulation, UHLC contends that the proposed award to KUD should be rescinded and the contract awarded to UHLC, or alternatively, the ITN reissued

and the process started anew. It alleges generally that the financial return to UCF is not in the University's best interests and that UHLC submitted a superior financial return; that KUD's response materially deviated from the state corporate registration requirement in section 2.15 of the ITN; that KUD received an unfair competitive advantage due to the evaluation committee's receipt of information about the Alford Inn; that three of the seven evaluators improperly scored the proposals of KUD and UHLC; that Mr. Merck improperly conferred with the evaluation committee members after receiving their scores; that UCF improperly communicated with KUD in pre-award communications; that KUD was allowed to amend its proposal after it was opened; and that UHLC was not given a point of entry to challenge the pre-award meeting between the negotiating team and KUD. Incorporated into these broad allegations are several other contentions. These allegations are discussed below.

i. Financial Return to the University

36. UHLC contends that even though financial return made up 20 percent of the total evaluation points, the ITN specifications were never changed to reflect the decreased importance given to financial return by Mr. Merck.

37. As noted in Finding of Fact 33, financial return was never the driving force for UCF on this project. This was consistent with section 2.8.C. of the ITN, which specifically

provided that "UCF is not obligated to make an award under or as a result of this ITN or to award such contract, if any, on the basis of lowest cost or highest commission offered." Also, section 2.3 of the ITN allowed UHLC to request clarification on "any conditions or requirements which [it believed] remain unclear or which restrict competition." No clarification regarding financial return was ever sought. UHLC's suggestion that financial return should be the overarching dispositive factor in awarding the contract is rejected.

ii. Violation of Section 2.15

38. UHLC contends that by listing a not-yet-formed entity, NewCo, LLC, to be a part of the project's future ownership structure, but not attaching that entity's state corporate registration certificate, KUD violated a material requirement of the ITN, section 2.15.

39. This section of the ITN was highlighted by Mr. Merck at the pre-proposal conference. It provides as follows:

2.15 State Licensing Requirements

All corporations seeking to do business with the State of Florida shall, at the time of submitting an offer in response to this ITN, either be on file or have applied for registration with the Florida Department of State in accordance with the provisions of Chapter 607, Florida Statutes. A copy of the registration/application must be furnished to UCF when submitting the offer.

40. Notably, this provision is not included as a part of the "nonnegotiable conditions and requirements" pursuant to ITN section 2.50 and Appendix II. Therefore, while the requirement is important, a failure to strictly comply with that provision did not mean that a proposal would be deemed non-responsive, as UHLC argues.

41. KUD's response was signed and submitted by KUD's executive vice president under the name KUD International, and it includes the Florida corporate registration certificate for that entity. Thus, KUD was the respondent to the ITN, not NewCo, LLC.

42. UHLC's response was signed by Mr. Headley in his capacity as manager of Simonson Road Partners, LLC, which is a second level parent/owner of UHLC. Its response did not include the corporate registration certification of Simonson Road Partners, LLC, and provided no documentation indicating Simonson Road Partners, LLC's authority to submit the response on behalf of SRP Hotels Partners, LLC, or UHLC.

43. Mr. Robinson reviewed both responses and determined they sufficiently conformed to the ITN. Even if there was arguably a deviation from the specification, he considered the deviation to be immaterial and one that could be waived. See § 2.18.A. ("UCF will, at UCF's sole discretion, determine whether a deviation is material."). No advantage or benefit

accrued to either respondent by UCF waiving strict adherence to this requirement.

iii. Information Regarding the Alfond Inn

44. UHLC asserts that UCF materially deviated from the ITN's specifications by providing the evaluation committee with information concerning the Alfond Inn shortly after the evaluation process began, and abused its discretion in permitting the committee to receive such information. As noted earlier, the Alfond Inn is located on the Rollins College campus and is managed by Olympia, which KUD intends to use to manage its hotel if awarded the contract.

45. On June 26, 2014, or two days after the opening of the proposals, Mr. Merck organized a group and individual meeting with the evaluators. At that meeting, the specifications were reviewed, and a description of a "typical" hotel of around 150 rooms or less was given. However, the evaluators were told that the size of the hotel might vary depending on each proposer's project scope.

46. The next day, Mr. Robinson sent an email to all evaluators that included Addendum 1 and 2 to the ITN. The email also included information concerning the Alfond Inn. Because a boutique hotel is a new concept in hotels, Mr. Robinson believed the information would be helpful to the evaluators. The email pointed out that the Alfond Inn had achieved an occupancy rate

as high as 94 percent and that it had exceeded its revenue projections. The email did not identify the Alford Inn's developer, architect, operator, number of rooms, or conference space. Mr. Robinson interpreted the ITN as permitting the committee to receive this type of information in its review process. This was a reasonable interpretation of the ITN and did not constitute an abuse of discretion.

47. There is no evidence that any evaluator materially relied on Mr. Robinson's email in scoring his/her proposal. The evidence does not support a finding that any respondent received a competitive advantage by this action.

iv. Evaluation Committee Members' Scores

48. Petitioner contends that three members of the committee acted arbitrarily and capriciously in the manner in which they scored the financial return criteria for both UHLC and KUD. It also contends that one of those members erroneously scored UHLC's response on the criteria of financial viability and the experience and qualifications in designing and managing hotel/conference center facilities. As relief, UHLC asks that KUD's total score be reduced from 596.5 to 537.5, and that UHLC's total score be raised from 567.0 to 597.0.

49. On this issue, the record shows that the challenged committee members gave reasonable explanations for their scoring based on facts and logic.

50. Petitioner also contends that the scoring process was flawed because the evaluators improperly used external sources to obtain information about the respondents.

51. Section 2.25 allows UCF to "make investigations to determine the ability of the Respondent to perform under the ITN." UCF's interpretation of this section to mean that evaluators could use the internet and company websites in their evaluation process was not unreasonable.

52. Many of the evaluators testified that they relied on the internet and company websites to assist them in their evaluation. One evaluator noticed on KUD's website an endorsement by Mr. Merck of KUD based on its work on a project that ended in 2007. However, he was not influenced by that information when he scored the proposals.

53. There is no evidence that any evaluator relied on opinions of friends or others in scoring the proposals.

54. Notably, under the terms of section 2.8.C. of the ITN, Mr. Merck was not bound by the scores of the evaluation committee. The ITN vested in him the discretion to choose KUD even if the evaluators had ranked it below UHLC. In Mr. Merck's judgment, UHLC's proposal was too oversized as to the facility, vague as to its proposed conceptual idea and hotel operator, and unsubstantiated as to some of its numbers. He was also concerned that an excessive number of hotel rooms might suffer

from lower occupancy rates, leading to decreased maintenance and service in order to maintain profit margins. In sum, he concluded it was in the best interest of the University to begin pre-award negotiations with KUD, which he believed submitted the best proposal.

55. UHLC further contends that KUD was given a competitive advantage because the initial scoring summary sent to Mr. Merck was incorrect and ranked UHLC as number four, rather than number two.

56. After the evaluation team completed its assignment, the score sheets were sent to Mr. Robinson. He then cut and pasted those scores onto an Excel spreadsheet. Though he correctly transposed individual scores for each evaluator, the Excel spreadsheet that he used contained formulas that incorrectly tallied total scores.

57. When first computed, Mr. Robinson's summary identified KUD in first place, but listed UHLC as number four. Although UHLC should have been ranked second, the summary listed Avista Management (Avista) as the second ranked proposal. The incorrect scores were forwarded to Mr. Merck on July 26, 2014, and were not corrected until Mr. Robinson returned from vacation on August 11, 2014.

58. Using the incorrect score sheets, Mr. Merck prepared a summary of the four proposals, as well as an outline reviewing

the total scores to the evaluators. Based upon his review, Mr. Merck intended to begin pre-award negotiations with KUD, the top ranked vendor, but if they were unsuccessful, negotiations would begin with the second ranked respondent, who he believed at that time was Avista.

59. When the incorrect summary was given to Mr. Merck, he concluded that "KUD should be the one that we pick," and the incorrect ranking of UHLC as number four instead of number two had no bearing on his decision. At that point in the process, Mr. Merck decided that there was no reason to discuss the merits of the other three proposals, and he wanted to confirm that the evaluators were comfortable with KUD as the highest ranked respondent. KUD did not receive an unfair competitive advantage by the incorrect summary.

v. Improper Collaboration Among Evaluators and Mr. Merck

60. UHLC contends that by meeting with the evaluators after the proposals were opened, but before an award was made, Mr. Merck violated the terms of the ITN in a material respect.

61. In support of this contention, UHLC points out that the ITN instructed the evaluators to "[w]ork independently" and to "not discuss the Offers or your evaluation with anyone." App. I, ITN. It also cites to another provision in the ITN that allowed evaluators to meet with Mr. Merck while the ITN

specifications were being formed, but not after offers were opened on June 24. See § 2.8.C.

62. Notwithstanding these provisions, section 2.8.C. also included the following important language:

At the time of such delivery [of score sheets] to the Purchasing Person, the evaluation committee members shall cease to participate further in this ITN process unless expressly requested by Decision Maker. The Decision Maker shall review, in the manner and to the extent he/she deems reasonable under the circumstances, the ITN, the offers, and the committee members' scoring forms The Decision Maker may, at any time during this ITN process, assign one (1) or more UCF staff members to assist the Decision Maker's review prior to his/her decision-making in this process. (Emphasis added.)

63. This language clearly allowed Mr. Merck to request a meeting with the evaluators at any time during the ITN process when expressly requested by Mr. Merck. Relying on that authority, both Mr. Merck and Mr. Robinson concluded that conferrals by Mr. Merck with the committee after receiving their scores were permitted. Here, Mr. Merck deemed it appropriate to confer with the evaluation committee members as a group to assess their overall level of comfort with KUD and their feelings on opening negotiations with both KUD and UHLC, or just KUD. The conferrals were not clearly erroneous, contrary to competition, arbitrary, or capricious, as alleged by UHLC.

vi. Pre-Award Communications With KUD

64. Section 2.6 of the ITN prohibited respondents from making offers or amendments to their proposals once they were opened. UHLC contends that section 2.6 was materially violated when a member of the evaluation team requested clarification on an item in KUD's proposal, and KUD was allowed to correct a typographical error in its proposal.

65. Dr. Young was a member of the evaluation team. During her review of KUD's response, she raised a question regarding how much land KUD proposed to use. She did so because KUD's proposal indicated on page 1 that 7.4 acres would be used, but in another place indicated that 4.4 acres would be used. As it turned out, the latter figure (4.4) was a typographical error.

66. To clarify this issue, Dr. Young sent an email to Mr. Merck, who forwarded it to Mr. Robinson. Mr. Robinson sought clarification from KUD, who provided an email response that 7.4 acres (shown on page 1) was the correct figure. In response to a second question from Dr. Young, KUD also provided information regarding Olympia, one of its team members. All evaluators were given a copy of Dr. Young's original question, along with KUD's response. However, these were permissible communications under section 2.25 of the ITN, which allows UCF to "make investigations to determine the ability of the Respondent to perform under the ITN." Moreover, by simply

allowing KUD to correct a typographical error when the correct acreage was listed elsewhere in its proposal, KUD was not given a competitive advantage.

67. UHLC also contends that UFC was prohibited from communicating with KUD prior to issuing the tentative award.

68. By August 11, 2014, Mr. Merck had decided that KUD submitted the best proposal. Accordingly, that same day, he advised Mr. Robinson that a negotiation committee would be formed to proceed with pre-award negotiations with KUD, and except for one individual, the evaluation committee members would comprise that group. The group met with KUD on September 9, 2014. Notice of the meeting was not given to other respondents. Three days later, Mr. Merck advised Mr. Robinson to publish a notice of intended award to KUD.

69. Mr. Merck explained that the point of the meeting with KUD was "not so much to drill down on exactly the specifics of what they would deliver, but more to -- for use to develop a comfort level that the team they were putting forth was a -- was a fit for the university and that generally what they orally suggested to us was consistent with what they had put in writing in their proposal. It was more an additional kick the tires exercise." This type of meeting is authorized in numerous places throughout the ITN. See § 2.25 ("As part of its evaluation process, UCF may make investigations to determine the

ability of the Respondent to perform under this ITN.");
§ 1.2.E. ("UCF reserves the right to conduct negotiations with the highest ranked offerer(s)."); § 2.8.A. ("UCF reserves the right to conduct negotiations if [Mr. Merck] . . . determines negotiations to be in the best interest of the university.");
§ 2.8.C. (Mr. Merck retains the right to negotiate with the highest ranked respondent). The University's interpretation of these provisions was not clearly erroneous, contrary to competition, arbitrary, or capricious, as alleged by UHLC.

vii. Failure to Offer Point of Entry Before Entering Pre-Award Negotiations with KUD

70. UHLC contends that it was entitled to a point of entry to challenge Mr. Merck's decision on August 11 to begin pre-award negotiations with KUD. However, at that time, UHLC was not yet eliminated from consideration, and Mr. Merck had not made a final decision to reject the other proposals. See Fla. Bd. Gov's Reg. 18.002(3)(c) (an intended or final decision occurs only after all responses have been rejected). Moreover, section 2.8.C. allows UCF the discretion to communicate with both KUD and UHLC, or any other respondent. If negotiations with KUD were unsuccessful, UCF intended to engage with UHLC as the second ranked proposer. Pursuant to section 2.9, UHLC's meaningful point of entry was provided when a notice of intent to award a contract was posted on September 15, 2014.

CONCLUSIONS OF LAW

71. This proceeding is governed by regulations adopted by the Florida Board of Governors. Board of Governors' Regulation 18.002 sets forth the procedures for protests related to the University's Contract Procurement Process. Paragraphs (13)(f) and (g) of that regulation contain the following standards that are applicable to this proceeding:

The [administrative law judge] shall conduct a de novo proceeding to determine whether the university's decision or intended decision is contrary to the statutes, regulations, or policies governing the university, or contrary to the Specifications. The standard of proof in this proceeding shall be whether the proposed university action was clearly erroneous, contrary to competition, arbitrary, or capricious.

72. "The burden of proof rests with the party protesting the university action." Id. Thus, Petitioner must establish by a preponderance of the evidence that UCF's intent to award a contract to KUD violated applicable rules and ITN specifications in a manner that was clearly erroneous, contrary to competition, arbitrary, or capricious.

73. Agency action will be found to be clearly erroneous if it is without rational support and, consequently, the Administrative Law Judge has a "definite and firm conviction that a mistake has been committed." U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

74. An act is contrary to competition if it (1) creates the appearance or opportunity for favoritism; (2) erodes public confidence that contracts are awarded equitably and economically; (3) causes the procurement process to be genuinely unfair or unreasonably exclusive; or (4) is unethical, dishonest, illegal, or fraudulent. Syslogic Tech. Servs., Inc. v. S. Fla. Water Mgmt. Dist., Case No 01-4385BID (Fla. DOAH Jan. 18, 2002), modified in part, Case No. 2002-051 (SFWMD Mar. 6, 2002).

75. A decision is arbitrary if it is not supported by facts or logic or is despotic. Agrico Chem. Co. v. State, Dep't of Env'tl. Reg., 386 So. 2d 759, 763 (Fla. 1st DCA 1978). To act capriciously is to act without thought or reason or to act irrationally. Id. If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. Dravo Basic Materials Co. v. State, Dep't of Transp., 602 So. 2d 632, 634n.3 (Fla. 2nd DCA 1992).

76. When the foregoing principles governing procurement protests are applied to the established facts, it is concluded that UHLC has failed to prove by a preponderance of the evidence that during its review of the proposals, UCF violated applicable rules and specifications in a manner that was clearly erroneous, contrary to competition, arbitrary, or capricious. Therefore,

UHLC's protest should be denied and the decision to award the contract to KUD sustained.

77. Finally, in its Proposed Recommended Order, UCF requests that it be awarded attorney's fees and costs pursuant to Florida Board of Governors' Regulation 18.002(22), which allows for an award of attorney's fees and costs if "the non-prevailing party has participated in the hearing for an improper purpose." Like similar provisions in chapter 120, an "improper purpose" is defined in the regulation as "participation in the protest proceeding primarily to harass, cause unnecessary delay, [or for a] frivolous purpose; needlessly increasing the costs of litigation, licensing, or securing the approval of an activity; or filing a meritless protest." Having reviewed UHLC's protest, the undersigned cannot conclude that it was filed for an improper purpose. The request is accordingly denied.

RECOMMENDATION

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

RECOMMENDED that the University of Central Florida enter a final order denying UHLC's Formal Protest of the Intended Award and sustaining its intention to award the contract to KUD.

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

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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RIGHT OF REVIEW

Pursuant to Regulation 18.002(13)(j), within fourteen days after rendition of this Recommended Order, the President of University of Central Florida shall issue a Preliminary Order and serve the parties with a notice of such order. If the Protestor takes exception to the Preliminary Order, the Protestor must timely file its written exceptions with the President within fourteen days after the date of this Recommended Order is issued. The Preliminary Order shall provide that, "This Preliminary Order is the Final Order unless the Protestor files written exceptions to the Preliminary Order with the President no later than 14 days after the date this Preliminary Order is issued."