STATE OF FLORIDA
DIVISION OF EMERGENCY MANAGEMENT

LOUIS BERGER GROUP, INC.,

Petitioner,

and

DISASTER STRATEGIES AND IDEAS GROUP, LLC,

Intervenor,

vs.

FLORIDA DIVISION OF EMERGENCY MANAGEMENT,

Respondent,

and

TRUE SOLUTIONS GROUP, LLC,

Intervenor.

_____/

DEM Case No. 15-002
ITB-DEM-14-15-023

DOAH Case No. 15-2537BID

RESPONDENT FLORIDA DIVISION OF EMERGENCY MANAGEMENT'S FINAL ORDER RESPONDING TO PETITIONER LOUIS BERGER GROUP, INC.'S EXCEPTIONS TO THE RECOMMENDED ORDER AND REQUEST FOR ENTRY OF A FINAL ORDER REFERRING THIS MATTER BACK TO DOAH

INTRODUCTION

Pursuant to section 120.57(3)(e), Florida Statutes, and rule 28-106.217(3), Florida Administrative Code, Respondent Florida Division of Emergency Management (the "Division"), files this Final Order in Response to the Exceptions to the Recommended Order and Request for

Entry of a Final Order Referring this Matter Back to DOAH (the "Exceptions") filed by Petitioner Louis Berger Group, Inc. ("Louis Berger").

FINAL ORDER

For all of the reasons outlined below, the Recommended Order of the ALJ is adopted in its entirety and incorporated herein. The Formal Written Protest and Petition for Formal Administrative Hearing is **DISMISSED** with prejudice, and the Division is directed to award the contract for ITB-DEM-14-15-023.

STANDARD OF REVIEW

Section 120.57, Florida Statutes, sets forth the parameters for an agency to review a recommended order and issue a final order. The agency may adopt the recommended order in its entirety or, under certain circumstances, may modify or reject findings of fact and conclusions of law. *See§* 120.57(1)(l), Fla. Stat. (2014). A final order must include an explicit ruling on each exception. *Id.*

The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

FINDINGS

After full consideration of the Exceptions, TSG' submission, and the record in the case, the undersigned finds the following:

(A) The Undersigned has been appointed by the Director of the Division of Emergency Management to review the record in this matter, consider the Recommended Order from the Division of Administrative Hearings ("DOAH"), consider the Exceptions and Responses to such Exceptions filed by the parties, and all other matters appropriately before the Division in this bid protest, and issue a Final Order in this matter. The Director of the Division was called upon to testify in the proceedings before DOAH and therefore decided to recuse himself.

(B) As noted in the Prehearing Stipulation, the contract in this case was awarded to True Solutions Group, Inc. ("TSG"). The Stipulation also shows where all bidders ranked based on price alone and assuming they were all "responsive" and "responsible" bidders, eligible to enter into a contract with the Division if so awarded. (See paragraph 12 of the Prehearing Stipulation wherein Louis Berger is ranked 8th.) To establish standing, Louis Berger was required to demonstrate that all 7 of the bidders ahead of it would be disqualified in order to

demonstrate it had standing. *See Preston Carrol Co., Inc. v. Fla. Keys Aqueduct Auth.*, 400 So. 2d 524, 525 (Fla. 3d DCA 1981).

(C) The Recommended Order of Dismissal dated June 10, 2015 and entered by the Honorable William F. Quattlebaum, Administrative Law Judge for the Division of Administrative Hearings, is hereby ADOPTED and incorporated herein. While the entire recommended order is adopted, the undersigned, in doing so, specifically adopts and approves the findings in paragraphs 19 – 22 of the Recommended Order holding that the plain language of section 19 of the Invitation to Bid ("ITB"), when read alone or in context of the entire ITB, requires a demonstration by a bidder only that it has three (3) years total of experience working with FEMA individual and public assistance programs and not that the bidder have 3 years' experience in each program.

(D) Louis Berger's own corporate representative having testified that based on that standard of 3 years, the bid of the seventh ranked MB3, Inc. ("MB3"), which was substantially lower than Louis Berger's bid, was compliant with the ITB's experience requirement, and there being no other basis in Louis Berger's Amended Petition to rely on to disqualify MB3's bid, Louis Berger is without standing to challenge the award to TSG.

(E) The First Amended Formal Written Protest and Petition for Formal Administrative Hearing filed by Petitioner, Louis Berger, is hereby dismissed for lack of standing.

(F) The Exceptions filed by Louis Berger have all been considered by the Undersigned and are disposed of as follows[1]:

Disposition of Exceptions

[1] Rather than attempt to sort out or organize this order by exception, the Undersigned will respond to each paragraph in the Exceptions.

1. This paragraph merely states facts that are not in dispute.

2. This paragraph merely states facts that are not in dispute.

3. This paragraph merely identifies deadlines that are not in dispute, although the appropriate statute is 120.57(3)(e), Florida Statutes.

4. This paragraph merely states facts that are not in dispute.

5. The first part of this paragraph merely states facts that are not in dispute. However, to the extent the language "based upon his reading of section 19 of the DEM's Invitation to Bid (ITB), bid documents" implies the Administrative Law Judge ("ALJ") made his decision based on less than the complete record before him at that point in time, the statement is rejected as inaccurate.

6. Again, the language in paragraph 6 appears to suggest a more narrow review of the decision making process than what actually occurred. It is accurate to state that the ALJ relied, in part at least, on section 19 of the Invitation to Bid.

7. This paragraph merely states facts that are not in dispute.

8. This paragraph is rejected as being unsupported and unclear. The ALJ read the language in section 19 in a manner that was consistent with the Division's interpretation of the section.

9. Louis Berger's comments in paragraph 9 are acknowledged. However, nothing in the paragraphs that follow require modification of the ALJ's Recommended Order.

10. This paragraph recites paragraphs 19 and 20 from the ALJ's Recommended Order. The quotes are accurate. However, while Petitioner labels paragraphs 19 and 20 as "findings of facts (sic)" paragraph 20 is a conclusion of law. *See Assessment Sys., Inc. v. Dep't of Bus. & Prof'l Reg.*, DOAH Case No. 98-1867BID (Dep't of Bus. & Prof'l Reg. Final Order,

Aug. 17, 1998) at p. 6 ("[T]he ALJ's interpretation in paragraph 13 that the RFP required a certain action by the lead evaluator at a certain point in the process is a conclusion of law because it is merely an interpretation of a document, one which the Department is qualified to make as is the ALJ, and one which the Department has special responsibility make regarding its own RFP.").

11. The general implication of paragraph 11 is correct. However, it would be more accurate to say "Important here," rather than "Critical here."

12. Paragraph 12 does not fully reflect the language of paragraph 20 of the Recommended Order. Paragraph 20, in its entirety, stated that "Berger's reading of ITB Section 19 is contrary to the plain language of the requirement, which clearly references a single three-year experience requirement." Berger's reading of the ITB was described in the preceding paragraph of the Recommended Order as requiring that the "actual experience required [for Individual Assistance and Public Assistance] must total at least six years." The ALJ properly rejected this legal interpretation of the ITB.

13. Paragraph 13 asserts the ALJ made "this factual determination based on his 'plain language' interpretation of section 19 of the ITB." The assertion that the ALJ made a "factual determination" in paragraph 13 is rejected. The ALJ's rejection of Louis Berger's interpretation of the ITB language in this paragraph was based on "the plain language of the requirement." The interpretation of a contract is a matter of law. *Nagel v. Cronebaugh,* 782 So. 2d 436 (Fla. 5th DCA 2001), and see the inserted language above in paragraph 10.

14. In paragraph 14, Petitioner asserts that the "ALJ's plain language interpretation is erroneous." This assertion is rejected and the ALJ's conclusions are adopted, given the ALJ's interpretation constitutes a reasonable reading of the ITB.

15. This paragraph accurately describes the ALJ's quote, however the paragraph does not contain a statement by the ALJ that he was interpreting the language in Section 19.

16. Petitioners are correct that the additional language they quote in paragraph 16 is in section 19 of the ITB.

17. There is no basis to assume the ALJ did not read and consider the additional language quoted by Petitioners in paragraph 16 of the Exceptions. The Undersigned rejects the conclusion that by not including this language in the quote in the Recommended Order that the ALJ "diminished and reduced the meaning of that section and therefore improperly modified the requirements of section 19 of the ITB." To the contrary, the ALJ properly construed the language in section 19 to require 3 years of experience working with FEMA's Individual and Public Assistance Programs, not 6 years, 3 with public assistance and 3 with individual assistance.

18. The Petitioner's conclusion in paragraph 18 of the Exceptions is rejected because there is no basis to conclude the ALJ did not consider all of the language of the ITB.

19. Paragraph 19 is rejected for the same reason set forth in paragraph 18 herein.

20. Paragraph 20 is rejected for the same reason set forth in paragraph 18 herein and because the ALJ properly read the language in section 19.

21. Paragraph 21 is rejected for the same reasons set out in paragraph 18 and 20 herein.

22. Paragraph 22 is rejected for the same reasons set out in paragraph 18 and 20 herein. In addition, the ALJ based his decision on a plain reading of the ITB language. "A proper factual basis" was therefore not necessary. Further, Petitioner has not alleged that there were any specific unresolved factual disputes that had to be resolved to reach the conclusions

reached by the ALJ. Instead, Louis Berger is simply alleging that the ALJ failed to give proper consideration to language the Louis Berger believes is critical. Contrary to Louis Berger's contention, the language in section 19 supports the ALJ's conclusion that section 19 does not require three years of experience in each the Individual Assistance and Public Assistance Programs. Notably, section 19 refers to the experience requirement as the "three (3) year experience requirement," and not the six year experience requirement. (Response, Ex. B p. 9 ("A vendor can satisfy the three (3) year experience requirement with corporate or key personnel experience.")). Thus, the plain language of section 19 requires that a bidder, in order to qualify as responsible, provide proof of some combination of Public Assistance and Individual Assistance experience that, when combined, totals at least three (3) years. Therefore, paragraph 22 of the Exceptions and its conclusions are rejected.

23. Paragraph 23 accurately recounts paragraph 20 in the Recommended Order. It does not however request or require any change.

24. In paragraph 24 of its Exceptions, Louis Berger argues that the only way to read the experience requirement the way the ALJ did is to assume that "and" means "or." To the extent that is necessary, the Undersigned believes that is an appropriate way to read the requirement, i.e. the 3 year experience requirement means a bidder must have three years of experience working with FEMA in its Individual Assistance or Public Assistance programs. As noted above, the ALJ was correct in finding that the total experience necessary was three years, not six. It is not disputed that the experience had to be with FEMA and its individual and public assistance programs. The Petitioner has offered no persuasive argument of facts to demonstrate why it would be appropriate to interpret 3 to mean 6, or 3 in each program.

25. Paragraph 25, alleging it has been DEM's position that section 19 required 6 years of experience, 3 in Public Assistance and 3 in individual assistance is rejected because it is clearly not true and because Petitioner has offered no basis for support and no competent substantial evidence. More importantly, regardless of any whether any individual DEM employee may have expressed a contrary position, the ALJ has ruled that the plain language of section 19 requires it be read to require only 3 years of experience combined in public and individual assistance. I find the ALJ's interpretation to be the most reasonable interpretation of the language and hereby adopt it as the Division's interpretation.

26. Petitioner's statement in paragraph 26 is a non sequitur. There is no reason to conclude that because it could have used different language and did not that the Division must have meant a total of 6 years of experience was necessary. It would be just as "logical" to state that if the Division wanted to require 6 years of experience with 3 years in each area, it could have said that, but it did not.

27. The agency's position before the hearing has no bearing on the ALJ's finding. The ALJ reached his finding based on the "plain language of the statute." In any event, the Petitioner failed to provide any competent substantial evidence to support for its contention that the ALJ "ignored the Agency's interpretation of that section." For all of these reasons, the statements in paragraphs 26 and 27 of the Exceptions are rejected.

28. The undersigned finds no support for Petitioner's repetitive statements in paragraph 28 and rejects them again.

29. Again, the ALJ did not base his conclusion regarding the minimum experience requirements on anything other than a "plain reading of the language;" such reading having been adopted by the Division in this Final Order. Therefore, the allegations in paragraph 29 of the

Exceptions are rejected as irrelevant. They are also rejected because the Petitioner did provide any support for them.

30. Paragraph 30 is rejected because the ALJ has applied the interpretation adopted by the Division in this Final Order and by the Division's representative at the hearing. The ALJ has correctly relied up the plain language of the ITB to interpret the related requirements.

31. Petitioner asserts several times that the ALJ erred by not reviewing and considering the ITB in its entirety or at least failed to review and address all provision in the ITB that were relevant to the interpretation of the 3 year requirement. The Undersigned objects to this allegation for several reasons. First, there is nothing anywhere in the record or proceeding to suggest the ALJ did not review and consider all of the ITB and the relevant bids before making a decision. Second, section 19 of the ITB is the only section that would be necessary to review to decide the plain language issue.

32. Petitioner fails to explain the relevance of paragraph 32 in the Exceptions, and it is rejected for that reasons and for the reasons set forth in paragraphs 30 and 31 above.

33. Paragraph 33 presumes the ALJ did not do his job without any support for such an accusation and is rejected for that reason. The paragraph also fails to identify the "pertinent and relevant language" that the ALJ allegedly overlooked and is rejected for that reason as well.

34. In paragraph 34, Petitioner quotes the language from section 19 defining a responsible bidder. The quoted language does not define or interpret section 19 of the ITB and does not say anything about the amount of experience necessary under section 19 to demonstrate "capability." Therefore, while the quote appears to be accurate, it does not support a different conclusion about the necessary experience than what was reached by the ALJ and is being adopted in this Order.

35. This paragraph appears to be accurate; however, there is no reason given as to why it should be added to the Recommended Order or this Final Order. It is therefore rejected.

36. This paragraph appears to be accurate; however, there is no reason given why it should be added to the Recommended Order or this Final Order. Further the contract is a sample, not a signed executed contract. It is therefore rejected.

37. This paragraph appears to be accurate; however, there is no reason given as to why it should be added to the Recommended Order or this Final Order. It is therefore rejected.

38. This paragraph appears to be accurate; however, there is no reason given as to why it should be added to the Recommended Order or this Final Order. It is therefore rejected.

39. This paragraph appears to be accurate; however, there is no reason given as to why it should be added to the Recommended Order or this Final Order. It is therefore rejected.

40. This paragraph appears to be accurate; however, there is no reason given as to why it should be added to the Recommended Order or this Final Order. It is therefore rejected.

41. First, it should be pointed out that the Scope of Work provisions are most relevant to advise bidders what will be expected of them if they are awarded a bid. It is not a statement of what must be in a bid response and does not reflect the number of years of experience required under section 19 of the ITB. In fact, there is nothing in the scope of work that requires a bidder to have any specific number of years' experience to be considered responsive or responsible. Instead, this provision from the scope of work simply requires that the winning bidder may be required, upon request by the Division, to provide specialists pre-trained under the Public Assistance Program and the Individual Assistance Program. Thus, the Scope of Work communicates a contract performance expectation to bidders; it does not constitute a bid requirement. Paragraph 41 of the Exceptions is therefore rejected.

42. There is nothing anywhere to suggest the ALJ did not review the proposed contract language. Regardless, his determination that the plain meaning of the language in section 19 of the ITB should control is not impacted by the language in the scope of work. There are no three year experience requirements in the proposed contract.

43. There is nothing anywhere to suggest the ALJ did not review the proposed contract language. Regardless, his determination that the plain meaning of the language in section 19 of the ITB should control is not impacted by the language in the scope of work. There are no three year experience requirements in the proposed contract, and the ALJ's finding was not in error.

44. This paragraph asserts that "The ALJ, in reaching his determination, appears to have relied on statements form Mr. Yon, attorney of record for DEM." The ALJ clearly decided what he believed the "plain language" of the ITB meant before the exchange cited by Petitioners. (Response, Ex. A, p. 15.) Specifically, during the hearing, the ALJ stated as follows:

> I'm reading the paragraph from Section 19 of the ITB and this is probably a question more for the division. Is that being read as two separate requirements? I mean, are we talking about six years – because there's a sentence – I'm sure you-all have read the sentence, but I'll read it for the record: Given the specialized nature of the work contemplated, the division requires the bidder must have at least three years' experience working with FEMA, individual assistance and public assistance programs. A vendor can satisfy the three-year experience requirement with corporate or key personnel experience. *To me, I read that as a single-three year experience requirement.* And so, please . . . (*Id.* (emphasis added).)

It is accurate that before making his decision final, the ALJ wanted to know what the Division's position was. He is entitled to ask that question. Paragraph 44 of the Exceptions therefore does not support any finding requiring any portion of the Recommended Order to be modified or rejected. This paragraph therefore is rejected.

45. This paragraph contains an accurate reprint of the transcript of the hearing. It also accurately describes the ALJ's position based on his review of the language in the ITB and the pleadings filed to that point.

46. This paragraph contains an accurate reprint of the transcript of the hearing.

47. This paragraph is a true statement.

48. This paragraph is a true statement.

49. In paragraph 49 of the Exceptions, Petitioner asserts that the "ALJ should have known that an attorney's response is not evidence and cannot be relied upon to resolve an evidentiary issue or make a finding of fact." While it is true an attorney's response is not evidence, an attorney can state (or in this case convey) the position of the party they represent on a particular issue. While it was not necessary for the ALJ to know what the Division's position on this issue was, it certainly was not improper for him to ask. Accordingly, paragraph 49 of the Exceptions is rejected.

50. The ALJ did not "rely on" a statement from Mr. Yon. Of course as an attorney admitted to the Florida Bar, Mr. Yon is obligated to act only in a completely ethical manner. It is not necessary that he be sworn in for the ALJ to be able to rely on his statement regarding his client's legal position on an issue. This paragraph is rejected.

51. The ALJ did not make a finding of fact with respect to the interpretation of the experience requirements of section 19 of the ITB. He made a finding as to how it should be interpreted based on the plain language of the ITB. This paragraph therefore is rejected as not being relevant and being misleading.

52. Petitioner assert in paragraph 52 that the Division's position on what experience was necessary was somehow determined by the testimony of the Director in a deposition.

Although Petitioner had an opportunity to present this deposition testimony to the ALJ during the hearing, Petitioner did not do so. "An agency is not authorized by section 120.57(1)(b)10 to reopen the record, receive additional evidence and make additional findings." *Lawnwood Med. Ctr. v. Agency for Health Care Admin.*, 678 So. 2d 421, 425 (Fla. 1st DCA 1996) (citation omitted). "[T]o allow a party to produce additional evidence after the conclusion of an administrative hearing below would set in motion a never ending process of confrontation and cross-examination, rebuttal and surrebuttal evidence, a result not contemplated by Chapter 120." *Id.* (quotation omitted). Thus, Petitioner may not attempt to offer evidence that was not presented at the hearing for the first time in its Exceptions. *See, e.g., id.; Ross v. City of Tarpon Springs,* DOAH Case No. 10-3351, OGC Case No. 10-1392 (Fla' Dep't of Ent'l Prot. Final Order Jan. 28, 2011), at pp. 14-15 ("Second, the Petitioner tries to establish his standing by pointing to 'public records' that were not presented at the hearing and are not part of the record evidence in this case. . . . Under the standard of review it is improper for a reviewing agency to make supplemental or additional findings of fact on issues where the ALJ made no findings."). Because the Division may not consider evidence that was not presented to the ALJ, paragraph 52 of the Exceptions is rejected. Additionally, when questioned by the ALJ at the hearing on June 4. 2015, Mr. Kennett's answer, representing the Division was that section 19 imposes a single three-year experience requirement. (Response, Ex. A, p. 15.)

53. Paragraph 53 is rejected for the same reasons as stated in paragraph 52 above. Additionally, the fault for such evidence not being in the record lies with Petitioner, as Petitioner had an opportunity to present additional evidence, but failed to do so.

54. Paragraph 54 is rejected for the same reasons as set forth in paragraphs 52 and 53 above. In addition, testimony was not necessary as the ALJ made his decision based on the plain

language of the ITB. To the extent he relied upon the representations of the Divisions made through its counsel, he was entitled to do so to provide support for his conclusion. Thus, Petitioner's requested modification is rejected.

55. Paragraph 55 is rejected because the requested finding is not supported by the plain meaning of the language in section 19 of the ITB.

56. Paragraph 56 accurately quotes paragraph 22 in the Recommended Order. It was not identified as a finding of fact, however, nor should it have been.

57. Paragraph 57 requests paragraph number 22 in the Recommended Order be modified.. The request is denied because it assumes an incorrect interpretation of the ITB, i.e. that MB3 must show in its response to the ITB it had 6 years total experience in individual and public assistance, with a minimum of 3 years in each category. As described above, this is not consistent with the plain language of the ITB or the way the Division interpreted the ITB.

58. In paragraph 58, Petitioner accurately quotes a portion of section 120.57(3)(e), Florida Statutes. It does not however request or require any change.

59. In paragraph 59, Petitioner accurately quotes Rule 28-106.216, Florida Administrative Code. It does not however request or require any change.

60. In paragraph 60, Petitioner contends the ALJ was required to, but failed to include conclusions of law in the Recommended Order. While Rule 28-106.216 requires that conclusions of law and findings of fact be separately stated, it does not require that headings be included which denote particular paragraphs as findings of fact or conclusions of law. In fact, such requirement would be meaningless as precedent establishes that the label given to a paragraph by an ALJ is not determinative of whether the statement therein is a finding of fact or conclusion of law. *See, e.g., Baptist Hosp., Inc. v. Dep't of Health & Rehab. Servs.*, 500 So. 2d

620, 623 (Fla. 1st DCA 1986). The Recommended Order clearly set forth conclusions of law, as the legal basis for the ALJ's findings are identified in paragraphs 14, 15, and 22 of the Recommended Order. Accordingly, paragraph 60 of the Exceptions is rejected.

61. Paragraph 61 of the Exceptions is rejected for the reasons stated in paragraph 60 above.

62. Paragraph 62 of the Exceptions is rejected for the reasons stated in paragraph 60 above.

63. Paragraph 63 of the Exceptions is rejected for the reasons stated in paragraph 60 above.

64. Paragraph 64 of the Exceptions (and conclusions of law 2-4 following thereafter) is rejected for the reasons stated in paragraph 60 above. Conclusion of Law number 1 is covered in the existing Recommended Order.

65. The recommendations in paragraph 65 and following are rejected for the reasons stated in the paragraphs above.

CONCLUSION

For all of the reasons stated above, the Recommended Order of the ALJ is adopted in its entirety and incorporated herein.

Wherefore, it is hereby ORDERED and ADJUDGED:

1. The Formal Written Protest and Petition for Formal Administrative Hearing is **DISMISSED** with prejudice.

2. This Final Order shall become effective on the date of filing with the Agency Clerk of the Division of Emergency Management.

3. The automatic stay is lifted and the Division is directed to award the contract in the proceeding for ITB-DEM-14-15-023.

DONE and ORDERED this 10th day of July.

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