STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AT AND T CORP.,

Petitioner,

vs. Case No. 15-5002BID

DEPARTMENT OF MANAGEMENT SERVICES,

Respondent,

and

CR MSA, LLC, A SUBSIDIARY OF HARRIS CORP.,

Intervenor.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, on October 13 through 16, 2015, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the Department of Management Services' intended decision to award a contract to CR MSA, LLC, a subsidiary of Harris Corporation, under ITN number DMS-13/14-024 is contrary to the Department's governing statutes, rules, policies, or the ITN specifications.

PRELIMINARY STATEMENT

On June 6, 2014, the Florida Department of Management Services (Department/Respondent) advertised an invitation to negotiate (ITN) which solicited proposals from firms interested in participating in competitive negotiations for the award of a contract for a telecommunications infrastructure data network to be known as "MyFloridaNet-2" (MFN-2).[1/] On October 21, 2014, AT&T Corp. (AT&T/Petitioner) and CR MSA, LLC, a wholly-owned subsidiary of Harris Corporation (Harris/Intervenor), each submitted a reply to the ITN. On January 5, 2015, the Department posted on the Vendor Bid System (VBS) website a Notice of Intent to Negotiate with AT&T and Harris. The Department conducted concurrent negotiations with AT&T and Harris between January and July 2015. After negotiations, the Department issued a Request for Best and Final Offers (RBAFO) to each vendor. The vendors

then submitted their best and final offers (collectively referred to as BAFOs). On August 11, 2015, the Department posted a Notice of Intent to Award the contract to Harris. AT&T timely filed a Notice of Intent to Protest the Department's Notice of Intent to Award. On August 24, 2015, AT&T filed its protest petition with the Department. The Petition was referred by the Department to the Division of Administrative Hearings (DOAH). On September 9, 2015, Harris intervened in the proceeding.

The parties filed a Joint Pre-Hearing Statement, which stipulates to certain facts and the admission of joint exhibits. This Recommended Order retains, for ease of reference, the exhibit numbers used in the Joint Pre-Hearing Statement. At the final hearing, Joint Exhibits 1 through 17 were admitted into evidence, as were: AT&T Exhibits 1 through 5, 6A, 6B, 7, 8, 16 through 21, 27, 28, 30 and 31; and Harris Exhibits 1, 3 through 7, 9 through 11, 13, 14, 16, 17, 21, 24, 26, 29, 31 through 35, 37, 38, 40, 43 through 53, 56, 67, and 68.

AT&T offered testimony from Steven E. Turner, an expert in the area of telecommunications networks, including multi-protocol label switching networks (MPLS); Mark Sullivan, a product development engineer for AT&T; Scott Morris, an expert in the areas of telecommunications, network engineering and architecture; Abdul Majid, the Department's lead engineer for the MFN network and an evaluator and subject matter expert for this procurement;

Eric Larson, the chief technology officer for the State of Florida, Agency for State Technology, and an evaluator for this procurement; Erik Lindborg, a corporate representative of AT&T; Jesse Tillman, the Department's designated procurement officer for this procurement; and R. Nicholas Platt, a former employee of the Department.

The Department offered testimony from Coleman Ayers, the network manager for the Florida Department of Agriculture and Consumer Services, and a negotiator for this procurement. Harris offered testimony from: Danny J. Thomas, a corporate representative for AT&T; Tiffany Sheffield, the product line manager for the Harris Trusted Enterprise Network and the corporate representative of Harris; Mark Graham, the chief technologist for the Harris critical network business area and Harris' technological lead in responding to this procurement; and Dr. Jason Rupe, an expert in the areas of telecommunications networks, modeling, availability, and reliability analysis. The testimony of Bret Hart, Troy Berry, Kevin Langston, Charles Hartsfield, Mark Lovell, Adam Jones, Chuck Lang, and Tom Gill was offered by deposition transcripts and admitted into evidence. By stipulation of the parties, Harris and AT&T filed excerpts of transcripts of negotiation and strategy sessions which were admitted into evidence.

The eight-volume Transcript of the final hearing was filed with DOAH on October 30, 2015. The parties submitted proposed recommended orders, which have been considered by the undersigned.

FINDINGS OF FACT

A. Background

1. The Department manages and operates the SUNCOM Network, Florida's state enterprise telecommunications system. § 282.703, Fla. Stat. (2014).[2/] The Department's existing network management contract with AT&T Services Inc., known as "MyFloridaNet" (MFN-1), expires in September 2016. The current ITN involves the Department's efforts to procure a new telecommunications infrastructure to provide SUNCOM Network services.

B. The ITN

2. On June 6, 2014, the Department released the ITN for MFN-2. The ITN consists of a 30-page document and several attachments. The technical aspects of the ITN are included in the statement of work, which is attachment A to the ITN.

3. Pursuant to section 287.057(1)(c), Florida Statutes, the Department specified objectives and goals for the MFN-2 ITN which include, without limitation, the goal of maintaining or reducing the total cost for each customer.

C. Responsiveness of Replies

4. The Department received replies to the ITN from two vendors: AT&T and Harris. Section 3.1 of the ITN, as noted below, identifies the process by which the responsiveness of the vendors' initial responses ("Reply" or "Replies") to the ITN would be determined:

> 3.1 Determination of Responsiveness
>
> Failure to comply with and acknowledge each of the requirements in the Qualification Questions will result in the Reply being deemed non-responsive. As indicated in Section 2.13, "Qualification Questions," DMS will not evaluate replies from Respondents who answer "No" to any of the Qualification Questions listed in Attachment K. Failure to provide any other information required by this ITN may also result in a determination of non-responsiveness.

5. The Department's designated procurement officer, Mrs. Jesse Tillman, determined responsiveness of the Replies in accordance with the "pass/fail requirements" set forth on the responsiveness checklist attached to the ITN as attachment K. Mrs. Tillman reviewed relevant provisions of the Replies and determined that both AT&T and Harris met the responsiveness requirements.

D. Evaluation Phase

6. In accordance with section 2.1.2 of the ITN, the Department, after determining that the Replies submitted by AT&T

and Harris were responsive, commenced the evaluation phase of the procurement process.

7. The evaluation phase is described in the ITN as follows:

> 2.1.2 Evaluation Phase – All responsive Replies will be evaluated against the evaluation criteria set forth in this ITN to establish a competitive range of Replies reasonably susceptible of award. DMS may then select Respondents within the competitive range (pursuant to Section 3.4) with which to commence negotiations.

8. The ITN requires the appointment of a five-member evaluation team to review and evaluate the vendors' Replies. The evaluation team was composed of: Abdul Majid; Eric Larson; Adam Jones, the network and information security manager for the Florida Department of Environmental Protection; Bret Hart, the network services administrator for the Florida Department of Health; and Troy Berry, the data processing manager for the Florida Department of Law Enforcement. The Department provided the evaluators with detailed instructions for evaluating the ITN.

9. The instructions given to the evaluators expressly provided that, "[t]he written information submitted will be the sole basis upon which Replies are evaluated and scored." Evaluators were not responsible for determining responsiveness of Replies or conducting independent research to verify information provided by the proposers.

10. The ITN directed the evaluation team to evaluate each Reply based on the following three categories:

> Category 1 – Statement of Work (Technical Solution) – 1,700 points
>
> Category 2 – Performance Measures (Service Level Agreements) – 250 points
>
> Category 3 – Migration and Transition Planning (Support Services) – 550 points

11. Each of these categories contain a number of specific subjects which the evaluators were to score. These scoring questions correspond with subsections of the ITN, and were set forth in attachment C, the evaluator score sheet workbook.

12. Evaluators were directed to score Replies on a defined scale ranging from "0" to "4" in accordance with the scoring guidelines set forth in the evaluator instructions.

13. In addition, the ITN also provides that Replies are scored on pricing via an automated price workbook included with the ITN. Pricing scores were broken into the following categories, with the following number of points available:

> Category 4 – Price: E-rate Eligible Items – 1,750 points
>
> Category 5 – Price: Non E-rate Eligible Items – 250 points
>
> Category 6 – Price: Snapshot Comparison Items – 500 points

14. The pricing scores were then added to the technical scores to reach a total score, with 5,000 being the maximum total number of obtainable points.

15. The evaluators worked independently from one another in their review of the Replies and scored each section in accordance with the scoring guidelines.

16. Based on the scoring of the Replies, including both technical scores and pricing scores, the Department determined both vendors to be reasonably susceptible of award.

E. Posting the Notice of Intent to Negotiate

17. On January 5, 2015, the Department posted a Notice of Intent to Negotiate which provides in relevant part as follows:

> The Department of Management Services hereby provides Notice of Intent to Negotiate with the following vendors:
>
> AT&T Corporation
> CR MSA, LLC.
>
> Failure to file a protest within the time prescribed in [s]ection 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under [c]hapter 120, Florida Statutes. Any protest must be timely filed with the Department of Management Services Agency Clerk listed at: Http://www.dms.myflorida.com/agencyadministration/generalcounsel

18. No protests to the Department's Notice of Intent to Negotiate with AT&T and Harris were filed.

19. Erik Lindborg testified that the individuals responsible for managing AT&T's Reply to the ITN conducted research into the corporate identity of CR MSA, LLC (CR MSA), at the time the Notice of Intent to Negotiate was released. Mr. Lindberg's research revealed that CR MSA had been incorporated less than 5 years prior to the submission of Replies in response to the ITN.

F. Negotiation Phase

20. The ITN provides for negotiations using a four-member negotiation team. The negotiation team consisted of: Chuck Hartsfield, the bureau chief of engineering within the Department's Division of Telecommunications; Mark Lovell, a contract manager within the Department's Division of Telecommunications; Coleman Ayers, the systems project administrator for the Office of Agriculture Technology Services within the Florida Department of Agriculture and Consumer Services; and Kasey Bickley, the bureau chief of the Information Technology/Telecommunications Bureau within the Department's Division of State Purchasing. Ms. Bickley left the negotiation team following the first negotiation session.

21. The negotiation team was assisted by the Department's purchasing officer, Jesse Tillman. The negotiators were also assisted by subject matter experts, including Abdul Majid, Amir

Qureshi, Tammy Williams, Kevin Langston, Jonathan Rakestraw, and Tabitha Hunter.

22. The negotiation team held a total of 22 negotiation sessions, 11 with each vendor. The negotiation team also held 50 strategy sessions where they discussed questions for the proposers, potential negotiation strategies, and options for achieving the best value for the State. During the negotiation sessions, the negotiation team reviewed each vendor's technical proposals and sought innovative suggestions from the vendors as to how cost could be reduced.

23. Because cost was a significant consideration, and the Replies indicated that costs would be higher than the Department expected, the negotiation team requested that each proposer submit a list of potential cost savings solutions that could be considered by the Department to reduce the cost for MFN-2. Each proposer submitted such a list proposing certain changes to the statement of work. Among the suggested cost savings suggestions was the possibility of reducing the minimum number of core facilities required by the ITN and the removal of "session initiation protocol core routing [(SCR)]."

24. On May 11, 2015, following the completion of 10 negotiation sessions with each vendor, the Department issued a Request for Revised Replies to each vendor pursuant to its reserved right to do so under section 3.5(B) of the ITN. Section

3.5(B) provides that the Department reserves the right to "[r]equire any or all responsive vendors to provide additional, revised or final written replies addressing specified topics."[3/]

25. The Department's Request for Revised Replies made certain revisions to the statement of work in an effort to achieve cost savings and best value for the State, including reducing the minimum number of required core facilities from 10 to 5.

26. Both vendors responded to the Request for Revised Replies. In its Revised Reply, Harris reduced the number of proposed core facilities from 11 to 6. AT&T revised certain aspects of its Reply and elected to maintain a 10-core facility proposal.

27. On July 2, 2015, following the completion of all negotiation sessions with the vendors, and further consideration by the negotiation team of cost savings possibilities, the Department issued a RBAFO, pursuant to section 3.6(A) of the ITN. Section 3.6 authorizes the RBAFO, and subpart (A) of this section provides that a vendor's BAFO must contain all negotiated terms and conditions that will be included in the final contract, as well as all revisions to the statement of work.

28. The RBAFO includes a revised attachment A, statement of work, which reflects the negotiated changes from the original statement of work. The revised statement of work incorporates

the changes that were discussed during negotiations, including specifically the removal of SCR and the reduction in the minimum number of core facilities from 10 to 5.

29. Each vendor submitted its BAFO on July 10, 2015. Each vendor removed SCR in their BAFO. However, like with its Revised Reply, Harris, in its BAFO, reduced the number of core facilities it proposed from 11 to 6, while AT&T continued to propose a 10-core facility solution.

30. The BAFOs were scored in accordance with section 3.7 of the ITN. AT&T received a total technical score of 42.9 from the negotiators, while Harris received a total technical score of 42.2 from the negotiators. BAFO pricing was scored using the Department's automated price workbook scoring. AT&T received a price score of 34.8, while Harris received a price score of 41.9. The technical and price scores of each vendor were combined, with Harris receiving a total score of 84.1, and AT&T receiving a total score of 77.7.

31. DMS then held a final public meeting on July 20, 2015, at which the negotiation team discussed its award recommendation and prepared its award memorandum. The memorandum provided a summary of the procurement and negotiation processes, recited the scoring of the Replies and BAFOs, and memorialized the negotiation team's recommendation that, based on total BAFO scores, including both technical and price, the contract be

awarded to Harris as the vendor representing the best value to the State.

32. The Department accepted the negotiation team's recommendation, and on August 11, 2015, posted the Notice of Intent to Award indicating its intent to award the contract to Harris.

G. The Protest

33. On August 24, 2015, AT&T filed its Formal Written Protest and Petition for Formal Administrative Hearing in this matter. On September 30, 2015, AT&T filed an Amended Formal Written Protest.

34. Based upon the Amended Formal Written Protest and the issues preserved for hearing by AT&T in the Pre-Hearing Stipulation, the following four categories of issues are being determined in this proceeding: (1) whether Harris was responsive in light of the decision to submit the Harris Reply "by and through" its wholly-owned subsidiary, CR MSA, LLC; (2) whether the Harris Reply complied with the technical requirements of the statement of work; (3) whether the Department was permitted to negotiate changes to the statement of work during the negotiation phase of the ITN; and (4) whether the Harris' BAFO complied with the revised statement of work included in the RBAFO.

35. The undersigned finds that none of the four issues raised by AT&T presents a basis for overturning the Department's intended award.

H. Corporate Identity Issues

36. AT&T alleges that the Harris Reply should have been evaluated for responsiveness based solely on the qualifications of its subsidiary, CR MSA, because the Harris bid was made "by and though CR MSA." AT&T argues that if only CR MSA is considered as submitting the Reply, then it failed to satisfy the ITN's requirements that vendors: (1) possess a minimum of 5 years of experience as either a prime contractor or subcontractor providing services on an MPLS enterprise services network with at least 800 sites (attachment K, qualification question 4); and (2) submit a letter from a surety or bonding agent documenting its ability to obtain a performance bond for the contract in an amount of at least $60 million.

37. The evidence presented at the final hearing established that the Department's responsiveness determinations, as to both Harris and AT&T, were based on a careful and even-handed review of the Reply documents and clarifications received from both vendors.

38. Jesse Tillman, the Department's procurement officer for the ITN, reviewed each vendor's Reply for responsiveness and determined that both Harris and AT&T were responsive. The

Department concluded, as to each vendor, that the information supplied in the respective Replies was sufficient, and any irregularity was minor.

39. The Department's responsiveness determination relied in part on responses provided by each vendor to a request for clarification regarding the role that affiliated companies would play in providing services to the Department. The Harris response explained that its Reply was submitted through its subsidiary, CR MSA, for business and accounting reasons, but that "Harris will ensure that all appropriate Harris entities and personnel are assigned to MFN-2." Harris' corporate representative at the final hearing also testified to these circumstances. Harris also provided an absolute guarantee to the Department confirming that Harris stood behind the proposal it had submitted through its wholly-owned subsidiary.

40. The Department's responsiveness determination as to Harris is also consistent with the documentary evidence admitted at hearing, including the cover letter on Harris letterhead with the subject line "Harris Reply to MFN-2 ITN"; the Harris narrative response to section 2.2 of the statement of work (referring to Harris as the prime contractor); the Harris response at page 4 through 7 (indicating Harris as the prime contractor); the business references set forth in section 2.2 (identifying Harris as the prime contractor for the business

references); and the proof of credit letter (indicating that it concerns the bonding ability of Harris, by and through its subsidiary, CR MSA LLC).

41. AT&T nonetheless argues that Harris' submission in this manner was not permitted by the ITN. As support for its assertion, AT&T cites to the ITN definition for "respondent," which is defined as "[a] vendor who submits a Reply to this ITN," and to the definition of "vendor" as "an entity that is capable and in the business of providing a commodity or contractual service similar to those within the solicitation." While AT&T accurately cites to the definitions, nothing in these definitions, nor anything contained elsewhere in the ITN, prohibits the submission of a reply in the manner that Harris elected (i.e., submission of a reply on behalf of the Harris by and through its wholly-owned subsidiary, CR MSA).

42. The Department's even-handed review of the vendors is reflected by the testimony and documentary evidence that AT&T's Reply similarly referred to affiliated business entities and that the Department provided AT&T the same opportunity to provide clarification regarding the role affiliated companies would play.

43. As to the corporate identity issues, the undersigned finds that the testimony and exhibits demonstrate that the Department complied with the terms of the ITN and Florida law in determining that both AT&T and Harris were responsive as to these

issues. The Department treated both vendors equally in this regard.

44. Finally, as discussed in the Conclusions of Law below, the undersigned concludes that AT&T has waived the issue of Harris' responsiveness by failing to protest on these grounds at the point of entry accompanying the Notice of Intent to Negotiate. Section 2.5 of the ITN allowed AT&T to request the Harris Reply following the completion of the evaluation phase of the ITN, which would have revealed the issues of responsiveness that AT&T now complains about. Moreover, AT&T had actual knowledge, at or near the time the Notice of Intent to Negotiate was posted, of issues related to CR MSA's corporate identity, yet AT&T failed to timely protest this issue, electing instead to take an impermissible "wait and see" approach.

I. Statement of Work Issue

45. Generally, AT&T argues that the initial Harris Reply to the ITN failed to comply with certain technical requirements of the ITN, and was therefore non-responsive. The statement of work, attachment A to the ITN, consists of 192 pages of technical details concerning MFN-2. The ITN clearly provides that statement of work requirements are not responsiveness requirements whose omission would render a vendor's bid non-responsive. Instead, the ITN provides that statement of work requirements are to be scored by the evaluators and the

negotiators as part of the ITN's evaluation and selection process. Responsiveness was determined based upon the responsiveness requirements (attachment K) of the ITN, while the technical solutions were scored by the evaluators and the negotiators in both the ITN reply and BAFO stage.

46. Each of the evaluators and negotiators who testified in this proceeding, as well as the Department's procurement staff, uniformly stated that any deficiencies in a vendor's response to a statement of work requirement was to be addressed in the scoring of the response, and was not a responsiveness issue. This point is underscored by the scoring guidelines themselves, which specifically contemplate that Replies might contain technical solutions that do not meet the technical requirements of the ITN, as the scoring guidelines provide for a possible score of 0, indicating that a response was "Inadequate" and demonstrated "Below minimum required functionality" or "Fail[ed] to demonstrate capability." If, as AT&T argues, a reply was required to be judged non-responsive for failure to meet a statement of work requirement, there would be no need for the ITN to contemplate a score of "0," because that failure would eliminate the vendor from further evaluation.

47. Furthermore, if a failure to comply with the statement of work requirements is fatal to an entity's proposal, AT&T's Reply would itself have to be rejected as non-responsive. The

record demonstrates that AT&T refused to provide a response, in either its Reply or BAFO, to the section 2.2.5 statement of work requirement that vendors disclose their dispute history. AT&T also failed to comply with the section 5.1 statement of work requirement for vendors to provide a proposed migration plan. AT&T left this part of its Reply intentionally blank, contending a migration plan was unnecessary.

i. Harris Complied With Core Facilities Requirements

48. Specifically, as to Harris' initial Reply to the statement of work, AT&T argues that Harris failed to satisfy the requirements of section 2.7.12, which require a minimum of 10 geographically dispersed core facilities throughout the state. This requirement provides: "The Respondent may propose changes to the selected cities in the diagram section 2.7, but the number of core facilities shall not be altered unless the Respondent includes more core facilities than those provided in MFN."

49. The Harris Reply complied with this requirement, providing for 11 core facilities. The narrative text of the Harris Reply provides that: "Our proposed MFN-2 design places core nodes in the following cities: Pensacola, Panama City, two core nodes in Tallahassee, Jacksonville, Gainesville, Daytona, Tampa, Orlando, Ft. Myers, and Miami," thus providing for a total of 11 core facilities.

50. AT&T argues that Harris' Reply failed to meet the requirements of 2.7.12 because of the labeling used by Harris to describe the routing equipment in its proposed facilities, identifying some of the facilities as "aggregation nodes," and others as "core nodes." According to AT&T, Harris' proposed "aggregation nodes" do not meet the requirements of a "core facility," and that Harris' Reply, therefore, did not propose at least 10 core facilities. All witnesses testified, however, that the ITN does not define what constitutes a "core facility," a "core node," or an "aggregation node." The witnesses likewise agreed that there is no consensus industry definition for these terms. Abdul Majid credibly testified that each of the facilities proposed by Harris--whether labeled by Harris as a "core node" or an "aggregation node"--satisfies the core facility requirements of the ITN. Mr. Nick Platt, a former Department employee who helped draft the ITN statement of work, testified that his intention was to have dual routers at each core facility, and for the nodes to be able to inter-operate with one another and transfer inter-LATA traffic. The routers proposed by Harris in its Reply, whether identified as "aggregation nodes" or "core nodes," satisfy these requirements.

ii. Harris Complied With IDS Requirements

51. AT&T contends that the Harris Reply failed to comply with the intrusion detection system (IDS) requirements set forth

in section 2.7.7 of the ITN. This argument, however, is based upon AT&T's mistaken contention that the ITN required IDS equipment to be located at each core facility.

52. Section 2.7.7 does not require IDS equipment to be included at each core facility, but instead requires only that all traffic be IDS-monitored. Mr. Majid specifically confirmed this fact. Indeed, the statement of work contemplates flexibility in the monitoring solutions proposed by vendors, as illustrated in section 2.7.7(d), which directs that vendors "[i]nclude a discussion of how and where backbone traffic is captured, plus how and where local traffic is captured." Both Scott Morris, AT&T's expert, and Mr. Sullivan, its lead MFN engineer, agree that section 2.7.7 does not require IDS hardware to be located at each core facility, but only that all traffic be IDS-monitored. Further, both of AT&T's experts agree that Harris' design would result in all traffic being IDS-monitored.

iii. Harris Complied With Access Requirements

53. AT&T argues that the Harris Reply does not satisfy section 2.7(o) of the statement of work because the Reply does not provide frame relay access at all core facilities.

54. Section 2.7(o) requires that the proposed network provide access to all forms of technology that might be used by the State's agencies and departments, which could include frame relay access. Frame relay access is, as even AT&T's experts

acknowledge, an older technology that is being phased out and replaced by newer access technologies, such as Ethernet.

55. Harris' Reply specifically addresses frame relay access, and states that all traffic using frame relay access is to be routed to either a core node or the Orlando aggregation node, which would have the capability to provide such access. To avoid the cost of providing access for this legacy technology that is being phased out, Harris expressly states that access will not be provided at its other aggregation nodes. However, because Harris' design provides access to the network for frame relay technology, Harris' Reply satisfies the section 2.7(o) requirement.

iv. Long Haul Circuits

56. AT&T argues that the State would be harmed by the inclusion of long haul circuits in Harris' six-facility architecture. The evidence does not support this argument. Mr. Graham testified that because pricing is not based on distance (such that longer distance access costs the same as shorter distance access), the inclusion of long haul circuits would not impact price. Additionally, because optical signals travel at nearly the speed of light, the distance of such circuits would be covered faster than the blink of an eye and would not impact network speed. While the evidence establishes that the Department initially wanted to avoid long haul circuits

because of previous experience with outages, the Department softened its position regarding this issue when Harris presented a solution that both allayed the Department's concerns and reduced costs. AT&T enjoyed the same opportunities as Harris, but decided to stay tethered to a solution that more closely resembles the existing MFN product.

v. Unavailability of Harris' Network

57. Mr. Turner expressed concern that Harris' proposed network may be unavailable while updates are being applied to IDS software. The suggestion is that any such system unavailability would negatively impact the functionality of MFN-2. This concern is not supported by the evidence. Mr. Graham noted in his testimony that Harris specifically addressed this issue in its BAFO, and its design includes bypass switches to re-route traffic if IDS equipment were to fail or go offline during any software updates.

J. Changes to the Statement of Work

58. AT&T asserts that it was improper for the Department to negotiate changes to the statement of work during the negotiation phase of the ITN. These arguments do not present a basis for overturning the Department's intended award.

59. The ITN process was specifically designed to provide agencies with the flexibility to negotiate requirements in order to receive the best value for the State under circumstances where

there are multiple methods available for meeting a specified goal of the agency. The process recognizes that negotiation on terms that differ from those of the procurement, or the initial written response, may be necessary. The plain language of the ITN statute supports this understanding, noting that the ITN: "is intended to determine the best method for achieving a specific goal or solving a particular problem and identifies one or more responsive vendors with which the agency may negotiate in order to receive the best value." § 287.057(1)(c), Fla. Stat. Thus, State agencies are specifically authorized by statute to negotiate the requirements and contractual terms in ITN procurements to identify and obtain the best method for achieving the procurement goal at the best value for the State. Changes to requirements during the negotiation process are an integral and necessary part of the ITN procurement process, as the agency gains more information from vendors regarding the alternatives available to meet its goals.

60. Consistent with the statutory purposes of the ITN procurement, the ITN at issue in this dispute provides, in a multitude of places, that changes to the statement of work could occur during the negotiation phase of the ITN. For example, section 3.4 of the ITN provides:

> Negotiations will include discussions of the Statement of Work and related services to be provided by the Respondent

> until acceptable terms are agreed upon, or it is determined that an acceptable agreement cannot be reached. The negotiation process will also include negotiation of the terms and conditions of the Contract. As this is an ITN, the Department reserves the right to negotiate the terms and conditions determined to be in the best interest of the State.

The ITN further provides in section 2.4 that:

> The awarded contract will consist of Attachment A (Statement of Work) as modified through negotiations, Attachment B (Contract), Attachment H, Special Conditions, and the revised Attachment E (Price Workbook) submitted with the Best and Final Offer.

61. Moreover, the Department, in section 3.5(B) of the ITN, expressly reserves the right at any time during the negotiation process to "[r]equire any or all responsive vendors to provide additional, revised or final written replies addressing specified topics." Furthermore, section 3.5(B) of the ITN also reserves to the Department the right to award a contract for all, or part, of the work contemplated by the ITN.

62. Additionally, the evidence does not establish that the revisions to the statement of work constitute a material change to the procurement. The goals and questions being explored by the ITN remained unchanged, as did the selection criteria upon which the best value decision was determined. Simply put, the ITN sought a network to process the State's telecommunications

traffic while meeting certain high-availability and high-reliability requirements.[4/] Neither the reduction in the number of core facilities included within the network, nor the removal of the SCR functionality, affected the fundamental nature of what was being procured.

K. BAFO and Revised Statement of Work

63. AT&T argues that Harris' BAFO design fails to satisfy the requirements of the RBAFO statement of work with regards to the high-availability (HA) and high-reliability (HR) requirement.

64. The evidence establishes that the Department acted rationally and reasonably in negotiating revisions to the statement of work. Because the negotiation team was concerned with the costs of the initial proposals, the team explored potential cost-saving ideas with both Harris and AT&T. The suggestion to reduce the number of required core facilities made financial sense, as long as the HA/HR requirements of the ITN could still be met. Indeed, the ITN business case, attachment G to the ITN, recognizes that "[r]equiring high numbers of nodes in the procurement specification should be avoided as this could inadvertently inject higher cost structures from the prospective vendor to recover the cost of deployment of necessary infrastructure to support the core routing design." There is no record evidence suggesting that this language was inserted in the

business case study in order to provide a competitive advantage to Harris.

65. To address the ITN's HA/HR requirements with a design involving fewer core facilities, Harris performed extensive modeling and analyzed several designs potentially using 5 to 10 core facilities. Based on this extensive analysis, which Harris shared with the negotiation team as it was considering a revision to the required number of core facilities, Harris ultimately concluded that a six-core facility design was optimal. Harris' analysis was thoroughly considered and reviewed by the negotiation team, and through this process, the Department decided to reduce the number of core facilities required by the statement of work. The negotiation team's decision to revise the statement of work in this regard was well-considered, rational, and reasonable.

66. Also, the process utilized by the Department in reaching its decision to reduce the number of core facilities afforded both vendors the same opportunity to propose a design with fewer core facilities, and therefore, provided no competitive advantage to either vendor.[5/] Indeed, by not allowing vendors the flexibility to consider and propose alternate designs that could accomplish the same goals, and instead requiring all vendors to mirror the design chosen by the incumbent vendor, this

likely would have hindered competition and certainly would not have served the State's interests.

67. Further, the evidence demonstrates that Harris' six-core facility BAFO design met, and in fact exceeded, the statement of work HA/HR requirement. Harris conducted a statistical availability analysis, and detailed this analysis and the results in presentations to the negotiation team during negotiations, and later in its BAFO. Harris' expert, Dr. Rupe, confirmed that Harris' assumptions and information were reasonable. Dr. Rupe conducted his own statistical analysis of Harris' BAFO core design and independently verified the results reached by Harris.

68. The Department's decision to remove SCR functionality from the statement of work was likewise not improper. SCR was merely an add-on to the network and the negotiation team, after due consideration, made the decision to delete this requirement. As testified to by Mr. Ayers, a number of factors played into the negotiators' decision to remove SCR functionality, including the fact that: (1) the technology is fairly expensive today; (2) technology changes could result in lower prices in the future; (3) the Department was not capable of adequately defining their parameters and/or what SCR functionality it required; (4) the functionality would be paid for from the time the contract was signed, notwithstanding that it was not required to be in

place for three years; and (5) the State could easily obtain SCR functionality through another procurement if it ultimately determined that the functionality was needed. This analysis, and the negotiation team's decision to remove this requirement, was rational, reasonable, and did not create any competitive advantage to either vendor, both of whom did not include this functionality in their BAFOs.

L. Ultimate Findings of Fact

69. Based on the foregoing, the undersigned finds that Harris was a responsive and responsible vendor who submitted a fully responsive reply to the ITN. The undersigned further finds that the Department's negotiations and negotiation phase revisions to the statement of work were consistent with Florida law and the rights reserved to the Department by the ITN. Finally, the undersigned finds that the BAFO submitted by Harris was fully responsive to the RBAFO and, pursuant to the selection criteria set forth in the ITN, the solution proposed by Harris represented the best value to the State of Florida. Simply stated, the record evidence failed to expose the existence of any shenanigans in the instant procurement.

70. Based on the above, the Department's decision to award a contract to Harris fully complied with applicable law, rules, and terms and conditions of the ITN and was not arbitrary, capricious, clearly erroneous, or contrary to competition.

CONCLUSIONS OF LAW

71. The Division of Administrative Hearings has jurisdiction to hear this protest and to issue a recommended order. §§ 120.569 and 120.57, Fla. Stat. (2015).

72. This is a de novo proceeding to determine whether the Department's notice of intent to award a contract to Harris is contrary to the Department's governing statutes, rules, or policies or to the ITN specifications. § 120.57(3)(f), Fla. Stat. Although this is a de novo proceeding, DOAH does not substitute its judgment for that of the Department. Instead, DOAH engages in a form of "inter-agency review," the object of which is to evaluate the action taken by the Department. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

73. Petitioner has the burden of proof. Petitioner must establish that the Department's proposed action was either: (1) contrary to the agency's governing statutes; (2) contrary to the agency's rules or policies; or (3) contrary to the ITN specifications. § 120.57(3)(f), Fla. Stat.

74. To prevail, Petitioner must prove that the agency's proposed action was: (1) clearly erroneous; (2) contrary to competition; or (3) arbitrary or capricious (that is, an abuse of discretion). R.N. Expertise, Inc. v. Miami-Dade Cnty. Sch. Bd., Case No. 01-2663BID (Fla. DOAH Feb. 4, 2002; Sch. Bd. Miami-Dade

Mar. 20, 2002). Petitioner must establish all of the above by a preponderance of the evidence. Id.

75. Agency action will be found to be clearly erroneous if it is without rational support and, consequently, the Administrative Law Judge has a "definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); see also, Pershing Indus., Inc. v. Dep't of Banking & Fin., 591 So. 2d 991, 993 (Fla. 1st DCA 1991). Agency action may also be found to be clearly erroneous if the agency's interpretation of the applicable law conflicts with the law's plain meaning and intent. Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004).

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

77. An arbitrary decision is one not supported by facts or logic or one that is despotic. Agrico Chem. Co. v. State Dep't of Envtl. Reg., 386 So. 2d 759, 763 (Fla. 1st DCA 1978). To act capriciously is to act without thought or reason or to act

irrationally. Id. If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

78. This procurement process is governed by the "invitation to negotiate" provisions of section 287.057(3). The ITN process is distinguished from requests for proposals and invitations to bid, in part, because it provides the State and competitors more flexibility in crafting a solution to meet the State's needs. Invitations to negotiate are used when an agency determines that negotiations may be necessary for the State to receive the best value. § 287.057(1)(c), Fla. Stat.

79. Section 287.057 (1)(c)3.-4. provides:

> The criteria that will be used for determining the acceptability of the reply and guiding the selection of the vendors with which the agency will negotiate must be specified. The evaluation criteria must include consideration of prior relevant experience of the vendor. The agency shall evaluate replies against all evaluation criteria set forth in the invitation to negotiate in order to establish a competitive range of replies reasonably susceptible of award. The agency may select one or more vendors within the competitive range with which to commence negotiations. After negotiations are conducted, the agency shall award the contract to the responsible and responsive vendor that

> the agency determines will provide the best value to the state, based on the selection criteria.

80. Thus, chapter 287 provides for two distinct parts to every ITN. The first part consists of submission of proposals or replies, evaluations, and ranking. The second part consists of negotiations with vendors selected from the ranking. In other words, an agency first determines which vendors are responsive and reasonably susceptible of award. The agency is then free to negotiate with one or more vendors and award a contract to the vendor that provides the best value, taking into consideration the selection criteria of the ITN.

A. AT&T Waiver as to ITN Specifications

81. Section 120.57(3)(b) provides that any protest to the "terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract" must be filed within 72 hours after the posting of the solicitation and the "[f]ailure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings" under chapter 120.

82. As set forth in the Findings of Fact, the terms of the ITN made explicit that the statement of work would be negotiated.

83. The Department and Harris argued in a Motion in Limine that AT&T had waived its right to challenge these specifications by failing to protest at the time the ITN was posted. The undersigned reserved ruling on this issue, but invited the parties to include arguments in their respective proposed recommended orders.

84. It is undisputed that AT&T did not protest the ITN's specifications, including the specifications regarding the Department's reservation of the right to negotiate the statement of work. The scope of AT&T's waiver includes any challenge to the Department's authority under the ITN's specifications to negotiate the terms of the statement of work, including the number of core facilities and the removal of SCR capability, as well as the Department's authority to make changes to the statement of work without publicly posting an addendum containing point of entry language to VBS.

B. AT&T's Failure to Protest Short-List Results in Waiver

85. It is well settled that parties may raise responsiveness issues regarding selected vendors at the posting of a short-list in an ITN, and vendors regularly do so. See, e.g., Cubic Transp. Sys., Inc. v. Dep't of Transp., Case No. 14-2322BID (Fla. DOAH Sept. 4, 2014) (Recommended Order resolving responsiveness of vendor issues on protest of Notice of Intent to Negotiate); Verizon Bus. Network Servs., Inc. v. Dep't

of Corr., Case No. 07-2468BID at ¶¶ 39-40 (Fla. DOAH Aug. 13, 2007) (concluding that failure of parties to avail themselves of a clear point-of-entry at the posting of the Notice of Intent to Negotiate meant that "the time to complain about the selection of [the selected vendors] ha[d] passed").

86. As set forth in the Findings of Fact, the Department posted a Notice of Intent to Negotiate on January 5, 2015, that included clear point-of-entry language allowing vendors to protest the Department's intended decision to negotiate with either vendor.

87. The Department's decision to negotiate with a vendor necessarily constitutes a determination by the Department that the vendor was a "responsive" vendor and that the vendor submitted a Reply "reasonably susceptible of award." See § 287.057(1)(c), Fla. Stat.

88. AT&T did not protest the Notice of Intent to Negotiate, and, accordingly, has waived any arguments as to Harris' responsibility or the responsiveness of the initial Reply submitted by Harris. These waived arguments include AT&T's challenges involving Harris' corporate identity.

89. AT&T's argument that it was unable to discover these issues at the time of the Notice of Intent to Negotiate is contrary to section 2.5 of the ITN, which provided that "[o]nce the Evaluation Team completes the evaluation phase, the Replies

may be disclosed pursuant to a public records request, subject to any confidentiality claims."

90. Had AT&T acted with reasonable diligence and made such a request, the Harris Reply would have been provided to it at the time the Notice of Intent to Negotiate was posted. Because the Harris Reply was available to AT&T at the time the Notice of Intent to Negotiate was posted, AT&T could have, and with reasonable diligence should have, known of all purported responsiveness or responsibility issues associated with the Harris Reply.

91. The Department's determinations that both AT&T and Harris were responsible vendors, whose initial Replies were responsive to the ITN, became final 72 hours after the Notice of Intent to Negotiate was posted in accordance with section 120.57(3). Any challenge related to these determinations has been waived.[6/]

92. Even if AT&T had not waived the right to protest Harris' responsibility and responsiveness, it failed to satisfy its burden of proof as to these issues.

C. The Department's Negotiations Were Properly Conducted

93. Even if AT&T had not waived its arguments regarding negotiation of the statement of work, the assertion that an agency may not alter the terms of an ITN during negotiations with vendors is contrary to law.

94. In Morphotrust USA v. Department of Highway Safety and Motor Vehicles, Case No. 12-2917BID (Fla. DOAH Dec. 7, 2012), the undersigned concluded that "[g]enerally, the Department is free to make changes to the provisions of an ITN prior to the submission of BAFOs as long as the changes do not favor, or create the opportunity for favoritism of, one bidder over another." Id. at ¶ 55.

95. The parties presented legal argument regarding these matters in a Motion in Limine and response thereto. In a Pre-hearing Order Denying Motion to Relinquish Jurisdiction or, in the Alternative to Dismiss Amended Formal Protest, the undersigned noted that the amended petition included factual allegations suggesting "collusion or favoritism" that were not appropriate for resolution before the presentation of evidence at the final hearing.

96. As stated in the Findings of Fact, AT&T did not carry its burden of proving collusion or favoritism on the part of the Department. AT&T put forth no credible evidence suggesting that the Department's negotiations were designed to favor Harris or provide to Harris a competitive advantage. The Department's witnesses testified convincingly that the ITN negotiations related to the statement of work were focused almost entirely on achieving cost savings for the State within the confines of a

technological solution that the Department determined would satisfy its goals.[7/]

D. The Harris Reply and BAFO Were Responsive

97. The issue concerning the corporate identity of CR MSA does not present a basis for overturning the award.

98. In Securus Technologies, Inc. v. Department of Corrections, Case No. 13-3030 (Fla. DOAH Nov. 1, 2013), Judge Boyd confronted a nearly identical issue and determined that the vendor was both responsive and responsible, reasoning as follows:

> GTL alleges that in EPSI's reply, EPSI relied upon the experience, qualifications, and resources of its affiliated entities in other areas as well. For example, GTL asserts that EPSI's claim that it would be providing 83 percent of the manpower is false, since EPSI has acknowledged that EPSI is only a contracting subsidiary of CenturyLink, Inc., and that EPSI has no employees of its own. While it is clear that EPSI's reply to the ITN relies upon the resources of its parent to carry out the terms of the contract with respect to experience, presence in the state, and personnel, EPSI demonstrated that this arrangement was common, and well understood by the Department.
>
> EPSI demonstrated that all required capabilities would be available to it through the resources of its parent and subcontractors at the time the contract was entered into, and that its reply was in conformance with the provisions of the ITN in all material respects. EPSI has the integrity and reliability to assure good faith performance of the contract.

Id. at ¶¶ 16-18.

99. The same reasoning is equally applicable to both Harris and AT&T in this instant case. While each clearly relies on the capabilities and resources of corporate affiliates to satisfy the ITN requirements and carry out the contract, this issue was well understood and considered in great depth by the Department, which requested clarification surrounding this issue from each vendor and then made a reasoned decision that such an approach to bidding was acceptable. The evidence demonstrates that all required capabilities are available to CR MSA through its parent, Harris Corporation.

100. Finally, AT&T argues that certain aspects of the Harris Reply and BAFO were non-responsive to the statement of work. These arguments are without merit, as Harris complied with the requirements of the ITN.

101. As described in the Findings of Fact above, the evidence demonstrates that the Department did not intend for the 192-page technical statement of work document to constitute responsiveness requirements for the ITN, and the response to the statement of work was instead to be scored. AT&T contends that the Department's use of the words "must, shall, or will," indicate mandatory requirements of the ITN as it relates to the statement of work. Compare Morphotrust USA, Case No. 12-2917BID at ¶ 24. A search for the terms "must" and "shall" in the

statement of work reveals that the terms collectively appear 657 times. Accepting AT&T's argument would result in the statement of work including 657 different responsiveness requirements. AT&T's argument is undercut by the ITN scoring guidelines which permit a score of zero when a vendor's response is "below minimum required functionality" or "fails to demonstrate capability." In sum, the terms of the ITN demonstrate that the requirements set forth in the statement of work were not intended to be, and are not, mandatory responsiveness requirements of the ITN.

102. Additionally, each of AT&T's arguments regarding the statement of work is based, not on any requirement plainly set forth in the narrative of the statement of work, but instead upon "requirements" that AT&T contends are implied by drawings included within the statement of work or upon the meaning ascribed to certain terms by AT&T--but which evidence demonstrated were neither defined in the ITN nor subject to agreed-upon definitions in the industry.

103. Having failed to challenge the meaning of such terms within the statement of work, the only interpretation of the terms that is relevant is that of the Department. The fact that others may differ from the Department's interpretation of the terms as used in the statement of work is not relevant to this proceeding. The sole issue that could conceivably remain is whether the Department properly interpreted terms within its own

statement of work, and in this regard, the inquiry is limited to whether the Department's interpretation of such terms falls within the range of reasonable interpretations and is not clearly erroneous. See Sunshine Towing at Broward, Inc. v. Dep't of Transp., Case No. 10-0134BID at ¶ 40 (Fla. DOAH April 6, 2010) (when a vendor has failed to timely challenge an ambiguous or vague specification, it does not present a ground for protest of the award if the agency relied on any interpretation of the specification that falls within the range of reasonable interpretations and is not clearly erroneous).

104. In the present case, the evidence clearly establishes that the Department's interpretation of its specifications relating to core facilities was satisfied by the Harris Reply, and that Harris' decision to label certain facilities as "core nodes" and certain facilities as "aggregation nodes," based upon the capacity of those facilities, did not alter the fact that each of the Harris facilities met the Department's interpretation of a core facility. Likewise, the Department's interpretation of the IDS requirement as merely requiring all traffic to be monitored as the ITN stated, and not as requiring IDS equipment to be installed at each core facility, was clear and consistent with the language included within the statement of work. Succinctly stated, the Department's interpretation of its statement of work requirements was reasonable.

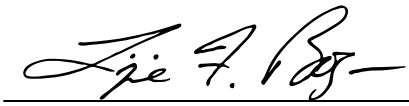
105. Harris fully satisfied the technical requirements of the statement of work and the Harris Reply is fully in line with the reasonable interpretation assigned to those requirements by the Department.

106. AT&T has failed to meet its burden to proof that either the Harris Reply or BAFO failed to satisfy the requirements of the statement of work, or deviated from the Department's reasonable interpretation of the statement of work. The Department's acceptance of Harris' Reply and BAFO, and intended award to Harris, are not arbitrary, capricious, contrary to competition, clearly erroneous, or contrary to the laws, rules and specifications governing the procurement.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law, it is recommended that Petitioner's protest be dismissed.

DONE AND ENTERED this 25th day of November, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of November, 2015.

ENDNOTES

[1/] The "ITN" was later amended by addenda. All references to the "ITN" mean the ITN as amended by Addenda 1-8.

[2/] All subsequent references to Florida Statutes will be to 2014, unless otherwise indicated.

[3/] Section 3.5 of the ITN provides that "DMS has sole discretion in deciding whether and when to take any of the foregoing actions [including requesting Revised Replies pursuant to Section 3.5(B)], over the scope and manner of such actions, the responsive vendor or vendors affected, and whether to provide concurrent public notice of such decision."

[4/] The ITN's high-availability and high-reliability requirement dictates that the network be available and running no less than 99.999% of the time.

[5/] AT&T's argument that this change was necessary so that Harris would be qualified to bid is not supported by the evidence, as Harris' Reply complied with the initial statement of work requirements of 10 core facilities and included SCR. Indeed, if the statement of work had any competitive impact, it was to reduce the competitive advantage that AT&T might have as the incumbent provider of MFN, with core facilities and equipment already largely in place. Furthermore, to the extent AT&T argues that it could not propose a smaller number of facilities because of its contracts with CenturyLink and Hayes, these arguments, on the record before the undersigned, are not persuasive. If AT&T's contracts with CenturyLink and Hayes bar AT&T from proposing a smaller design for MFN-2, then the decision by AT&T to enter into such binding agreements may be improvident, but any such contractual limitations do not provide a basis for challenging the present procurement.

[6/] In Global Tel Link Corporation v. Department of Corrections, Case No. 13-3028BID at ¶¶ 85-92 (Fla. DOAH Nov. 1, 2013) ("GTL"), Judge Boyd held that certain responsiveness challenges to the selected vendors were not waived by a failure to protest after the posting of the Notice of Intent to Negotiate. In GTL, however, as noted in paragraph 88 of the Recommended Order

therein, the responsiveness issues were not known, and could not have been known, to the parties at the time of posting because the information was contained only in the ITN Replies, which remained exempt from public release and therefore unavailable for review. This is not the case here, where AT&T's designated representative admitted that he had actual knowledge of the facts surrounding CR MSA's qualifications prior to the expiration of the Notice of Intent to Negotiate point-of-entry, and the Department--unlike the DOC in GTL--made the ITN Replies publicly available pursuant to section 2.5 of the ITN when the Notice of Intent to Negotiate was posted.

[7/] AT&T relies heavily on Infinity Software Development, Inc. v. Department of Education, Case No. 11-1662BID (Fla. DOAH June 7, 2011), for the proposition that an agency may advance only a responsive vendor to negotiations, and may not utilize negotiated changes to its requirements in order to transform a non-responsive reply into a responsive reply. This holding has no applicability in the instant case as the Findings of Fact clearly demonstrate that the Harris Reply was responsive to the initial ITN requirements. Moreover, AT&T waived any challenge to the responsiveness of Harris' Reply, and to its advancement to the negotiation stage, by virtue of its failure to protest the Notice of Intent to Negotiate.

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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.