

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BSN SPORTS, LLC, A DELAWARE
LIMITED LIABILITY COMPANY,

Petitioner,

vs.

Case No. 15-1566BID

SCHOOL BOARD OF PALM BEACH
COUNTY, A POLITICAL SUBDIVISION
OF THE STATE OF FLORIDA,

Respondent,

and

D&J COMMERCE SOLUTIONS, INC.,
d/b/a OLC TEAM SOLUTIONS,

Intervenor.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy in West Palm Beach, Florida, on June 2, 2015.

APPEARANCES

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Santo DiGangi, Esquire
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For Respondent: Kalinthia R. Dillard, Esquire
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For Intervenor: Brady J. Cobb, Esquire
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STATEMENT OF THE ISSUES

Whether, when making a recommendation to award ITB No. 15C-26K (Term Contract for the Purchase of Physical Education/Athletic Supplies, Equipment, and Uniforms) to (1) Matty's Sports (Matty's), (2) Simmons Team Sports (Simmons), (3) D&J Commerce Solutions, Inc., d/b/a OLC Team Solutions (D&J), and (4) Palm Beach Sports (PB Sports), Respondent, School Board of Palm Beach County (School Board), 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 November 4, 2014, the School Board issued ITB No. 15C-26K for the provision of athletic equipment (hard goods) and athletic clothing, including uniforms (soft goods). The sealed bids were opened on November 26, 2014. On January 28, 2015, the School District of Palm Beach County's Director of Purchasing posted a recommendation to award ITB No. 15C-26K to the three responsive and responsible bidder(s) offering the highest discount to be deducted from their catalog list prices, retail pricing, or

prices on company webpage for each of the 26 items set forth in the solicitation document.

On February 2, 2015, Petitioner, BSN Sports, LLC (BSN), served a notice of protest of the Award Recommendation/Tabulation. After receiving the bid protest, the School Board held an Informal Meeting to try to resolve the issues in the protest in accordance with section 120.57(3), Florida Statutes, and School Board Policy 6.14. The parties were not able to reach a resolution.

BSN timely filed a formal Petition on March 12, 2015. In its Petition, BSN challenges the School Board's recommendation for award to (1) Matty's, (2) Simmons, (3) D&J, and (4) PB Sports for Items 1 through 26. Specifically, BSN asserted that the School Board's proposed agency action is improper because the bids of the four proposed awardees enumerated above suggested to the School Board that those bidders "clearly engaged in collusion in submitting their responses" in violation of Section 2 of the Instructions to Bidders. BSN did not contest the suggested award to bidders Runner's Edge, Inc. (Items 11 and 13), or Hatworld, Inc., d/b/a Lids Team Sports (Item 26).

Additionally, BSN asserted that the School Board should have required the actual prices of various products to be supplied by the winning bidders. For relief, BSN requested that the School Board cancel the recommended bid award to the four proposed

bidders and remove the four entities from all bid lists for the School Board. The Petition was referred to the Division of Administrative Hearings (DOAH) on March 19, 2015.

The School Board moved to dismiss the Petition on two grounds. First, the School Board asserted that BSN untimely asserted its claim that the School Board should have required the actual prices of various products to be supplied. Additionally, the School Board argued that BSN lacked standing to challenge the recommended contracts for Items 1, 3, 5, 7, 11, 15, 17, 19, 21, or 25. BSN withdrew its claim that the School Board should have required the actual prices of various products to be supplied by the winning bidders. The undersigned denied the Motion to Dismiss and the final hearing was conducted on June 2, 2015, as scheduled.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation, which contained a 16-paragraph statement of facts which were admitted and did not require proof at hearing. Joint Exhibits 1 through 23 and 25 were admitted in evidence without objection.

Terrence M. Babilla, BSN's President, Chief Operating Officer, General Counsel, and Secretary; Adam Rhein, BSN's Manager of its East Coast bid department; Sharon Swan, Palm Beach County School District (District) Director of Purchasing; Jan Butts, Purchasing Agent III for the District; David Benson, owner

of D&J; Fred Carr, owner of PB Sports; Matthew Wilkin, owner of Matty's Sports; Tim Simmons, owner of Simmons; and Barry Zuccarini owner of Recreation Sports, Inc., appeared as witnesses at the final hearing.

During the final hearing and after taking the testimony of several witnesses, BSN made an ore tenus amendment of its Petition and removed Matty's as one of the named colluding parties. However, BSN indicated it was still challenging the School Board's award of the bid.

A two-volume Transcript of the final hearing was filed with DOAH on June 11, 2015. BSN and the School Board filed proposed recommended orders which were considered in the preparation of this Recommended Order. Unless otherwise noted, citation to the Florida Statutes and Florida Administrative Code refer to the versions in effect on January 13, 2015.

FINDINGS OF FACT

ITB No. 15C-26K and the Bid Process

1. On November 4, 2015, the School Board issued Invitation to Bid (ITB) No. 15C-26K entitled "Term Contract for the Purchase of Physical Education/Athletic Supplies, Equipment and Uniforms" for the provision of athletic equipment (hard goods) and athletic clothing, including uniforms (soft goods).

2. The ITB offered prospective vendors the opportunity to bid on 26 items but did not require that a vendor offer a bid for

each of the 26 identified items. The odd-numbered items were for hard goods and the even-numbered items were soft goods.

3. Paragraph G, AWARD of the SPECIAL CONDITIONS of ITB No. 15C-26K, stated:

In order to meet the needs of the various schools and departments, the contract shall be awarded to the three (3) responsive responsible bidders offering the greatest discount for each Item referenced in the Bid Summary Document, after adjustments have been made for all preferences that may be applicable.

4. Paragraph P, FIXED PERCENTAGE DISCOUNT of the SPECIAL CONDITIONS of ITB No. 15C-26K, stated:

The discounts, terms and conditions of this bid are to remain firm throughout the contract period. Additional discounts are always accepted. Bidder shall indicate in spaces provided on the Bid Summary Document their single fixed percentage discount to be deducted from the catalog list prices, retail pricing or prices on company webpage.

5. As part of their bid submissions, BSN, D&J, Matty's, Simmons, and PB Sports signed a Bidder Acknowledgement form that stated, "By electronically submitting your bid, the bidder certifies that they have not divulged, discussed or compared their bid with other bidders and have not colluded with any other bidder or parties to the bid whatever [sic]."

6. BSN, D&J, Matty's, Simmons, and PB Sports timely submitted their bid proposals. The sealed bids were opened on

November 26, 2014. Thirty-six bids were received that bid on at least one item.

7. The District's Director of Purchasing posted a recommendation of award ITB No. 15C-26K to the three responsive and responsible bidders offering the highest discount to be deducted from their catalog list prices, retail pricing, or prices on company webpage for each of the 26 items set forth in the solicitation document.

8. For Items 1 through 25, Matty's, Simmons, D&J, and PB Sports bid a 35% discount on all equipment (hard goods) and a 45% discount on clothing (soft goods). For Item 26, both D&J and PB Sports bid a 20% discount, thus matching on all 26 items. Similarly, Simmons and Matty's both offered a 45% discount for Item 26, thus having identical bids for all 26 items.

9. D&J was recommended for award on Items 2 through 6, 8, 10, 12, 14, 15, 17 through 20, and 22 through 25. Hat World, Inc., d/b/a Lids Team Sports, was recommended for award on Item 26. Matty's was recommended for award on Items 1 through 3, 6 through 8, 10, 12 through 18, 20, 21, 23 through 25, and 26. PB Sports was recommended for award on Items 1 through 12, 14, 16, 19, 21, and 22. Runner's Edge, Inc., was recommended for award for Items 11 and 13. Simmons was recommended for award for Items 1, 4, 5, 7, 9, 11, 13, and 15 through 26.

10. For Items 1 through 25, BSN bid an 18% discount on all equipment (hard goods) and a 35% discount on clothing (soft goods). BSN was not recommended as an awardee. BSN timely filed a notice of protest on February 2, 2015, and a letter of protest on February 9, 2015. BSN timely filed a formal protest petition on March 12, 2015.

Basis of the Bid Protest and Allegation of Collusion

11. In its Petition, BSN challenges the School Board's recommendation for award to (1) Matty's, (2) Simmons, (3) D&J, and (4) PB Sports, as contrary to the School Board's solicitation specifications for Items 1 through 26.^{1/} Specifically, BSN asserts that the School Board's proposed agency action is improper because the bid responses of the four proposed awardees enumerated above suggests that those bidders "clearly engaged in collusion in submitting their responses" in violation of Section 2 of the Instructions to Bidders.

12. BSN argues that collusion between these four must be inferred due to the nearly identical bidding pattern for all items, the close personal relationships between the owners of these businesses, and the geographic proximity of these businesses with 60 miles of each other. Further, D&J and PB Sports both had their bids notarized by the same person, a full-time employee of D&J, and D&J and PB Sports provided an identical vendor list.

13. The four alleged colluders all deny that they had any assistance in preparing their bids or that they worked together in preparing their bids.

Bidding Patterns

14. As admitted by BSN's President, Terrance Babilla (Babilla), and explained at final hearing by Janet Butts (Butts) of the District's Purchasing Department, patterns that appear in bidding do not, standing alone, suggest collusion.

15. The very nature of this ITB, of having all odd-numbered items represent hard goods and even-numbered items represent soft goods, invited a pattern of bidding a straight percentage for all odd numbered items and the same or another percentage for even items. For example, Bob's Athletic and Knockout Sportswear had the identical bid pattern because both companies chose not to bid on any hard goods, and both bid a 20% discount across the board on all soft goods. Similarly, the bids of Coastal Enterprises, Neff Motivation, Inc., and RASA's, Inc., were identical in that all three chose not to bid on hard goods and bid a 5% discount on soft goods.

16. Numerous bidders matched on the percentage offered on either hard or soft goods. Aluminum Athletic Equipment Company and BSN both bid 18% on all hard goods. Pyramid and S&S Worldwide both offered a 20% discount on the hard goods for which they bid. HSA Enterprises, Inc., and Nasco both bid a 10%

discount on hard goods. Bob's Athletic, Pyramid School Products, and Scotty's Sport Shop all bid a 20% discount on the soft goods for which they bid.

17. According to BSN's witnesses, the fact that four bidders matched percentage discounts offered on 25 of 26 items is beyond coincidence. Even if true, it does not necessarily follow that that the identical even/odd pattern of bidding is the result of collusion.

18. D&J, PB Sports, and Matty's were aware that the Broward County School Board (BCSB), which oversees a district geographically connected, and a school system demographically similar to that of Palm Beach County, awarded its latest contract for athletic wear and equipment to Matty's, which bid a 35% discount for hard goods and generally a 45% discount for soft goods. Unlike the School Board's ITN, the BCSB ITN was broken down by vendor for hard and soft goods. Matty's successfully bid a 45% discount for Adidas brand soft goods to secure the BCSB contract.

19. In fact, D&J was an unsuccessful bidder on the BCSB ITB because it offered a 40% discount on soft goods. D&J primarily sells Adidas products. After D&J was an unsuccessful bidder for BCSB, but prior to the issuance of the School Board's ITB at issue in this case, David Benson (Benson), owner of D&J, and Fred Carr (Carr), owner of PB Sports, discussed the fact that the next

time a similar ITB was issued, a bidder could not go less than 45% for soft goods in order to beat or tie Matty's. Based upon the BCSB bid process, both Benson and Carr believed 45% to be the new "benchmark" for soft goods.

20. D&J used its standard all-school rate of a 35% discount for the hard goods number offered to the School Board. Carr used the standard 35% discount for hard goods to schools offered by Adidas, the brand he primarily carries.

21. Simmons, whose business opened in January 2014, was not familiar with the BCSB bid but based his bid on his prior experience working as a salesman for D1 Sports, which sold Adidas and Under Armour soft goods to schools at a 40% discount and hard goods at a 30% discount. He decided to increase those amounts by 5% in an effort to win the bid.

22. Matty's, of course, was aware of the amounts it bid to successfully secure the BCSB bid. Because it had to propose one percentage for the School Board rather than numerous percentages for various vendors as it did for BCSB, it chose the 45% discount used for Adidas goods. Matty's often used the 35% on hard goods and 45% on soft goods to successfully secure contracts with other school districts. Additionally, Matty's belongs to a purchasing group of approximately 250 sporting goods suppliers, Sports Inc., that provides a significant discount from vendors so that Matty's could still be profitable with 35% and 45% discounts.

23. The explanations offered by D&J, PB Sports, Simmons, and Matty's, for how each business came to their 35% and 45% discounts for odd and even numbered items, are credible, rational and strongly weigh against any possible inference of collusion.

Relationships Between the Owners of the Winning Bidders

A. Benson and Carr

24. According to BSN, the specter of collusion is raised when the nearly identical bidding patterns and the personal relationships among the successful bidders is revealed.

25. Benson, the owner of D&J, and Carr, the owner of PB Sports, have known each other and worked with each other through their roles with various sports companies in South Florida over the last 11 to 13 years, and they have the closest relationship among the winning bidders. When Benson worked for Websters Team Sports, Carr served as Websters' Adidas representative. Thereafter, Carr became the owner of D1 Sports which then purchased athletic supplies from D&J in D&J's capacity as a wholesaler. Carr continued to purchase primarily Adidas products through D&J when he became owner of PB Sports.

26. D&J was a winner on several line items on the 2012 BCSB athletic supplies bid. The School Board "piggybacked" off this BCSB contract and allowed Palm Beach County schools to use those winners as authorized vendors for Palm Beach County

schools. As such, schools in Palm Beach County could utilize D&J as a vendor for certain products prior to ITB No. 15C-26K.

27. Up through the time ITB No. 15C-26K was issued, Carr served as a subcontractor for Benson in Palm Beach County. As a subcontractor, Carr sold athletic supplies to Palm Beach County schools through D&J. In this capacity, Carr used D&J letterhead to invoice schools, had full access to D&J's vendor costs for all athletic supplies, and was able to call different vendors and place his orders using D&J's name. The School Board had some nominal knowledge of a business relationship between the two, but did not know the exact nature of that relationship.

28. Benson still serves as a wholesaler to Carr (in his capacity as owner of PB Sports) permitting Carr to purchase goods at Benson's cost and selling Carr between 65% to 70% of his athletic supplies. Further, Benson sells Carr between 95% to 99% of the Adidas products which Carr then re-sells to third-parties. Carr considers D&J to be his "exclusive Adidas provider." Carr is not an authorized dealer of Adidas products (or "open" with Adidas) and is unable to purchase items directly from Adidas. However, if PB Sports is awarded the contract at issue in this case, Carr anticipates being able to buy direct from Adidas.

29. In exchange for permitting Carr to use Benson's vendors to purchase various athletic supplies, Benson provides a 10% "upcharge" on every item PB Sports purchases from D&J. The

relationship is mutually beneficial because Benson receives a 10% profit on every item Carr purchases through D&J's vendors, and Carr is able to sell these products to D&J's customers in Palm Beach and to PB Sports' customers as well. As a result of this relationship, Benson is purchasing a higher volume of supplies because he is ordering for both D&J and for Carr. Carr and Benson are able to obtain higher discounts as a result of consolidating their purchases from several of D&J's vendors, particularly Adidas.

30. BSN suggests that the arrangement between D&J and PB Sports is "unheard of, at least in this industry." However, BSN is not open with Adidas so it does not know whether Adidas would prohibit the relationship between Carr and Benson.

31. It should also be noted that there is a significant difference in the volume of business enjoyed by BSN and those entities alleged to have engaged in collusion. BSN does approximately 1500 to 2000 bids annually across the nation. D&J has participated in three bids all in South Florida. ITB No. 15C-26K was the first bid submitted by Simmons and PB Sports. Understandably, there is a significant difference in business models between BSN and the alleged colluders.

32. BSN itself is a member of the general purchasing organization, U.S. Commodities, and utilized U.S. Commodities standard 18% discount for athletic hard goods, the same

percentage discount offered by Aluminum Athletic, for the bid at issue in this case.

33. As discussed above, Matty's is a member of Sports, Inc., the largest athletic clothing and equipment buying group, with 250 buyers in the United States and Canada. Although Matthew Wilkin (Wilkin), Matty's owner, does not share pricing with other members of Sports, Inc., he is aware of the discount offered to members who do a similar volume of business as Matty's. Wilkin explained he does not share pricing with Sports, Inc., members because they are not in the same geographic location. According to Wilkin, it is common in the industry to buy or sell to other local dealers.

34. Interestingly, Barry Zuccarini (Zuccarini), owner of Recreation Sports, another unsuccessful bidder, testified he purchases from Athletic Connection, a subsidiary of BSN, and he sees Athletic Connection pricing.

35. Butts, the School Board's bid facilitator for ITB No. 15C-26K, explained that she was not alarmed when she saw patterns among the four successful bidders because she assumed that they were part of a consortium.

36. The anti-collusion policy prohibits working together on the bid, not generally working together. Sharon Swan (Swan), the School Board's Director of Purchasing, best explained it as follows:

The relationship that was described here today about one vendor buying through another vendor is not an unusual situation in my world. I have vendors who buy from wholesalers, from resellers, from manufacturers, and that is allowed. And whenever one party buys through another party, it increases their volume of business and that results possibly in them getting additional discount . . . I do not believe that fact creates a situation of proof of collusion between any of the vendors.

Transcript page 306, lines 10-22.

37. Both Carr and Benson credibly testified that they were competitors, rather than wholesaler and subcontractor, when participating in response to ITB No. 15C-26K.

38. BSN makes much of the fact that on one page, the bids of D&J and PB Sports were both notarized by the same individual, Ophelia Duggan (Duggan), an employee of D&J. Carr explained that he was aware that Duggan was a notary, and so, he stopped to have her notarize his Beneficial Interest and Disclosure of Ownership Affidavit page of the bid packet prior to its submission. Benson was not aware that Carr used Duggan to notarize the form. There was no testimony to suggest that Duggan reviewed any other portion of either bid submission or shared their contents.

39. BSN also asserts that the fact that PB Sports submitted a vendor list, that was prepared by D&J, in response to the School Board's request after the bids were opened, smacks of collusion. Carr reasonably explained that because PB Sports

purchases more than 95% of his goods from D&J, it made sense to use its vendor list.^{2/}

B. Carr and Simmons

40. As noted above, prior to owning PB Sports, Carr owned and was a partner at D1 Sports, which also engaged in the business of selling sporting goods. From approximately 2009 to 2014, Tim Simmons, owner of Simmons, was a salaried employee of D1 Sports and worked under Carr.

41. Carr and Tim Simmons still communicate with each other, sometimes as many times as several times a week. Carr also purchases goods from Tim Simmons and utilizes his heat press for jersey numbers. On different occasions, Tim Simmons has ordered items from Carr in Carr's capacity as a subcontractor for D&J. Carr and Tim Simmons consider each other competitors and do not have access to each other's pricing like Benson and Carr. Simmons does not maintain an inventory of soft or hard goods, and did not have an established line of hard goods with which he worked at the time of bid submission. However, inventory was not a requirement of the bid specifications.

C. Wilkin

42. Wilkin has owned and operated Matty's and its predecessor, Cycle Sports, in South Florida for approximately 30 years. He has never done business with Carr or Tim Simmons and recalls only one or two instances of purchasing goods from

Benson. Wilkin considers D&J to be a competitor and has never shared pricing with competitors. BSN contacted Wilkin in early 2015 to discuss the possibility of purchasing Matty's. During the final hearing, BSN dropped the allegations of collusion against Matty's.

Geographic Proximity

43. BSN argues that the geographic proximity of these awardees, within 60 miles of each other, in conjunction with the other facts discussed above, inevitably leads to the conclusion of collusion.^{3/}

44. Given the fact that the School Board runs one of the largest school districts in the nation, it is not surprising that many of the 36 bidders were from around the country and based outside of Florida. It is also not surprising that vendors of athletic merchandise headquartered in South Florida, and which have established business and personal relationships with certain schools, teams and coaches, were keenly aware of this particular bid process as well as that of Broward County, and bid steep discounts to secure the business in their own backyard.

Finding of Ultimate Fact

45. No inference of nefarious dealing or collusion necessarily flows from the foregoing Findings of Fact. There is no persuasive evidence that the integrity of the bid process in this case was compromised in any way. The School Board acted in

accordance with its governing statutes, rules, policies, and procurement specifications.

CONCLUSIONS OF LAW

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

Petitioner's Burden and Standards of Proof

47. Pursuant to section 120.57(3)(f), Florida Statutes, the burden of proof rests with BSN 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). BSN 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).

48. 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.

49. 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.

50. 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.

51. 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.

52. 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 as a result of this misstep, the agency's action was: (a) clearly erroneous; (b) contrary to competition; or (c) an abuse of discretion.

53. 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.

54. 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).

55. 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.

56. If, however, the challenged agency action involves an ultimate factual determination 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 judge that a defect in the agency's logic unequivocally led to a mistake.

57. 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.

58. 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).

59. 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.

60. 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.

61. 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.

62. 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.

63. 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.

64. 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.

65. 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.

66. 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 March 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).

The Specifics of This Bid Protest

67. BSN alleges that the intended actions of the School Board are contrary to the bid or proposal specification, in particular, the anti-collusion provision. Benson, Carr, and Tim Simmons each signed their bid for their respective companies and certified that they understood the contents of this clause and did not engage in any collusion with any other bidder to ITB No. 15C-26K. Collusion between bidders would clearly be contrary to the bid specifications.

68. No direct evidence of collusion was presented at the final hearing.^{4/} The evidence presented by BSN was circumstantial which BSN argues gives rise to the inference of collusion. It is well-settled that "fraud is rarely susceptible of direct and positive proof" and that while evidence must be presented to show fraud occurred, such "evidence need not be direct" and "may be wholly circumstantial, or a combination of direct and circumstantial evidence." Fla. E. Coast Ry. v. Thompson, 93 Fla.

30, 111 So. 525 (1927); see, e.g., Cohen v. Kravit Estate Buyers, 843 So. 2d 989 (Fla. 4th DCA 2003); S&S Toyota v. Kirby, 649 So. 2d 916 (Fla. 5th DCA 1995). Intent is rarely proven by direct evidence but typically must be established based upon surrounding circumstances. See Brewer v. State, 413 So. 2d 1217 (Fla. 5th DCA 1982).

69. The following excerpt, from 24 Fla. Jur. 2d Evidence and Witnesses § 484, accurately states the general rule as to the sufficiency of circumstantial evidence in a civil or administrative proceeding:

The proper test for the sufficiency of circumstantial evidence in civil [or administrative] cases is that circumstantial evidence need not exclude every other reasonable hypothesis than the one contended for, but must outweigh all contrary inferences to such extent as to amount to a preponderance of all reasonable inferences that might be drawn from the same circumstances.

70. Collusion is not the only, and certainly is not the most logical, inference to be drawn from the bidding pattern, relationships between owners, geographic proximity, and other facts presented in this case.

71. The remaining three alleged colluders, D&J, PB Sports, and Simmons, or their principals, have been in the business of selling athletic merchandise to schools in South Florida in some capacity for a substantial period of time. All three were

certainly aware that a profit could be made on Adidas merchandise while offering a 45% discount. Certainly D&J and PB Sports were aware of the discounts offered by Matty's to win Broward County. All three companies bid as competitively as they could to be able to service those schools, teams, and coaches with which they have existing relationships.

72. Due to the nature of the bid solicitation, D&J, PB Sports, Simmons, and Matty's came up with the same percentage discounts for the two types of goods sought—hard goods and soft goods.

73. The School Board's decision, that collusion did not occur, and that the intended award should stand, was made after consideration of all relevant factors and based upon facts and logic.

74. BSN failed to demonstrate by a preponderance of the evidence that the School Board erred by not determining the successful bidders engaged in collusion. Accordingly, BSN failed to meet its burden to demonstrate that the School Board acted contrary to one or more governing statutes, rules, policies, or procurement specifications, or any combination thereof.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Palm Beach County enter a final order that adopts the Findings of Fact and

Conclusions of Law contained herein, dismisses the protest filed by BSN Sports, LLC, and upholds the awards of contracts ITB No. 15C-26K to Matty's Sports, Simmons Team Sports, D&J Commerce Solutions, Inc., and Palm Beach Sports.

DONE AND ENTERED this 22nd day of July, 2015, in Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July, 2015.

ENDNOTES

^{1/} BSN withdrew its claim against Matty's during the final hearing and indicated that it no longer believes that the fact that Simmons and Matty's had identical bids meant that the two vendors had engaged in collusion in violation of the solicitation documents.

^{2/} BSN offered the testimony of Zuccarini, owner of Recreation Sports, an unsuccessful bidder, regarding a purported conversation that he had with Carr at the informal hearing conducted by the School Board in an effort to resolve the bid dispute. According to Zuccarini, he approached Carr after the meeting to say hello, and Zuccarini commented on what he considered an unusual bid format. Carr stated, "Well I didn't know, so I just copied it." Zuccarini testified he did not know

what Carr meant when he referred to "it." BSN argues that "it" must refer to the bid in this case.

Carr was not questioned at hearing regarding whether he made such a statement or to what he might have been referring. It seems possible and quite logical that if Carr made such a statement, he was referring to the BCSB bid which he admits he used as a basis for his discount percentages. Accordingly, the alleged statement does not constitute direct evidence of collusion as suggested by BSN.

^{3/} Interestingly, BSN's bid specialist, who prepared its proposal in this case, is located in Pennsylvania, in close proximity to Aluminum Athletic Equipment Company (Aluminum), another unsuccessful bidder who also bid a straight 18% discount on hard goods, just like BSN. BSN's President testified this could raise the specter of collusion, but he did not admit any relationship or collusion between BSN and Aluminum.

^{4/} See discussion above in endnote 2.

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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.