

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TOSHIBA BUSINESS SOLUTIONS
(USA), INC., A DELAWARE
CORPORATION,

Petitioner,

vs.

Case No. 14-5300BID

SCHOOL BOARD OF BROWARD COUNTY,

Respondent,

and

IMAGENET CONSULTING OF MIAMI,
INC.,

Intervenor.

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy in Fort Lauderdale, Florida, on April 9, 2015.

APPEARANCES

For Petitioner: William G. Salim, Jr., Esquire
Moskowitz, Mandell, Salim
and Simowitz, P.A.
800 Corporate Drive, Suite 500
Fort Lauderdale, Florida 33334

Eric J. Rayman, Esquire
Genovese, Joblove and Battista, P.A.
PNC Center, Suite 1110
200 East Broward Boulevard
Fort Lauderdale, Florida 33301

For Respondent: Robert Paul Vignola, Esquire
Office of the General Counsel
Eleventh Floor
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301

For Intervenor: Albert E. Dotson, Esquire
Wendy Francois, Esquire
Bilzin, Sumberg, Baena, Price
and Axelrod, LLP
1450 Brickell Avenue, Suite 2300
Miami, Florida 33131

STATEMENT OF THE ISSUES

Whether, in issuing the Revised Recommendation/Tabulation for contracts for Items 1 and 3 for Invitation to Bid No. 15-048E, Multifunctional Devices, Cost-Per-Copy, Respondent acted contrary to one or more governing statutes, rules, policies, or procurement specifications, or any combination thereof; and if so, for each such instance, whether the misstep was clearly erroneous, arbitrary or capricious, or contrary to competition.

PRELIMINARY STATEMENT

On June 3, 2014, Respondent, School Board of Broward County (SBBC), issued Invitation to Bid (ITB) No. 15-048E entitled "Multifunctional Devices, Cost-Per-Copy" for the provision and maintenance of copying devices during the contract term. On June 18, 2014, SBBC issued Addendum Number 1 for the ITB which replaced a number of pages of the bidding documents and contained responses to questions posed by prospective bidders. Addendum Number 1 included an Appendix A-Summary Cost Sheet which

requested bidders to provide cost-per-copy based on a stated average monthly number of copies, and to extrapolate cost out for 12 months, 36 months, 48 months, and 60 months.

On June 20, 2014, shortly before bid submissions were due, SBBC issued Addendum Number 2 for the ITB which deleted Appendix A-Summary Cost Sheet, provided a Revised-Appendix A-Summary Cost Sheet which stated "A Cost Summary Sheet must be completed for each options 36 months, 48 months and 60 months," and included a cost summary sheet for each of those three options. No bid specifications protest was filed by any person or entity concerning the ITB or addenda numbers 1 or 2.

The sealed bids were opened on June 24, 2014. SBBC posted its original Recommendation Tabulation on July 10, 2014, which recommended award of Items 1 and 2 to Intervenor, ImageNet Consulting Services of Miami, Inc. (ImageNet), as the primary awardee and to Innovative Software Solutions, Inc. (Innovative), as the alternate awardee; and award of Item 3 to Ricoh USA, Inc. (Ricoh), as the primary awardee and to ImageNet as the alternate awardee based upon the lowest costs submitted by bidders for a 36-month contract term. The award period specified in the Recommendation/Tabulation was for a 36-month contract term commencing on August 6, 2014, and concluding September 30, 2017 (the additional weeks beyond the 36-month period were to allow the awardee to install the equipment necessary to provide the

copying services). Timely bid protests to the July 10, 2014, posted award recommendation were filed by Petitioner, Toshiba Business Solutions (USA), Inc. (Toshiba), and Konica Minolta, Inc. (Konica).

SBBC met with the protestors in accordance with section 120.57(3), Florida Statutes, and SBBC Policy 3320. As a result of that meeting, SBBC determined that Konica's bid was timely submitted and should be considered for purposes of award. SBBC also determined that Toshiba's bid for Item 2 should be rejected as non-responsive due to a failure of its proposed equipment to meet the technical specifications for Item 2.

SBBC posted a Revised Recommendation/Tabulation on August 29, 2014, which continued to recommend award of Item 1 to ImageNet as the primary awardee and to Innovative as the alternate awardee; and award of Item 3 to Ricoh as the primary awardee and to ImageNet as the alternate awardee. In addition, the Revised Recommendation/Tabulation included an award recommendation for Item 2 which is not at issue in these proceedings. The award period specified in the Revised Recommendation/Tabulation was for a 36-month contract term commencing on October 7, 2014, and concluding November 30, 2017 (the additional weeks beyond the 36-month-period were again to allow the awardee to install the equipment necessary to provide the copying services).

On September 4, 2014, Toshiba timely filed its notice of intent to protest the August 29, 2014, posted Revised Recommendation/Tabulation. On September 15, 2014, Toshiba timely filed its Amended Formal Petition Protesting Proposed Revised Recommendation/Tabulation. SBBC's Bid Protest Committee conducted a meeting with Toshiba on November 5, 2014, pursuant to section 120.57(3), SBBC Purchasing Policy 3320, and the ITB, and rejected Toshiba's bid protest.

On November 10, 2014, Toshiba timely requested that SBBC forward its bid protest to the Division of Administrative Hearings (DOAH) for a formal hearing. ImageNet subsequently was granted leave to intervene in these proceedings. The parties agreed to waive the requirement under section 120.57(3) that the formal hearing be commenced in these proceedings within 30 days after the receipt of the formal written protest by DOAH.

On April 7, 2015, the parties filed a Joint Pre-hearing Stipulation which included a 51 paragraph Statement of Admitted Facts. To the extent deemed relevant, those facts have been incorporated herein. The final hearing was conducted as scheduled on April 9, 2015. The parties stipulated to the entry of Joint Exhibits 1 through 15 into evidence. Matthew L. Barnes, Petitioner's President, testified on behalf of Toshiba. Toshiba's Exhibits 1 through 13 were admitted into evidence. Michelle Bryant Wilcox, Purchasing Agent for SBBC, testified on

behalf of SBBC. Richard Lane, District Sales Manager for Samsung, testified as a rebuttal witness for ImageNet.

A one-volume Transcript of the proceeding was filed with DOAH on April 27, 2015. Proposed recommended orders were timely filed by all parties and have been given due consideration during the preparation of this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. On June 3, 2014, SBBC issued ITB No. 15-048E (the ITB) entitled "Multifunctional Devices, Cost-Per-Copy" for the provision and maintenance of copying devices during the contract term. The listed Submittal Requirements were:

- a. Manufacturer's Authorization Special Condition 8;
- b. Descriptive Literature Special Condition 6; and
- c. Material Safety Data Sheets Special Condition 16.

A Bidder's Preference Statement was not identified as a Submittal Requirement.

2. Section 4, Paragraph 2, of the ITB was entitled "TERM" and notified bidders that SBBC sought through the award of this bid to "establish a contract for the period beginning from the date of award and continuing through June 30, 2017."

3. The Bid Summary Sheet found at Section 5 of the ITB requested bidders to provide cost-per-copy based on a stated average monthly number of copies, and to extrapolate cost out for 12 months and for 36 months.

4. Page 1 of the ITB contained a certification to be executed by each bidder's authorized representative which stated in pertinent part as follows:

Bidder agrees to be bound to any and all specifications, terms and conditions contained in the ITB, and any released Addenda and understand that the following are requirements of this ITB and failure to comply will result in disqualification of bid submitted.

All bidders submitted a signed bidder certification.

5. Section 3, Paragraph 1(a), of the General Conditions of the ITB provided as follows:

SEALED BID REQUIREMENTS: The "Bidder Acknowledgment Section" must be completed, signed and returned with the bid. The Bid Summary Sheet pages on which the Bidder actually submits a bid, and any pages, upon which information is required to be inserted, must be completed and submitted with the bid. The School Board of Broward County (SBBC) reserves the right to reject any bid that fails to comply with these submittal requirements.

a) BIDDER'S RESPONSIBILITY: It is the responsibility of the Bidder to be certain that all numbered pages of the bid and all attachments thereto are received and all Addendum released are received prior to submitting a bid without regard to how a copy of this ITB was obtained. All bids are

subject to the conditions specified herein on the attached bid documents and on any Addenda issued thereto.

6. Section 3, Paragraph 6, of the General Conditions of the ITB provided as follows:

AWARDS: In the best interest of SBBC, the Board reserves the right to: 1) withdraw this bid at any time prior to the time and date specified for the bid opening; 2) to reject any or all bids received when there are sound documented business reasons that serve the best interest of SBBC; 3) to accept any item or group of items unless qualified by Bidder; and 4) to acquire additional quantities at prices quoted on this ITB unless additional quantities are not acceptable, in which case, the bid sheets must be noted "BID IS FOR SPECIFIED QUANTITY ONLY."

7. On June 18, 2014, SBBC issued Addendum Number 1 for the ITB which replaced a number of pages within the bidding documents and contained responses to questions posed by prospective bidders.

8. Addendum Number 1 included Question No. 6 in which Xerox inquired whether SBBC "would . . . consider a change to the contract term of the contract to 48 or 60-month term?" SBBC responded through Addendum Number 1 that it had amended the bid "to include additional pricing for 48 or 60-months term[s]," and SBBC continued to request proposals for a 36-month contract term.

9. Addendum Number 1 revised Section 4, Paragraph 2, of the Special Conditions of the ITB to state as follows:

TERM: The award of this bid shall establish a contract for the period beginning from the date of award and continuing through an award for a term of 36, 48 or 60 months. Bids will not be considered for a shorter period of time. All prices quoted must be firm throughout the contract period. Items will be ordered on an as needed basis.

10. Addendum Number 1 included an Appendix A-Summary Cost Sheet which required bidders to provide cost-per-copy based on a stated average monthly number of copies, and to extrapolate cost out for 12 months, 36 months, 48 months, and 60 months.

11. On June 20, 2014, SBBC issued Addendum Number 2 for the ITB. The first page of Addendum Number 2 advised prospective bidders, "This Addendum amends the above referenced bid in the following particulars only: 1. DELETE: Appendix A-Cost Summary Sheet INSERT: Revised Appendix A-Cost Summary Sheet." The first page of Addendum Number 2 further cautioned bidders that "[i]t is important to include the REVISED page when submitting your response." Addendum Number 2 went on to provide a Revised-Appendix A-Summary Cost Sheet which stated "A Cost Summary Sheet must be completed for each options [sic] 36 months, 48 months and 60 months" and included a cost summary sheet for each of those three options.

12. The ITB and addenda numbers 1 and 2 were released by SBBC via Onvia DemandStar, with email notices thereof to

prospective vendors who subscribed to its bid notification service.

13. Toshiba downloaded the ITB, Addendum Number 1, and at least the first page of Addendum Number 2 from DemandStar prior to the submission of its bid to SBBC. Again, the first page of Addendum Number 2 cautioned bidders that Appendix A-Summary Cost Sheet had been deleted and replaced and that it was "important to include the REVISED page when submitting your response."

14. No bid specifications protest was filed by any person or entity concerning the ITB or addenda numbers 1 or 2.

15. On July 3, 2014, SBBC opened bids timely submitted in response to the ITB by: Toshiba; ImageNet; Innovative; Lexmark International, Inc.; and Ricoh. Konica had also presented a bid to SBBC in the bid opening room prior to the opening of bids but after the announced time for submittal of bids. The Konica bid was delivered to SBBC but was not opened at the time of the bid opening.

16. Toshiba, the incumbent, was the only bidder that violated the pricing requirements of the ITB. The bid submitted by Toshiba utilized the version of Appendix A-Summary Cost Sheet that was released under Addendum Number 1 and only offered cost-per-copy pricing for the 60-month term option. Toshiba's bid did not submit the Revised-Appendix A-Summary Cost Sheet issued under Addendum Number 2, nor did it contain any bids offering cost per

copy pricing to SBBC for the 36 or 48-month term options. Although Toshiba's bid was not rejected as non-responsive for failing to bid on the 36 and 48-month term options and for failing to utilize and complete the Revised-Appendix A-Summary Cost Sheet issued under Addendum Number 2, SBBC's staff later concluded in hindsight that it should have been rejected for such non-compliance.

17. Toshiba's bid included a "Pricing" note immediately prior to its Appendix A-Summary Cost Sheet that stated:

[Toshiba] is proposing a 60 month CPC as a response to the [ITB]. Based on the fact the [ITB] has no minimum, cancellation for convenience, ability to upgrade and downgrade with no penalty, it is in the best interest of our organization to bid a term of 60 months. This term allows us to provide the most aggressive price to the [SBBC] and maintain the excellent service and support level in place.

18. SBBC's staff recommended that an award be made under the ITB for pricing offered for a 36-month contract term for Items 1, 2, and 3 for a contract period of August 6, 2014, through September 30, 2017. On July 10, 2014, SBBC posted its initial ITB Recommendation/Tabulation which did not consider the Konica bid. The initial posted Recommendation/Tabulation notified bidders of SBBC's intended award of contracts for Items 1 and 2 to ImageNet as the primary awardee and to Innovative as the alternate awardee for a contract period of

August 6, 2014, through September 30, 2017, and recommended the award of contracts for Item 3 to Ricoh as primary awardee and to ImageNet as alternate awardee for a contract period of August 6, 2014, through September 30, 2017.

19. Timely bid protests and bid protest bonds were filed by Konica and by Toshiba concerning SBBC's initial Recommendation/Tabulation of July 10, 2014. SBBC's Bid Protest Committee conducted a meeting with the protestors on August 26, 2014, and determined that Konica's bid had been timely submitted and directed SBBC's Procurement and Warehousing Services Department (the Department) to evaluate Konica's bid for responsiveness. It also directed the Department to revise its recommendation on the ITB to reject Toshiba's bid for Item 2 as the device offered by Toshiba for that item did not meet the ITB's specifications which called for a single device capable of performing 95 copies per minute (cpm) and Toshiba instead offered two devices that performed at 85 cpm.

20. After reviewing Konica's bid for responsiveness, SBBC posted a Revised Recommendation/Tabulation for the ITB on August 29, 2014, which (a) recommended award of Item 1 to ImageNet for a term from October 7, 2014, through November 30, 2017, as the primary awardee and to Innovative as the alternate awardee; (b) recommended award of Item 3 to Ricoh for a term from October 7, 2014, through November 30, 2017, as the primary

awardee and to ImageNet as the alternate awardee; and

(c) recommended the rejection of Toshiba's bid for Item 2 for its failure to meet the specifications for that Item.

21. On September 4, 2014, Toshiba timely filed its notice of intent to protest the August 29, 2014, posted Revised Recommendation/Tabulation. On September 15, 2014, Toshiba timely filed its Amended Formal Petition Protesting Proposed Revised Recommendation/Tabulation.

22. SBBC's Bid Protest Committee conducted a meeting with Toshiba on November 5, 2014, pursuant to section 120.57(3), SBBC Purchasing Policy 3320, and the ITB, and rejected Toshiba's bid protest.

23. On November 10, 2014, Toshiba timely requested that SBBC forward its bid protest to DOAH for a formal hearing.

24. Toshiba has presented a number of arguments in these proceedings seeking to avoid the circumstances Toshiba created for itself when it failed to comply with Addendum Number 2 and violated the ITB's pricing requirements and the ITB's requirement as to the term of the contract to be awarded, when Toshiba only submitted a single bid and restricted the contract term for which it would be considered to 60 months. First, Toshiba attempts to divest SBBC of its express authority to select proposals for any contract duration for which it solicited bids other than for a 60-month term. Second, Toshiba argues that SBBC was somehow

obligated to specify within the bid specifications those business considerations that would inform SBBC's selection of the duration of the contract term to be awarded under the ITB. Third, Toshiba argues that ImageNet was non-responsive regarding the ITB's specifications concerning manufacturer's certifications. Toshiba also argues that all bidders, including itself, were non-responsive with regard to the ITB's specifications regarding bidding preference laws. None of the arguments presented by Toshiba in opposition to SBBC's intended award of Items 1 and 3 are persuasive.

A. The Selection of the 36-Month Term

25. SBBC's recommended award for a 36-month contract period from October 7, 2014, through November 30, 2017, is consistent with the terms and conditions of the ITB and its addenda. At the very start of this competitive solicitation, SBBC informed bidders through Section 4, Paragraph 2, of the ITB and the Bid Summary Sheet at Section 5 of the ITB that it was seeking a contract through June 30, 2017--i.e., a 36-month contract. SBBC also made it clear in its response to Question No. 6 of Addendum Number 1 that "[t]he contract will be for a full 36 months."

26. Although SBBC revised the bid specifications through Addendum Number 1 to allow bidders to submit "additional pricing for 48 and 60 months term[s]," "to allow the School District to consider a 48 and/or 60 months term contract," and revised

Section 4, Paragraph 2, of the ITB to provide for "an award for a term of 36, 48 or 60 months," it was clear under the ITB that SBBC contemplated that a 36-month contract could serve its needs. Addendum Number 2 further revised the bid specifications by providing the Revised-Appendix A-Summary Cost Sheet which informed bidders that "a Cost Summary Sheet must be completed for each options [sic] 36 months, 48 months and 60 months." SBBC intended to review the additional pricing offered for 48 and 60-month contract terms to determine whether those particular options were a better business decision for SBBC.

27. Several factors were considered by SBBC in selecting the contract duration for the award under the ITB. The selection of the shorter 36-month contract term was consistent with the expressed terms of the ITB and addenda and the expressed preference of SBBC's governing board to refrain from entering into long-term contracts and enabled SBBC to be flexible in finding solutions to its copying needs and to take advantage of changes that may arise in technology; avoided problems the school district was currently experiencing with a long-term cost-per-copy contract which ranged from equipment performance issues to the long-term placement of technology in schools; and enabled the school district to conduct research to determine whether future implementation of a managed print solution would provide the school district with additional cost savings or financial

benefits in contrast to the cost-per-copy services being procured through the ITB. Clearly, this selection was neither arbitrary nor capricious.

28. SBBC's elected governing board has made it known by its actions taken at public meetings that it disfavors long-term contracts for the procurement of goods and services and has gone so far as to reduce the term of contracts from the dais. SBBC's staff determined that the pricing offered to SBBC for a 60-month contract term was not significant enough to recommend a contract longer than the 36-month term SBBC had been requesting since the release of the ITB. Any cost advantages offered by Toshiba's bids for Items 1, 2, and 3 were reduced by \$525,000 per year due to the disqualification of its bid for Item 2, which failed to meet the ITB's specifications.

B. Consideration of Managed Print Services

29. Xerox Corporation informed SBBC that a managed print services (MPS) program could save millions of dollars per year and later submitted a no bid response to SBBC regarding the ITB because SBBC was not implementing a MPS program under the ITB. SBBC had also received proposals from vendors in October 2013 concerning a MPS program and concluded that there existed a potential annual savings of millions of dollars if such a program could be implemented. All of which were additional reasonable, rational reasons for SBBC to remain consistent with its decision

to award the contracts for a term of 36 months and not something longer.

30. The ITB contains standard terms and conditions which enable SBBC to terminate an awarded contract regardless of reason and with or without cause upon 30 days written notice to the other party. Toshiba wants SBBC to rescue Toshiba from its failure to submit required bids for 36-month and 48-month periods by forcing SBBC to award a contract obligating the agency for a longer duration under the ITB than desired by the agency and then have SBBC terminate the 60-month contract award for convenience after 36 months.

31. SBBC includes termination for convenience provisions within its contracts for goods and services due to section 1011.14, Florida Statutes, which restricts the ability of district school boards to obligate public funds for a period beyond one year. The inclusion of the standard termination for convenience clauses in its ITBs enables SBBC to enter into contracts exceeding one year which affords the school district opportunities to obtain continuity of service and price advantages that would not be available under shorter contracts.

32. While SBBC has the ability under the ITB to terminate contracts for convenience upon 30 days' notice, it rarely does so. SBBC has never exercised its right to terminate its two prior contracts for the services sought under this ITB. Any such

termination requires action by SBBC's governing board during a public meeting.

33. SBBC's staff would not engage in the sham of recommending a contract to its governing board for a contract term longer than the period for which it intends to procure services from a vendor. SBBC's procurement staff believes that using the termination for convenience clause in the manner Toshiba recommends can have an adverse effect upon the school district's ability to encourage bidders to participate in its competitive solicitations or to offer it their best pricing. Questions 1 and 59 of Addendum Number 1 of the ITB provide evidence of concern within the bidding marketplace that SBBC might exercise its termination for convenience clauses with regard to the services being procured under the ITB and support the perception of SBBC's that it should avoid a reputation for exercising such termination authority.

34. Toshiba argues that SBBC somehow materially misled bidders through the ITB by stating in response to Question No. 3 concerning MPS of Addendum Number 1 that:

- The School District is not planning to implement a Managed Print Services at this time.
- The School District would like to receive Additional information regarding other districts that have implemented a Managed Print Services.

- There are no evaluation points associated with this ITB.

SBBC's responses to Question No. 3 of Addendum Number 1 were accurate and did not mislead bidders. Toshiba is the only bidder to claim to have been misled.

35. Section 6, Paragraph 10, of the ITB requested bidders provide SBBC with information about how the awardee could transition SBBC to a MPS model from the cost-per-copy model being offered under its bid. While SBBC requested such information from vendors within the bidding marketplace, there is no evidence that any bidder's provision or omission of such information within its bid submission was considered in the selection of the recommended awardees. In fact, ImageNet was recommended for award even though it did not provide this ancillary information about transition to a MPS delivery model. Rather, the recommended awardees for a 36-month contract term for Items 1 and 3 were determined solely on the basis of cost submitted for those items by the bidders, all in accordance with the ITB.

36. A MPS program was a possible initiative being considered by SBBC's former Chief Information Officer prior to his departure from SBBC in February 2014, at which time the school district's current cost-per-copy contract was nearing its expiration. Although SBBC still had an interest in the possibility of a MPS program, it was not going in that direction

at the time it needed to release a bid for copying services to replace its current expiring contract.

37. Toshiba contends that SBBC was somehow required to disclose to bidders whether the potential future implementation of a MPS program might impact the contract award period that SBBC might choose under the ITB. A myriad of business considerations may inform an agency in selecting the length of its contracts for goods and services, and there is no law or rule that requires an agency to specify those factors within an ITB.

C. Responsiveness of the Bidders

38. Toshiba has attempted to argue that ImageNet, the recommended awardee for Item 1 and the alternate awardee for Item 3, was somehow non-responsive under the ITB and ineligible for award. In support of this argument, Toshiba has referenced Section 4, Paragraph 8, of the Special Conditions of the ITB which state as follows:

MANUFACTURER'S CERTIFICATION:

Bidder must submit with their ITB a notarized letter from manufacturer certifying that bidder is authorized to sell, service and warrant the multifunctional devices offered within this ITB. Failure of the bidder to provide this letter with their submitted bid or upon request shall result in disqualification of entire bid. If the bidder is the manufacturer, then bidder should state that their company is the manufacturer of the equipment provided in this bid (the letter does not need to be notarized).

39. A bid is only disqualified under Section 4, Paragraph 8, of the ITB if (1) a notarized manufacturer's letter is omitted from the bid; and (2) the bidder fails to comply with a subsequent request from SBBC to provide the letter. No bidder, including Toshiba and ImageNet, included a notarized letter from a manufacturer with its bid. SBBC did not request any of the bidders to submit a notarized manufacturer's letter at any time after the submission of bids. As a result, none of the bids, including that of ImageNet, was non-responsive for a failure to satisfy Paragraph 8 of Section 4 of the ITB.

40. Toshiba has also argued that all bids should be rejected due to Section 3, Paragraph 1(d), of the General Conditions of the ITB which concerns bidders' preference laws and states as follows:

d) BIDDING PREFERENCE LAWS: ALL BIDDERS MUST COMPLETE AND SUBMIT THE LEGAL OPINION OF BIDDER'S PREFERENCE FORM IN ORDER TO BE CONSIDERED [sic] FOR AWARD. The State of Florida provides a Bidder's preference for Florida vendors for the purchase of personal property. The local preference is five (5) percent. Bidders outside the State of Florida must have an Attorney, licensed to practice law in the out-of-state jurisdiction, as required by Florida Statute 287.084(2), execute the "Opinion of Out-of-State Bidder's Attorney on Bidding Preferences" form and must submit this form with the submitted bid. Such opinion should permit SBBC's reliance on such attorney's opinion for purposes of complying with Florida Statute 287.084. Florida Bidders must also complete its portion of the form.

Failure to submit and execute this form, with the bid, shall result in bid being considered "non-responsive" and bid rejected.

41. No bidder, including Toshiba, included an "Opinion of Out-of-State Bidder's Attorney on Bidding Preferences" form with its bid. Each bidder's omission of that form was for good reason. Section 3, Paragraph 1(d), of the General Conditions of the ITB is a boilerplate provision within SBBC's standard bidding documents that is included pursuant to section 297.084(2), Florida Statutes, for any competitive solicitations in which personal property is to be purchased by SBBC. In instances in which it solicits bids to purchase personal property, SBBC includes a "Bidder's Preference Statement" form and includes that form among the checked "Submittal Requirements" listed in Section 2, Page 1, of the ITB. This ITB did not include a "Bidders Preference Statement" form among the bidding documents or list it as one of the required submittals.

42. The state law and the boilerplate provision at Section 3, Paragraph 1(d), of the General Conditions of the ITB are only applicable to competitive solicitations for the purchase of personal property and do not extend to competitive solicitations for the purchase of services. As Section 4, Paragraph 12, of the Special Conditions of the ITB makes it clear that the multi-functional devices to be provided by the awardee under the ITB will "remain the property of the vendor," the

standard bidder's preference provision contained within the ITB is plainly inapplicable to this procurement.

CONCLUSIONS OF LAW

43. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes (2014).

A. Petitioner's Burden and Standards of Proof

44. Pursuant to section 120.57(3)(f), the burden of proof rests with Toshiba as the party opposing the proposed agency action. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Toshiba must sustain its burden of proof by a preponderance of the evidence. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

45. Section 120.57(3)(f) spells out the rules of decision applicable in bid protests and, in pertinent part, provides:

In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. 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.

46. The First District Court of Appeal has construed the term "de novo proceeding," as used in section 120.57(3)(f), to "describe a form of intra-agency review. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." State Contracting, 709 So. 2d at 609.

47. In framing the ultimate issue to be decided in this de novo proceeding as being "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications," the statute effectively establishes a standard of conduct for the agency, which is that, in soliciting, evaluating, and accepting bids or proposals, the agency must obey its governing statutes, rules, and the project specifications. If the agency breaches this standard of conduct, its proposed action is subject to reversal in a protest proceeding.

48. Consequently, the party protesting the intended award must identify and prove, by the greater weight of the evidence, a specific instance or instances where the agency's conduct in taking its proposed action was either: (a) contrary to the agency's governing statutes; (b) contrary to the agency's rules

or policies; or (c) contrary to the bid or proposal specifications.

49. It is not sufficient, however, for the protester to prove merely that the agency violated the general standard of conduct. By virtue of the applicable standards of "proof," which are best understood as standards of review, the protester additionally must establish that the agency's misstep was: (a) clearly erroneous; (b) contrary to competition; or (c) an abuse of discretion.

50. The three review standards mentioned in the preceding paragraph are markedly different from one another. The abuse of discretion standard, for example, is more deferential (or narrower) than the clearly erroneous standard. The bid protest review process thus necessarily entails a decision or decisions regarding which of the several standards of review to use in evaluating a particular action. To do this requires that the meaning and applicability of each standard be carefully considered.

51. The clearly erroneous standard is generally applied in reviewing a lower tribunal's findings of fact. The Florida Supreme Court has explained this standard as follows:

A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was

induced by an erroneous view of the law. A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion. . . . When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous' and the appellate court will reverse because the trial court has 'failed to give legal effect to the evidence' in its entirety.

Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956) (citation omitted).

52. Because administrative law judges (ALJs) are the triers of fact charged with resolving disputed issues of material fact based upon the evidence presented at hearing, and because bid protests are fundamentally de novo proceedings, the undersigned is not required to defer to the letting authority in regard to any findings of objective historical fact that might have been made prior to the agency's proposed action. It is exclusively the ALJ's responsibility, as the trier of fact, to ascertain from the competent, substantial evidence in the record what actually happened in the past or what reality presently exists, as if no findings previously had been made.

53. If, however, the challenged agency action involves an ultimate factual determination—for example, an agency's

conclusion that a proposal's departure from the project specifications was a minor irregularity as opposed to a material deviation—then some deference is in order, according to the clearly erroneous standard of review. To prevail on an objection to an ultimate finding, therefore, the protester must substantially undermine the factual predicate for the agency's conclusion or convince the ALJ that a defect in the agency's logic unequivocally led to a mistake.

54. There is another species of agency action that also is entitled to review under the clearly erroneous standard: interpretations of statutes for whose administration the agency is responsible, and interpretations of the agency's own rules. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 610 (Fla. 1st DCA 1998). In deference to the agency's expertise, such interpretations will not be overturned unless clearly erroneous. Id.

55. This means that if the protester objects to the proposed agency action on the ground that it violates either a governing statute within the agency's substantive jurisdiction or the agency's own rule, and if, further, the validity of the objection turns on the meaning of the subject statute or rule, then the agency's interpretation should be accorded deference; the challenged action should stand unless the agency's

interpretation is clearly erroneous (assuming the agency acted in accordance therewith).

56. The same standard of review also applies, in a protest following the announcement of an intended award, with regard to preliminary agency action taken upon the agency's interpretation of the project specifications—but for a reason other than deference to agency expertise. Section 120.57(3)(b) provides a remedy for badly written or ambiguous specifications: they may be protested within 72 hours after the posting of the specifications. The failure to avail oneself of this remedy results in a waiver of the right to complain about the specifications per se.

57. Consequently, if the dispute in a protest challenging a proposed award turns on the interpretation of an ambiguous, vague, or unreasonable specification, which could have been corrected or clarified prior to acceptance of the bids or proposals had a timely specifications protest been brought, and if the agency has acted thereafter in accordance with a permissible interpretation of the specification (i.e., one that is not clearly erroneous), then the agency's intended action should be upheld—not out of deference to agency expertise, but as a result of the protester's waiver of the right to seek relief based on a faulty specification.

58. The statute also requires that agency action (in violation of the applicable standard of conduct) which is "arbitrary, or capricious" be set aside. The phrase "arbitrary, or capricious" can be equated with the abuse of discretion standard because the concepts are practically indistinguishable—and because use of the term "discretion" serves as a useful reminder regarding the kind of agency action reviewable under this highly deferential standard.

59. It has been observed that an arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chemical Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979). Thus, under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." Adam Smith Enters., Inc. v. Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Nevertheless, the reviewing court must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of each of these factors to its final decision. Id.

60. Whether the standard is called "arbitrary or capricious" or "abuse of discretion," the scope of review, which demands maximum deference, is the same. Clearly, then, the narrow "arbitrary or capricious" standard of review cannot properly be applied in evaluating all agency actions that might be challenged in a bid protest; rather, this highly deferential standard appropriately applies only to those decisions which are committed to the agency's discretion.

61. Therefore, where the protester objects to agency action that entails the exercise of discretion, but only in such instances, the objection cannot be sustained unless the agency abused its discretion, i.e., acted arbitrarily or capriciously.

62. The third standard of review articulated in section 120.57(3)(f) is unique to bid protests. The "contrary to competition" test is a catch-all which applies to agency actions that do not turn on the interpretation of a statute or rule, do not involve the exercise of discretion, and do not depend upon (or amount to) a determination of ultimate fact.

63. Although the contrary to competition standard, being unique to bid protests, is less well defined than the other review standards, the undersigned concludes that the set of proscribed actions should include, at a minimum, those which:

(a) create the appearance of and opportunity for favoritism;

(b) erode public confidence that contracts are awarded equitably and economically;

(c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or

(d) are unethical, dishonest, illegal, or fraudulent. See, e.g., Phil's Expert Tree Service, Inc. v. Broward Cnty. Sch. Bd., Case No. 06-4499BID, 2006 Fla. Div. Adm. Hear. LEXIS 161, *24 (DOAH Mar. 19, 2007; BCSB May 8, 2007); R. N. Expertise, Inc. v. Miami-Dade Cnty. Sch. Bd., Case No. 01-2663BID, 2002 Fla. Div. Adm. Hear. LEXIS 163, *58 (DOAH Feb. 4, 2002; MDCSB Mar. 14, 2002); see also E-Builder v. Miami-Dade Cnty. Sch. Bd., Case No. 03-1581BID, 2003 WL 22347989, *10 (DOAH Oct. 10, 2003; MDCSB Nov. 25, 2003).

B. The Merits of This Bid Protest

64. As discussed above, Toshiba advances three primary arguments in this bid protest:

(a) the selection of a 36-month contract term violates governing statutes, SBBC's policies and the ITB specifications because the contract term providing the most financial benefit to the school was the 60-month term as offered by Toshiba;

(b) Toshiba's bid, at a 60-month term, offered the lowest cost-per-copy by a responsive and responsible bidder; and

(c) ImageNet's bid failed to comply with the ITB's specifications.

1. SBBC's choice of a 36-month term did not violate applicable statutes, SBBC policies or the ITB specifications.

65. Regarding the length of the contract term recommended for award, SBBC had a logical justification for its selection of a 36-month term. The 36-month contract period avoids locking SBBC into an obligation that would limit its ability to take advantage of technological changes and new solutions to its copying needs, particularly when marketplace leaders informed SBBC that it could save millions of dollars annually through a copying program other than the one being solicited under the ITB. It also avoids performance problems such as those currently being experienced by SBBC when copying service technology is kept in place for more than three years. In addition, the 36-month period was in keeping with the expressed preference of SBBC's elected governing board for contracts that do not exceed three years in duration.

66. Toshiba's arguments are based on no more than a claim that SBBC should have made a different business judgment. Florida's courts have consistently rejected such claims and support the decision-making authority and business judgment of public bodies. As was stated in Engineering Contractors Association of South Florida v. Broward County, 789 So. 2d 445, 450 (Fla. 4th DCA 2001), citing Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982), "In

Florida . . . a public body has wide discretion in soliciting and accepting bids and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree." DOAH has repeatedly found that "An agency has wide discretion in soliciting and accepting bids, and its decision, if based on an honest exercise of this discretion, will not be overturned even if reasonable persons may differ with the outcome." AAA-1 Quality Lawn Care Serv. v. Sch. Bd. of Palm Beach Cnty., Fla., Case No. 95-3879BID, 1995 WL 1053216, at ¶ 3 (DOAH Oct. 23, 1995; SBPBC Dec. 19, 1995).

67. Toshiba states in its amended protest, "In essence, the School Board could receive the same items and services for an additional two years while saving the District hundreds of thousands of dollars." But to do so, SBBC would need to commit to a longer contract term than what made business sense and in an honest exercise of its discretion it chose not to do so.

68. Toshiba's offer is detrimental to SBBC because it deprives SBBC of an opportunity to exercise business judgment as expressed in the ITB. Choosing a 60-month contract term does provide financial benefits, but choosing a 36-month term provides other financial benefits that SBBC deemed to be more beneficial. There is an obvious trade-off between the contract term and the unit price, but the decision to accept a higher unit price in

exchange for the greater flexibility that a shorter term affords, as opposed to a lower unit price with no flexibility, was solely SBBC's to make. Section 3, Paragraph 6, of the General Conditions of the ITB makes this clear to bidders in stating that, "In the best interest of SBBC, the Board reserves the right to . . . reject any or all bids received when there are sound documented business reasons that serve the best interest of SBBC."

69. Toshiba's claim, that the evaluation process was tainted as a result of the consideration of SBBC's potential future plans to transition to a MPS program, does not pass muster because no such evaluation criteria were advertised, it was not possible to conform the ITB to incorporate MPS, and no other bidders were privy to information to which Toshiba did not have access.

70. In Section 10, Page 33, of the ITB, SBBC stated, "If the School District wishes to implement Managed Print Services district-wide for all of its Print/Copy/Fax/Scan needs, provide information on how the Awardee could transition the District to a Managed Printed Services model." This disclosed to all proposers that SBBC may be considering a transition to MPS in the future (a fact already known to Toshiba), and also allowed proposers the opportunity to provide information regarding this consideration and incorporate this fact into their pricing and their overall

proposal. It was Toshiba's responsibility to respond accordingly in its proposal. The possibility of transitioning to MPS in the future was made known to proposers and that possibility was properly relied upon by SBBC in making the business decision to select a shorter contract term.

71. MPS provides a complete print management program that monitors and maintains all print devices as it relates to overall printing efforts, so as to reduce recurring spending on document output, eliminate wasteful printing, reduce printing fleet, and reduce delays caused by printer malfunctions and unexpected repairs. MPS offers visibility and control of printing to help cut costs, improve sustainability, productivity, and automation. Thus, MPS was not incorporated into the ITB because it could not be; the ITB is cost-per-copy. MPS is an integrated system of management and production of copying and printing needs.

72. The ITB was properly awarded in accordance with the terms and conditions set forth therein. SBBC did not use the potential transition to MPS as part of its evaluation criteria to select an awardee or award points; it used the possibility of implementing MPS as a factor in deciding the best contract term to use.

73. Toshiba has attempted to somehow limit SBBC's ability to select any bids other than Toshiba's 60-month bids for Items 1 and 3 by citing a response to Question No. 6 within Addendum

Number 1 in which it stated that "[b]ased on the responses to bid document, the School District will make a business decision to award to the lowest responsive bidder for the contract term that provides the most financial benefit to the District." That sentence does not create a revised standard for award of an ITB, but rather acknowledges that the lowest and best bid will receive the award. The Addendum response references, to "mak[ing] a business decision" and the "most financial benefit to the District," simply inform the bidders that, after receiving the costs information in their bids, SBBC will assess the three (3) alternate periods of contract duration and exercise its discretion and business judgment to select the contract term that best meets its needs.

74. Even if SBBC were to make its business decision solely upon financial considerations, the potential savings through types of copier programs other than the one sought through this ITB that were identified to SBBC by the vending marketplace, both prior to and within this competitive solicitation, provide a logical justification to support SBBC's selection of the lowest and best bids submitted for Items 1 and 3 for a 36-month contract term.

2. Toshiba was a nonresponsive bidder.

75. In order to protest the award of the ITB, Toshiba needed to establish that it had a "substantial interest" that

would be determined or affected by SBBC or a personal stake in the outcome of the ITB. Preston Carroll Co., Inc. v. Fla. Keys Aqueduct Auth., 400 So. 2d 524 (Fla. 3d DCA 1981).

76. In Enabling Technologies Company v. Florida Department of Labor and Employment Security, 1996 WL 1060412 (DOAH Case No. 96-3265BID (DOAH Sept. 11, 1996)), at Paragraph 18, the hearing officer held as follows:

Persons "affected adversely" by the agency's decision or intended decision in a bid proceeding are provided in section 120.53(5), Florida Statutes [now Section 120.57(3), Florida Statutes], the opportunity to protest and challenge the agency's action or intended action. "Standing," or the status of "affected adversely," is the subject of myriad appellate court decisions related to bid proceedings. Those decisions . . . establish that a bidder who is ineligible to be awarded the contract does not have standing to protest the award.

77. Because Toshiba's bid did not provide the information upon which award of the ITB was based (proposals for a 36 or 48-month contract term), its bid was nonresponsive and Toshiba does not have standing to protest because it does not have a substantial interest that is being affected by SBBC's decision.

78. Toshiba argues that its failure to follow the specific requirement of the ITB is immaterial and a minor irregularity that SBBC has the discretion to waive. But, the courts have denied the discretion to waive irregularities when one bidder would be placed "in a position of advantage over other bidders."

Robinson Elec. Co. v. Dade Cnty., 417 So. 2d 1034, 1034 (Fla. 3d DCA 1982). See also Liberty Cnty. v. Baxter's Asphalt & Concrete Inc., 421 So. 2d 505 (Fla. 1982). Minor irregularities do not affect the bid price, give a competitive advantage, or adversely impact the procuring agency's interests. Toshiba's bid does all three of these things, and therefore, its noncompliance with the ITB requirements constitutes a substantial, non-waivable irregularity. See Lab. Corp. of Am. v. Dep't of Health, Case No. 12-3170BID, 2012 WL 6512603, at ¶ 2 (DOAH Dec. 10, 2012; DOH Jan. 16, 2013); Qualtech Cleaning, Inc., d/b/a Action Cleaning v. Fla. State Univ., Case No. 00-4420BID, 2001 WL 92108, at ¶ 7 (DOAH Feb. 1, 2001; FSU Feb. 21, 2001); NEC Bus. Commc'n Sys. (E.), Inc. v. Seminole Cnty. Sch. Bd., Case No. 95-5038BID, 1995 WL 1053245, at ¶ 13 (DOAH Dec. 29, 1995; SCSB Feb. 1, 1996).

79. Bidders cannot select whatever requirements they decide best suit them regardless of whether the procuring agency establishes and publishes different requirements. Such an approach to government contracting would completely undermine all public procurements and diminish SBBC's ability to do business with private parties.

80. Accepting Toshiba's bid would be to ignore this tribunal's warning that accepting bids that fail to meet requirements that are outlined in addenda "would encourage bidders to submit incomplete bids with artificially low

price This is contrary to the purpose of competitive bidding. It discourages fair competition upon equal terms and eliminates the opportunity for an exact comparison of bids." David Nixon, Inc. v. Dep't of Corr., Case No. 90-006278BID (Fla. DOAH Mar. 1, 1991). In David Nixon, Inc., the hearing officer found that when the failure to follow the instructions provided in an addenda provide a "substantial benefit not enjoyed by the other bidders such an irregularity may not be waived" and "would provide no penalty for manipulating the competitive bidding system by submitting incomplete, 'low-ball' bids."

81. Indeed, at the hearing, Toshiba emphasized that its bid included a pricing note stating:

[Toshiba] is proposing a 60 month CPC as a response to the [ITB]. Based on the fact the [ITB] has no minimum, cancellation for convenience, ability to upgrade and downgrade with no penalty, it is in the best interest of our organization to bid a term of 60 months. This term allows us to provide the most aggressive price to the [SBBC] and maintain the excellent service and support level in place.

82. Acceptance of Toshiba's bid, in contravention of the ITB's rules and standards, would permit Toshiba to gain an unfair competitive advantage by allowing it to choose what evaluation standards are in its best interest and because longer term contracts are generally cheaper, at the 60-month term its bid is more appealing than that of the other bidders. Other firms took

on risk by providing different prices for different contract term periods. Thus, if the only price submitted by a bidder is for the longer contract term, it is only natural that such bidder will appear to be the lowest bidder. A price proposal for only the 60-month term contract is a material variance from what SBBC specified in its requirements insomuch as it granted Toshiba an unfair competitive advantage and deprived SBBC of the ability to enter into a contract on the critical terms it desired.

Toshiba's proposal was non-responsive and was properly rejected.

83. Further, a material deviation arises if a bid fails to provide the agency the goods, services or benefits sought by the agency under an ITB. In this case, Toshiba failed to offer SBBC its requested prices for 36-month and 48-month contracts for cost-per-copy services despite the plain directions in Addendum Number 2. It was Toshiba's clear and sole responsibility under the ITB's certification statement and Section 3, Paragraph 1(a), of the ITB to obtain Addendum Number 2 and to submit a bid in compliance with that addendum's directions. By failing to submit completed Revised-Appendix A-Summary Cost Sheets for the 36-month and 48-month contract terms, Toshiba not only failed to comply with the ITB's terms and specifications, it failed to extend an offer for SBBC to consider for any contract period other than its lone 60-month bid.

84. Toshiba's proposal deprived SBBC of the assurance that such a contract will be entered into, performed, and guaranteed according to SBBC's specified requirements because it failed to comply with the instructions of Addendum Number 2. As a result, Toshiba is ineligible for consideration by SBBC for an award under the ITB for a contract of any duration--and has no pending offer for the 36-month contract duration chosen by SBBC in the reasonable exercise of its business judgment.

85. In the initial protest, and in the amended protest, Toshiba attempted to excuse its noncompliance with the ITB by asserting that it only had part of the bid instructions. More specifically, Toshiba claims that it, "did not receive actual notice of Addendum Number 2 until after its bid submission." In the amended protest, Toshiba states that it "did not receive actual notice of the second revised Cost Summary Sheet in Addendum 2 until after it submitted its bid." Significantly, Toshiba does not argue that SBBC did not provide adequate notification of Addendum Number 2. In fact, Toshiba admits that it did receive notification from Onvia DemandStar of Addendum Number 2 on the same day the bid was due. Rather, Toshiba argues that, despite this notice, it did not know about Addendum Number 2.

86. In Xerox Corporation v. Department of General Services, Case No. 79-2226BID, 1980 WL 142896 (DOAH Feb. 29, 1980; DGS

June 1, 1980), the Department of General Services issued an ITB for cost-per-copy copying machines and five addenda to the ITB. The basis of evaluation of the bids was cost-per-copy of responsive bids. One of the addenda included a revised bid sheet and instructions that only this revised bid sheet should be used. Xerox did not insert on its bid sheet the price of the machine it was proposing, claiming that the revised bid sheet did not contain dollar signs next to the blanks. Xerox's bid package did include a catalog which contained a list of machine prices. No other bidder failed to insert the machine cost on their bid sheets. Xerox was not selected for award and filed a bid protest. DOAH ruled that Xerox's proposal was properly disqualified for not including a price on the bid sheet and that it failed to submit a low, responsive bid because its bid constituted a material deviation from the provisions of the ITB. The hearing officer stated, "Inasmuch as cost per copy constituted the basis for an award, such failure was a material deviation and renders the outright purchase bids unresponsive. The ITB required all pricing information to be placed on the bid sheet." Id. at 6.

87. The holding in Xerox applies with equal force here. Much like Xerox, Toshiba cannot hold SBBC responsible for its own negligence. Price was a critical factor in the evaluation of the bids and to deny SBBC the ability to properly assess that factor

diminishes SBBC's use of its discretion and business judgment. The procedures followed in competitive bids must afford an "equal advantage to all vendors" and not adversely affect the interests of the agency, but rather allow the agency to confidently contract by being able to verify costs. Id. Toshiba's bid did not allow SBBC the opportunity to be assured of the cost of a 36-month term contract. See Nat'l Data Prod., Inc. v. State of Fla., Dep't of Mgmt. Servs., Div. of Purchasing, Case No. 93-0534BID, 1993 WL 943766, at ¶ 8 (DOAH Mar. 31, 1993; DMS June 9, 1993). The fact that Toshiba did not have the time to review the Addendum Number 2 or chose not to review it, is not reason to suspend the established rules and standards of the ITB and evaluate Toshiba's bid differently than that of the other bidders. Toshiba's failure to comply with the ITB cannot be excused by Toshiba's own lack of diligence in reviewing the addenda to the ITB.

88. Toshiba attempts to discount the difference in contract term options by pointing to the fact that the contract may be terminated for convenience, but by law SBBC is not permitted to enter into a 60-month term contract with the intent to simply terminate it after 36 months. In Handi-Van, Inc. v. Broward County, 116 So. 3d 530 (2013), the court explains that the standard used to analyze the propriety of a governmental entity's decision to terminate for convenience is whether the

governmental entity exercised its right to terminate in bad faith. Id. at 538. Importantly, in cases in which the governmental entity entered into the contract with no intention of fulfilling its promise, the court reads into termination for convenience clauses the requirement of a change from the circumstances of the bargain or in the expectations of the parties, further limiting the ability to terminate for convenience. Id. at 537, 539.

89. SBBC is not permitted to enter into a contract with the intent to cut it short. On page 14 of Addendum Number 1, when asked about the early termination clause "of the RFP [sic]," SBBC responded in a manner that explained that it does not typically use the termination clause stating, "[SBBC] has not exercised this option in its two previous contract terms. This period would be from 2002 to present." Thus, Toshiba's argument that their longer term contract can simply be cancelled for convenience to conform with SBBC's ultimate decision to select a 36-month contract term is incorrect, would expose SBBC to a lawsuit challenging the legality of the termination, and is not in line with the business practices of SBBC.

3. ImageNet's bid complied with the ITB specifications.

90. ImageNet's bid is not rendered non-responsive by its lack of the notarized Manufacturer's Certification discussed at Section 4, Paragraph 8, of the ITB. Although this ITB provision

states that a bidder is to submit a notarized letter with its bid from the manufacturer certifying that the bidder is authorized to sell, service and warrant the multifunctional devices offered under the ITB, the ITB states that disqualification would only occur if the bidder failed to provide the letter "with their submitted bid or upon request." (emphasis added). The record is clear that (a) no bidder (including Toshiba) submitted a notarized manufacturer's certification; and (b) no post-bid request was made by SBBC to any bidder for the submission of a notarized manufacturer's certification. Under these facts and the terms of Section 3, Paragraph 1(d), of the ITB, none of the bidders are subject to disqualification of their bids.

91. Toshiba also argues that ImageNet's bid (and those of the other bidders) was non-responsive due to a lack of a legal opinion of bidder's preference form. The standard boilerplate provision at Section 3, Paragraph 1(d), of the ITB's general conditions concerning submission of a legal opinion of bidders preference form, as well as section 287.084(2), Florida Statutes, which prompted inclusion of that boilerplate provision, are inapplicable to this competitive solicitation. The terms and conditions of the ITB make it clear that the recommended awardee will be providing cost-per-copy services to SBBC and that SBBC will not be purchasing personal property under the contract awarded pursuant to the ITB. As such, the lack of a legal

opinion of bidders preference form within ImageNet's bid, or that of any other bidder, does not render those bids nonresponsive.

4. The awardees were the lowest and second lowest responsive, responsible bidders.

92. SBBC selected awardees that followed the fixed rules and standards outlined in the ITB which required that a price proposal be submitted for each contract term. If SBBC accepted Toshiba's bid and decided to not follow its own ITB requirements, it would be acting arbitrarily. Procacci v. Dep't of HRS, 603 So. 2d 1299, 1299-1300 (Fla. 1st DCA 1992).

93. SBBC issued an addendum that specifically stated that a Cost Summary Sheet must be completed for each of the contract terms, thus, contrary to what Toshiba claims, it is not arbitrary, capricious, illogical or despotic for it to then base its decision to award on any of the contract terms for which bidders were required to offer a price proposal. SBBC properly exercised its discretion when it recommended ImageNet and not Toshiba for award and Toshiba did not prove that SBBC acted arbitrarily or capriciously.

94. In light of the foregoing Findings of Fact and Conclusions of Law, the lowest and second lowest responsive, responsible bidders for Item 1 under the ITB for the 36-month contract option were ImageNet and Innovative and the lowest and second lowest responsive, responsible bidders for Item 3 under

the ITB for this 36-month contract option were Ricoh and ImageNet.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Broward County enter a final order that adopts the Findings of Fact and Conclusions of Law contained herein, dismisses the protest filed by Toshiba Business Solutions (USA), Inc., and upholds the awards of contracts under the procurement for a 36-month term from October 7, 2014, through November 30, 2017, to ImageNet Consulting of Miami, Inc., as the primary awardee for Item 1 and to Innovative Software Solution, Inc., as the alternate awardee for Item 1, and to Ricoh USA, Inc., as the primary awardee for Item 3 and to ImageNet Consulting of Miami, Inc., as the alternate awardee for Item 3.

DONE AND ENTERED this 15th day of June, 2015, in Tallahassee, Leon County, Florida.



MARY LI CREASY
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 15th day of June, 2015.

COPIES FURNISHED:

Robert Paul Vignola, Esquire
Office of the General Counsel
Eleventh Floor
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301
(eServed)

William G. Salim, Jr., Esquire
Moskowitz, Mandell, Salim
and Simowitz, P.A.
800 Corporate Drive, Suite 500
Fort Lauderdale, Florida 33334
(eServed)

Eric J. Rayman, Esquire
Genovese, Joblove and Battista, P.A.
PNC Center, Suite 1110
200 East Broward Boulevard
Fort Lauderdale, Florida 33301
(eServed)

Albert E. Dotson, Esquire
Wendy Francois, Esquire
Bilzin, Sumberg, Baena, Price
and Axelrod, LLP
1450 Brickell Avenue, Suite 2300
Miami, Florida 33131
(eServed)

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Robert W. Runcie, Superintendent
Broward County School Board
Tenth Floor
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301
(eServed)

Pam Stewart
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400
(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.