STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

AT&T Corp.,

Petitioner,

v. **Case No.:** 15-5002BID

DEPARTMENT OF MANAGEMENT SERVICES, **DMS Final Order No.:** DMS-16-0001

Respondent,

and

CR MSA, LLC, a subsidiary of Harris Corp.,

Intervenor.
_____/

FINAL ORDER

Preliminary Statement

On November 25, 2015, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) submitted a Recommended Order (RO) to the Department of Management Services (DMS or Department). A copy of the RO is attached as Exhibit A. Pursuant to Section 120.57(3)(e), Florida Statutes, and the notice provided in the RO, parties were allowed to file written exceptions to the RO. The Petitioner AT&T Corp. (Petitioner) timely filed exceptions to the RO. The Respondent DMS and the Intervenor CR MSA, LLC, a subsidiary of Harris Corp. (Harris), responded to the Petitioners' Exceptions on December 17, 2015. The parties waived the deadline for entry of final orders set forth in section 120.57(3) (e), Florida Statutes, and granted an extension of the deadline for entry of the Final Order until January 4, 2016.

Background

On June 6, 2105, the Department issued an invitation to negotiate (ITN) seeking proposals from vendors interested in participating in competitive negotiations for the award of a contract for a telecommunications infrastructure data network to be known as "MyFloridaNetwork-2". Petitioner AT&T and Harris responded and advanced to the negotiations stage. After negotiations and receipt of the two vendors' best and final offers, the Department posted the Notice of Intent to Award on August 11, 2015. Petitioner AT&T timely protested the Notice of Intent to Award, and the ALJ conducted a formal hearing on October 13 through 16, 2015, in Tallahassee, Florida.

The Recommended Order

In the RO, the ALJ recommends that the Department enter a final order dismissing the Petitioner's bid protest. (RO p.43). The ALJ concludes that the Petitioner failed to prove by a preponderance of the evidence that DMS violated its governing statutes, rules, and policies or any specifications governing the procurement in its award decision. The ALJ did not find the Department's actions during the procurement process to be arbitrary, capricious, contrary to competition or clearly erroneous. (RO pp. 37-43)

Rulings on Exceptions

In determining how to rule upon a party's exceptions and whether to adopt the ALJ's RO in whole or in part, the Department must follow Section 120.57(1)(l), Florida Statutes. This law prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "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 on competent substantial evidence or that the proceedings on which the findings were based did not comply

with essential requirements of law." In accordance with these standards, and after having considered the pleadings, the transcript of the proceedings, depositions and exhibits admitted into evidence, the exceptions filed by the Petitioner, and the responses to the exceptions, the undersigned makes the following rulings on the exceptions:

Exception 1

In its first exception, the Petitioner asserts that the ALJ incorrectly held that DMS had no obligation to undertake a responsiveness determination. To support this assertion, Petitioner takes exception to Findings of Fact 5, 35, 37-38, 45-46, 69, Footnote 7, and Conclusions of Law 91, 100-104, and argues that *Infinity Software Development, Inc. v. Department of Education*, Case No. 11-1662BID (Fla. DOAH June 7, 2011), should control the legal analysis of this case.

Petitioner maintains that DMS should have used the technical requirements included in the Statement of Work in the ITN as part of its responsiveness determination. This argument takes issue with the ALJ's reliance on Attachment K of the ITN documents and the testimony of Jessie Tillman, the Department's procurement manager, who determined responsiveness of all bidders by using the "pass/fail requirements" in Attachment K.

Petitioner disagrees with DMS's responsiveness determination and the ALJ's acceptance of the process because the determination allowed Harris to move forward into the negotiation phase of the procurement process. Petitioner argues that DMS should have considered the technical requirements in a responsiveness determination because the terms "must" and "shall" were used in the Statement of Work. To support its argument, Petitioner relied heavily upon a legal analysis set forth in *Infinity*.

The ALJ rejected Petitioner's expanded definition of what constitutes a responsiveness determination and provided two separate legal analyses for the rejection. The first analysis

involved a review of the procurement documents and a determination as to whether the *Infinity* analysis should apply. The ALJ stated in Finding of Fact 45 that the Statement of Work requirements are not responsiveness requirements whose omission would render a vendor's bid non-responsive. Instead, the evaluators and negotiators scored the Statement of Work requirements during the ITN's evaluation and selection process. The ALJ found that Section 3.1 of the ITN controls the determination because this section states that the responsiveness determination would be conducted by using the Qualification Questions listed in Attachment K.

The ALJ used the procurement documents to address whether the use of the words "must" and "shall" in the ITN and Statement of Work were mandatory. The ALJ rejected this argument because the documents did not include language stating that their use was intended to create mandatory requirements.

The ALJ considered Petitioner's arguments regarding the application of *Infinity* to this procurement and concluded that *Infinity* does not control this particular legal analysis and is distinguishable from this case, as explained in Footnote 7.

The ALJ's second legal analysis applied the concept of "waiver" in the procurement challenge process. In Conclusion of Law 91, the ALJ noted that Petitioner's window of opportunity to protest Harris' responsiveness occurred during the 72-hour period after the Notice of Intent to Negotiate was posted, in accordance with section 127.57(3)(b), Florida Statutes. Petitioner missed this window and did not file a protest within the protest period. This Conclusion of Law independently resolves the argument regarding Harris' responsiveness by establishing Petitioner waived any challenge as to responsiveness when it failed to timely protest after the posting of the Notice of Intent to Negotiate.

In response to Exception 1, the Agency agrees with Findings of Fact 5, 35, 37-38, 45-46, 69, Footnote 7, and Conclusions of Law 91, 100-104. The ALJ determined the responsiveness procedure DMS used complied with the ITN. Joint Exhibit 1 at pp.20-22; Joint Exhibit 1 at Attachment C, Joint Exhibit 4; and Tr. 659, 673-74, 710-713. The conclusions of law in which the ALJ determined Petitioner waived its right to protest the responsiveness are supported by *CCA of Tenn., LLC v. Dep't of Mgmt. Svcs.*, Case No. 13-0880BID (Fla. DOAH July 12, 2013) and *U.S. Foodservices, Inc. v. Sch. Bd. of Hillsborough Co.*, Case No. 98-3415BID (Fla. DOAH Nov. 17, 1998).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health,* 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.,* 652 So. 2d 894, 896 (Fla. 2d DCA 1995). Therefore, the Agency denies Petitioner's first exception as there is competent substantial evidence to support the challenged ALJ's findings of fact and the conclusions of law are more reasonable than the conclusions advocated by Petitioner.

Exception 2

In its second exception, Petitioner maintains the ALJ exceeded his authority by conducting an initial responsive determination that DMS failed to undertake. As a result, Petitioner challenges Findings of Fact 47-57 and Conclusions of Law 100-105.

Petitioner considers the ALJ's review and discussion of Harris' responsiveness, which finds Petitioner's contentions to be without merit, to be an expansion of authority that the ALJ should not have performed, citing *Procacci v. State, Dep't of Health & Rehabilitative Servs.*, 603

So.2d 1299, 1300-01 (Fla. 1st DCA 1992) (reversing an agency procurement decision where the agency allowed the hearing officer to undertake a responsive review on its behalf).

A review of the RO demonstrates that Petitioner mischaracterizes the challenged Findings of Fact and Conclusions of Law as an initial responsiveness review. Instead, the RO describes the responsiveness determination DMS conducted and distinguishes that determination from the scoring of the Reply by the Department's evaluators. *Procacci* does not apply to the ALJ's analysis because he did not exceed the scope of his authority, which is set forth in section 120.57(3)(f), Florida Statutes.

The record at hearing supports the ALJ's Findings of Fact 47-50. Joint Exhibit 5; Tr. 297-303; 384-386; 430-31, 500, 502, 527, 533-34, 553, 822-825, 833, 945, 956, 998-1000, 1006-07, 1080-81.

The following exhibit and transcript citations support Findings of Fact 51-52: Joint Exhibit 1 at Attachment A, p. 55; Tr. 311; 386-87, 430-31, 501-02, 955-56, 1020, 1085-86. Finding of Fact 56 is supported by Tr. 1019 and Finding of Fact 57 is supported by Joint Exhibit 12 at p. 4-176; Tr. 1024-27.

Petitioner's argument that Conclusions of Law 92 and 100-105 should be overturned is incorrect based upon Petitioner's misconception of the purpose behind the ALJ's factual findings related to a responsiveness determination. These Conclusions of Law describe the applicable law and apply it to the findings of fact. There is no basis in the record or the RO to argue that the ALJ made a responsiveness determination in place of the Department.

Competent substantial evidence supports the conclusions reached. *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). As a result, Petitioner's second exception is denied.

Exception 3

Petitioner's third exception attacks the ALJ's Findings of Fact 19 and 37-44 relating to the corporate identity issues of CR MSA, LLC, a wholly-owned subsidiary of Harris Corp.

Additionally, Petitioner requests that Conclusions of Law 97-99 be rejected based upon citation to *TMS Joint Venture v. Comm'n for the Transp. of Disadvantaged*, DOAH Case No. 10-0030BID. This case determined that the wholly-owned subsidiary submitting a response to a Request for Proposals (RFP) could not be held liable for the performance of the contract.

The ALJ found in Finding of Fact 41 that nothing in the ITN prohibits the submission of a reply on behalf of Harris by and through its wholly-owned subsidiary, CR MSA. The evidence supporting the findings of fact related to Harris' corporate identity issues are found in Joint Exhibit #5 at 1-1; 1-2, 4-2, 4-6, 4-7, 4-10, 6-67; Petitioner's Exhibit #3, Tr. 714-15, 907-09.

Findings of Fact 19 and 44 which determine Petitioner was aware of the corporate identity issue after the Notice of Intent to Negotiate was posted, are supported by evidence found at Tr. 623-24; Prehearing Stipulation at p. 7, #14. As these findings are supported by substantial competent evidence, the Agency may not reject the findings, even if alternative findings are also supported by competent substantial evidence. *Resnick v. Flagler Cty, Sch. Bd.*, 46 So.3d 110, 112-13 (Fla. 5th DCA 2010).

Petitioner cites the *TMS* case to support the argument that Conclusions of Law 97-99 are to be rejected. *TMS* holds that a vendor cannot use the qualifications of its parent company to satisfy responsiveness requirements when the bid does not inform the evaluators that the vendor is using the qualifications of its parent company as though they are its own in the bid submission.

In the instant case, DMS is aware the parent company qualifications are used as part of its qualifications. Tr. 452-53, 522, 714-715, 907-09 and 989.

The evidence demonstrates that the use of parent company qualifications is consistent with *Securus Technologies, Inc. v. Department of Corrections*, Case No. 13-3030 (Fla. DOAH Nov. 1, 2013), a decision relied upon by the ALJ in Conclusion of Law 98.

The Agency can only reject or modify an ALJ's conclusions of law "over which it has substantive jurisdiction." *See* § 120.57 (1)(l), Fla. Stat.; *Barfield v. Dep't of Health*, 805 So.2d 1008 (Fla. 2d DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2DCA 2001). The Agency is without authority to reject the conclusions of law challenged in this exception so Exception 3 is denied.

Exception 4

In this fourth exception, Petitioner argues that Harris' reply did not meet the minimum ten core facilities requirement of the ITN, contrary to the ALJ's determination that these requirements were met. Petitioner takes exception to Findings of Fact 49-50 and Conclusions of Law 92 and 105.

A review of the record demonstrates the factual findings are supported by substantial, competent evidence. Abdul Majid, a DMS evaluator with subject matter expertise, testified that Harris' proposed aggregation nodes described in its reply fully satisfied the requirements to serve as a "core facility" within the meaning of the ITN's initial core facility requirement. Tr. 500. Additional testimony revealing that the routers in the "aggregation nodes" satisfied the ITN requirements is found in Tr. 532. Another witness testified that the proposed aggregation nodes had PE routers and in fact functioned as PE routers in all cases except in the sole instance of local traffic when the routers used VRF-lite to force the traffic to a core node for IDS

monitoring. Tr. 1007-1014. Petitioner's expert admitted that the routers proposed for the aggregation nodes had the same functionality as the routers in the core nodes, and simply had less capacity. Tr. 297-298. Petitioner's other expert conceded that the routers for the aggregation node also had the capacity to function as a PE router. Tr. 416-17. Other witnesses who were familiar with the routers confirmed they had the PE functionality to serve as core routers. Tr. 823. Because there is evidence to support the ALJ's findings, the Agency will not reweigh the evidence, attempt to resolve conflicts, or judge the credibility of witnesses. *Belleau v. Dep't of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997).

The ALJ's decision to accept the testimony of one expert witness over that of another expert regarding the minimum ten core facility requirement cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See Peace River Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009). Petitioner's exception 4 is denied based upon the record supporting the ALJ's decision.

Conclusions of Law 92 and 105 interpret the ITN document as it relates to the node facilities requirements, based upon the underlying fact determinations by the ALJ. The general rule is that interpretation of a document is a question of law rather than fact. *Peacock Const. Co., Inc. v. Modern Air Conditioning, Inc.*, 353 So.2d 840, 842 (Fla. 1977). Thus, these conclusions of law that determine Harris' reply was responsive are upheld and Petitioner's Exception 4 is denied.

Exception 5

Petitioner's fifth exception challenges the ALJ's Findings of Fact 51-52 and Conclusions of Law 92 and 104-105, which determine that Harris's reply satisfied the ITN requirements

about the intrusion detection system (IDS) monitoring. In its argument, Petitioner maintains that if given its proper weight, the evidence presented at hearing does not support the ALJ's findings that the Statement of Work requirement related to IDS monitoring was satisfied by Harris' reply.

The ALJ addressed this argument in the RO but was rejected it based upon Petitioner's mistaken contention that the ITN required such equipment to be located at each core facility. Instead, the ITN required only that all traffic be IDS monitored. The ALJ relied upon testimony from expert witnesses regarding this aspect of the ITN, including one of Petitioner's experts and its lead MFN engineer, for the resolution of the different interpretations of the specifications. The ALJ's findings of fact are supported by competent, substantial evidence in the record by Joint Exhibit 1, Attachment A, p.55; Tr. 311, 386-387, 430-31, 501-02, 955-56, 1020, 1085-86. Even if there is competent substantial evidence supporting a contrary finding, it is irrelevant if there is competent evidence to support the ALJ's findings of fact. *Arand Construction Co. v. Dyer*, 502 So.2d 276, 280 (Fla. 1st DCA 1991).

Petitioner's exception to Conclusions of Law 94 and 104-105 should be denied for the same reason the exception to these conclusions of law were denied in Exception 2. Because there is an insufficient basis to overturn the factual findings and legal analysis in these conclusions of law, Petitioner's Exception 5 is denied.

Exception 6

Petitioner's sixth exception proposes that Findings of Fact 58-62 and Conclusions of Law 82-84, 93 and 96 be rejected because the ALJ mischaracterized Petitioner's arguments related to changes to the Statement of Work during the negotiation process. Essentially, Petitioner argues that the process prevented fair competition and misled potential vendors who may have submitted replies if the changes made during negotiation had been in the original ITN

documents. The ALJ's findings of fact are supported by the ITN in Joint Exhibit 1 at pp. 6-7, 12, 26-30 (ITN 1.2, 1.3, 3.6 and 3.7) and hearing testimony at Tr. 502-508, 952-968. These findings cannot be overturned by the reviewing agency as the credibility of witnesses and weighing of evidence is left to the ALJ. *Aldrete v. Dep't of Health*, 879 So.2d 1244, 1246 (Fla. 1st DCA 2004).

Conclusions of Law 82-84 and 93 regarding Petitioner's waiver of the opportunity to protest ITN specifications are discussed in the denial of Exception 1. For the same reasons, Petitioner's Exception 6 is denied.

Exception 7

Petitioner's seventh exception argues that DMS's decision to reduce the required number of core facilities favored Harris and will adversely impact the State. Petitioner challenges Findings of Fact 63-67 and 69 together with Footnote 5, on the basis that they are not supported by the record. A review of the record demonstrates Findings of Fact 63-69 are supported by Joint Exhibit 12, pp. 4-22, Harris Exhibit 51 at pp. 3-4, Tr. 1032-36, 1087-90. Finding of Fact 69 summarizes prior findings of fact supported by the record. The Findings in Footnote 5 are supported by testimony from the hearing. Tr. 921-22. As noted previously, the Agency's review of exceptions does not allow the reweighing of evidence. *Rogers, supra*. Petitioner did not discuss conclusions of law in this exception. Based upon the substantial competent evidence supporting the ALJ's findings, Petitioner's seventh exception is denied.

Exception 8

Petitioner's eighth exception challenges the ALJ's Findings of Fact 68-69, which determine that the deletion of the Sip Core Routing (SCR) requirement during negotiations was not a fundamental change in the procurement and did not favor Harris, as argued by Petitioner at

hearing. These findings are supported by hearing testimony in Tr. 952, 965-67, 502-508, 540.

These findings of fact appear to be based on competent, substantial evidence so the Agency may not reject the findings of fact, pursuant to section 120.57(1)(l), Florida Statutes, and case law cited previously regarding an agency's inability to overturn facts supported by the record. Based upon this analysis, Petitioner's Exception 8 is denied.

Exception 9

Petitioner's ninth exception challenges the ALJ's Finding of Fact 44, Conclusions of Law 85-92, and Footnote 6 that determine Petitioner waived its right to challenge Harris' responsibility and responsiveness when it did not timely raise these issues after the posting of the Notice of Intent to Negotiate. Finding of Fact 44 is supported by competent substantial evidence in the record.Tr.623-24; Prehearing Stipulation at p.7, #14. As discussed previously, *Resnick* advises the reviewing agency that when the findings are supported by competent substantial evidence, the agency cannot reject or modify the ALJ's findings of fact. Petitioner's knowledge of the alleged responsiveness issues, and Petitioner's failure to timely protest at the point of entry accompanying the Notice of Intent to Negotiate have been addressed in the denial of these same findings of fact in Exception 2 and Exception 5 in this Final Order.

The challenged Conclusions of Law 85-92 and Footnote 6 demonstrate the ALJ reviewed applicable law regarding clear points of entry and the waiver that occurs when protests are not timely filed. The ALJ's citation to *Cubic Transp. Sys., Inc. v. Dep't of Transp.*, Case No. 14-2322BID (Fla. DOAH Sept. 4, 2014) and *Verizon Bus. Network Servs., Inc. v. Dep't of Corr.*, Case No. 07-2468BID (Fla. DOAH Aug. 13, 2007) as support for his conclusion that Petitioner had a point of entry to protest at the positing of the ITN short-list is reasonable. In Footnote 6, the ALJ views *Global Tel Link Corporation v. Department of Corrections*, Case No. 13-3023

(Fla. DOAH Nov. 1, 2013) differently than Petitioner but the Agency finds that the ALJ's conclusions of law are more reasonable than Petitioner's argument to the contrary. Because an agency may only reject or modify conclusions of law when a finding is made that the substituted conclusions are as or more reasonable, Petitioner's Exception 9 is rejected. §127.57(1) (l), Fla. Stat.

Exception 10

Petitioner's tenth exception addresses Finding of Fact 62 and Footnote 4. Based upon the ALJ's findings that the revisions to the Statement of Work were not a material change to the procurement, Petitioner concludes that there was a "fundamental misunderstanding of the evidence." Contrary to Petitioner's viewpoint, the findings of the ALJ regarding the ITN's high-availability and high-reliability requirements are supported by competent substantial evidence in the record. *See* Joint Exhibit 1 at Attachment A, pp. 4, 51, 63; Joint Exhibit 5 at pp.4-B-1 through 4-B-39; Tr. 331-34, 435-36, 1087-90, 1090-91.

Because these findings of fact are based upon competent, substantial evidence, the Agency may not reject the findings of fact, pursuant to section 120.57(1)(l), Florida Statutes.

Footnote 4 is a conclusion of law based upon the ALJ's interpretation of the ITN documents. As previously stated in the denial of Exception 4, the general rule is that interpretation of a document is a question of law rather than fact. *Peacock Const. Co., Inc.* The ALJ's interpretation of the ITN is more reasonable than Petitioner's interpretation. Thus, the findings of fact and conclusion of law that determine Harris' reply was responsive are upheld and Petitioner's Exception 10 is denied.

Exception 11

Petitioner's eleventh exception argues that even assuming the ALJ had authority to evaluate responsiveness, his conclusions regarding Petitioner's responsiveness are not supported by the evidence and are contrary to the ITN and applicable law. This exception challenges Finding of Fact 47. A review of the record demonstrates there is competent substantial evidence to support the ALJ's finding. See Joint Exhibit 6 at p. 35; Joint Exhibit 13 at p. 36; Joint Exhibit 6 at Tab 5; Harris Exhibit 10; Tr. 613-15, 619. As discussed previously, *Resnick* advises the reviewing agency that when the findings are supported by competent substantial evidence, the agency cannot reject or modify the ALJ's findings of fact. Based upon this case law and section 127.57(1) (l), Florida Statutes, Petitioner's Exception 11 is denied.

Exception 12

Petitioner argues in its twelfth exception that the ALJ erred in his ultimate conclusion that DMS's intent to award to Harris should be upheld. Petitioner challenges Finding of Fact 70 and Conclusion of Law 106. The ALJ made Finding of Fact 70 and Conclusion of Law 106 based upon the requirements of section 120.57(3)(f), Florida Statutes, which states:

> . . . In a competitive procurement protest . . . the ALJ shall conduct a de novo proceeding to determine whether the agency's proposed agency action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid proposal or specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitraryor capricious.

The ALJ's fulfilled these statutory requirements by evaluating the actions taken by the Department. Upon review of the evidence presented at hearing, the ALJ determined that Petitioner failed to meet its burden of proof and that DMS correctly performed its duties. Because the ALJ followed the requirements section 120.57(3)(f), Florida Statutes, when he ultimately concluded that DMS's intent to award should be upheld, Exception 12 is denied

CONCLUSION

Having considered the applicable law and being otherwise duly advised, it is **ORDERED** that:

A. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference.

B. The Formal Written Protest is DENIED and the Petition for Administrative Hearing filed by Petitioner, AT&T Corp., is DISMISSED.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 4th day of January, 2016.

STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

Chad Poppell, Secretary
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NOTICE OF RIGHT TO APPEAL

This order constitutes final agency action. Judicial review of this proceeding may be instituted by filing a notice of appeal with the filing fee prescribed by law in the District Court of Appeal, pursuant to Section 120.68, Florida Statutes, and a copy with the Agency Clerk of the Department of Management Services, 4050 Esplanade Way, Tallahassee, Florida 32399-3000. Such notice must be filed within thirty (30) calendar days of the date this order is filed in the official records of the Department of Management Services, as indicated in the Certificate of Clerk. Review proceedings shall be conducted in accordance with the Florida Rules of Appellate Procedure.

Certificate of Clerk:

Filed in the office of the
Clerk of the Department of
Management Services on this 4th
day of January, 2016.

Michael Sivilla, Agency Clerk

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