

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JANI-KING GULF COAST REGION,

Petitioner,

vs.

Case No. 16-2762BID

ESCAMBIA COUNTY SCHOOL BOARD,

Respondent.

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RECOMMENDED ORDER

A hearing was held pursuant to notice, on June 21, 2016, in Pensacola, Florida, before W. David Watkins, the assigned Administrative Law Judge of the Florida Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brian W. Hoffman, Esquire
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Pensacola, Florida 32502

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For Respondent: David C. Willis, Esquire
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STATEMENT OF THE ISSUES

On January 8, 2016, the Escambia County School District (District) issued Request for Proposal Number 161301 (RFP) for custodial services. The RFP was issued to solicit proposals to clean the District's Zone Three schools. After evaluating the proposals, the District awarded the contract to American Facility Services, Inc. (AFS), who was the highest-scoring proposer. Enmon Enterprises, LLC, d/b/a Jani-King of Pensacola (Jani-King), received the second highest score and is protesting the scoring and proposed award of the contract to AFS. At issue is whether the District's decision to award the cleaning contract to AFS was contrary to a governing statute, the District's rules or policies, or project specification; and, if so, whether such action was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On January 8, 2016, the District issued the RFP to solicit proposals for custodial services to clean the District's Zone Three schools. The RFP had an opening date and time of March 1, 2016, at 2:00 p.m., Central Time. On March 14, 2016, an evaluation committee met to grade the submitted proposals. On April 8, 2016, evaluation tabulations and the recommended award were posted on-line. The tabulations showed that ten proposals were submitted, and of those ten proposals, three were

immediately rejected as being non-responsive to the RFP. The recommended supplier, pursuant to the tabulation results, was AFS with a score of 94 points. Jani-King was the second highest scored supplier with a score of 83.65 points.

Jani-King protested the scoring and proposed award of the contract to AFS. Jani-King argues that AFS submitted a non-responsive proposal because it submitted reviewed, rather than audited, financial statements, although the RFP required submittal of two years of audited financial statements. Jani-King contends that the submission of reviewed, rather than audited, financial statements was a material deviation from the requirements of the RFP and, thus, renders AFS's proposal non-responsive. Jani-King argues that because the proposal was non-responsive, it should have immediately been rejected, or at the least, the company should have received no points in the "financial stability" section of the RFP. Jani-King also argues that the scoring methodology of the financial statements was arbitrary and capricious.

Jani-King's Protest was referred to the Division of Administrative Hearings (DOAH) on May 18, 2016, where it was assigned to the undersigned. By Notice entered on May 20, 2016, the final hearing was scheduled for June 21, 2016.

The final hearing was convened as scheduled. At the hearing, the parties submitted a Joint Prehearing Stipulation

which included some stipulated facts. To the extent relevant, those stipulated facts have been incorporated herein.

At the hearing, the parties called the following witnesses: Marvin Beasley (accepted as an expert in accounting and auditing), Brad Mostert, Terry St. Cyr, John Dombroskie, and Chance Enmon. The parties' Joint Exhibits 1 through 29 were received in evidence without objection. Petitioner's Exhibits 30 through 32 were received in evidence over Respondent's objections.

The one-volume hearing Transcript was filed with DOAH on July 5, 2016. The parties requested an extension of time to submit proposed orders and were granted 10 additional days, making their proposed orders due on July 25, 2016. The evidence presented at the hearing and the submissions from the parties have been carefully considered in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to the 2015 version of the Florida Statutes.

FINDINGS OF FACT

1. The Escambia County School District is an independent taxing and reporting public entity managed, controlled, operated, administered, and supervised by the District's school officials.

2. Jani-King of Pensacola is a master franchise territory of Jani-King International. Enmon Enterprises, LLC, has bought the rights to sell franchises in a geographic territory referred to as "Jani-King of Pensacola." Jani-King of Pensacola is one of 13 territories that Enmon Enterprises, LLC, has bought from Jani-King International.

3. On January 6, 2016, the District issued the RFP for custodial services. When the RFP was issued, the District still had approximately five years left on its contract with the incumbent provider of cleaning services.

4. Once an RFP is posted, the District gives those interested in responding an opportunity to ask questions. Those questions, along with the District's answers, are compiled and posted on the District's website for all to see, creating an equal playing field. No inquiry was submitted regarding the requirement that "Responder must provide the last two (2) years' audited financial statements for the Responder."

5. The RFP was created by John Dombroskie, Escambia County School District's director of purchasing, and Jim Beagle, a custodial manager.

6. The RFP required vendors to show "financial ability," by demonstrating the wherewithal and knowledge to cover the expenses associated with fulfilling the terms of the contract. As noted, part of this requirement included the submission of

two years of audited financial statements. The entire "financial ability" section of the RFP was worth ten total points in the overall evaluation of the bidding companies.

7. According to Brad Mostert, senior auditor with the District, the District requested audited financial statements primarily in order to assess whether a bidding company could handle the start-up cost of the job, since it would be 45 to 60 days before the winning company would be paid. Mr. Mostert testified that the District wanted to ensure that "for the initial period of their services, 45 to 60 days, that they would be able to maintain their operations, i.e., pay their payroll for the folks they would have to hire and invest in the equipment that they would have to invest in to perform the duties under the bid."

8. The RFP stated that any proposal which did not provide all of the requested items would be deemed non-responsive. However, the District expressly reserved the right to waive any conditions or criteria set forth in the RFP. The District also reserved the right to waive any irregularities and technicalities.

9. The Evaluation Committee Instructions, which were provided to each committee member, stated, "[e]ach committee member will review and assign points to the areas giving the best proposal the highest assigned points for each area

evaluated. Points will be awarded based on the responses that each proposal received. Lack of a response for any item will receive zero points in that item."

10. Within the Financial Ability section of the Evaluation Committee Instructions it was stated that "Responder must provide the last two (2) years' audited financial statements for the Responder."

11. The proposals were opened on March 1, 2016. At the time bids were opened, John Dombroskie, with purchasing, was present, along with Jim Beagle, with custodial services, and Michelle Kiker, a senior auditor from internal auditing. These three individuals served as witnesses to which bids were timely received by the District, and they also made the initial determination as to which bids should be rejected as non-responsive.

12. Three submitted proposals were immediately rejected and were not considered as they were deemed non-responsive. One proposal submitted by Owens Realty Services was dismissed because it was not signed, and two other proposals submitted by ABM Janitorial Services and GCA Services Group were dismissed for failure to submit a bid bond.

13. Mr. Dombroskie put together a diverse committee to evaluate the remaining submitted proposals. The committee members were: Terry St. Cyr, assistant superintendent, Finance

and Business, Escambia County School Board; Brad Mostert, internal auditor for Escambia School Board; Jim Beagle, manager III, custodial services; Keith Rich, custodial employee; Chuck Peterson, maintenance director; Shawn Dennis, assistant superintendent; and Margret Warr, assistant principal. John Dombroskie acted as a non-voting supervisor of the committee. The committee met on March 14, 2016.

14. Mr. Dombroskie gave the proposals to the committee members about a week prior to their meeting, along with the Evaluation Committee Instructions, in the hopes that they would read and evaluate the proposals on their own. Each committee member was given evaluation sheets, which contain the criteria area, plus the points that could be earned by a perfect score in that area.

15. Jani-King and AFS both submitted proposals in response to the RFP. AFS submitted reviewed, rather than audited, financial statements. Jani-King submitted audited financial statements. AFS's proposal was the lowest in proposed cost and received the highest total score from the evaluation committee. Jani-King's proposal was the second highest scored proposal and it had the second highest proposed cost. The Jani-King proposal also included 30 percent more staffing than the AFS proposal.

16. In its proposal, Jani-King submitted three or four franchise owners' resumes who could potentially do the work if

Jani-King was the winning bidder. At the time it submitted its proposal, Jani-King had not yet selected the franchise owner who would actually service the account.

17. Jani-King did not supply audited financial statements or any other financial information for any of the franchise owners to the District. Jani-King instead submitted audited financial statements only for Enmon Enterprises, LLC.

18. AFS' proposal deviated from the RFP requirements because AFS submitted reviewed financial statements, rather than audited financial statements. At least two other bidders also submitted reviewed financial statements, rather than audited financial statements.

19. It is unknown how many prospective bidders did not submit bids because of the requirement that proposals include (the more costly) audited financial statements. Also unknown is how many additional bids would have been submitted had the requirement been for reviewed, rather than audited, financial statements.

20. The fact that some companies had submitted reviewed, rather than audited, statements arose at the beginning of the evaluation committee meeting. The issue was raised by committee member, Bradley Mostert, an auditor for the District, who understands the difference between an audited and a reviewed statement. Mr. Mostert explained these differences to the

evaluation committee in relation to the bidder, American Maintenance Services, who also submitted reviewed, rather than audited, financial statements. As the recording of the meeting reveals, Mr. Mostert explained the differences between reviewed and audited financial statements, but there was no substantive discussion among the committee members as to whether non-audited financial statements would provide the necessary assurance that the winning bidder would have the financial wherewithal to perform under the terms of the contract. In addressing the committee members about the issue, Mr. Mostert stated:

[F]or an audit, I'm testing the material portion of all of those transactions that are relevant to those financial statements. For a review, I'm compiling the numbers. I'm getting them together. I'm doing some analysis, maybe ratios, maybe stuff like that, but in an audit, I'm in the nitty gritty. I'm looking at documents that support those numbers in the material portion. (Oh) present fairly, (um) that means there's nothing materially out of compliance with the appropriate rules that they need. But what I'm saying is, the weight behind that opinion is different than an audit, and it may not matter, but it is different. There was less work performed on those financials.

(Audio recording of March 14, 2016, meeting at 12:05-12:56).

21. Mr. Mostert did not explain to the committee members the difference in the opportunity for fraud or material misstatement with reviewed financial statements as compared to audited financial statements. According to Mr. Mostert, he

simply wanted to point out to the committee members that there "is a little bit of a difference" between reviewed and audited financial statements.

22. At hearing, Jani-King introduced in evidence the "Guide to Financial Statement Services: Compilation, Review and Audit" published by the American Institute of Certified Public Accountants. The publication highlights the significant differences between reviewed and audited financial statements.

The review is the base level of CPA assurance services.

* * *

A review is substantially narrower in scope than an audit. A review does not contemplate obtaining an understanding of your business's internal control; assessing fraud risk; testing accounting records through inspection, observation, outside confirmation or the examination of source documents or other procedures ordinarily performed in an audit.

In a review engagement, the CPA will issue a formal report that includes a conclusion as to whether, based on the review, he is aware of any material modifications that should be made to the financial statements in order for them to be in accordance with the applicable financial reporting framework.

23. In contrast to reviewed financial statements, audited financial statements provide a much higher level of assurance as to the validity of the financial information presented:

CPA issues a formal report that expresses an opinion on whether the financial statements

are presented fairly, in all material aspects, in accordance with the applicable financial reporting framework.

* * *

The CPA performs procedures in order to obtain "reasonable assurance" (defined as a high but not absolute level of assurance) about whether the financial statements are free from material misstatement.

In an audit, your CPA is required to obtain an understanding of your business's internal control and assess fraud risk. Your CPA is also required to corroborate the amounts and disclosures included in your financial statements by obtaining audit evidence through inquiry, physical inspection, observation, third-party confirmations, examination, analytical procedures and other procedures.

24. As between financial statement review and audit, only audited statements include a licensed professional's assessment of fraud risk, and a reasonable assurance that the financial statements are free from material misstatement.

25. As noted by Jani-King's expert in accounting and auditing, Marvin Beasley, only an audited report confirms that "the financial statements present fairly in all respects the financial condition of the company." This is because the financial data presented in reviewed statements is simply provided by the client, rather than being independently verified as required in an audited statement.

26. Mr. Beasley further noted that the difference in a review versus an audit is the level of assurance one should associate with those two types of reports because of the amount of work done by the audit or accounting firm. The work it takes to issue a reviewed report is substantially less in volume and scope than the work an auditor or certified public accountant (CPA) would be required to do to issue an audited report. Consequently, the cost of obtaining audited financial statements is considerably higher than the cost of obtaining reviewed financial statements.

27. The CPA on the committee, and the District's chief financial officer, Terry St. Cyr, did not consider the submission of reviewed versus audited statements to be a material deviation from the RFP. Brad Mostert also did not think the submission of reviewed, instead of audited, financial statements should disqualify the bidders "because of the nature of the bid." The evaluation committee deemed the submission of reviewed, rather than audited, statements as "acceptable for [their] purposes."

28. At hearing, Mr. St. Cyr explained the District's rationale in deciding not to reject proposals that included reviewed, but not audited financial statements:

Q Did the submission of those reviewed financial statements instead of audited financial statements send up any red flags

or give you cause for concern about those bids or proposals?

A It did not concern the District. Even though it stated audited financials, we were satisfied, based on the level of testing or evaluation that we were doing, and the services to be performed, that we were not worried about whether or not they were audited, as long as they were reviewed with the reviewed statement by the auditor that the financial statements do not have a material misstatement, we were good with relying on them.

29. The reviewed financial statements contained in the AFS proposal do not include an auditor's or CPA's statement that the financial statements do not contain a material misstatement. To the contrary, on the cover page of the reviewed financial statements, the accounting firm noted that:

A review is substantially less in scope than an audit, the objective of which is the expression of an opinion regarding the financial statements as a whole. Accordingly, we do not express such an opinion.

* * *

Based upon our reviews, we are not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with accounting principles generally accepted in the United States of America.

30. Committee members were told not to consider price as part of their scoring, and there was no discussion about pricing during the committee meeting. At the end of the meeting,

John Dombroskie gave the committee a sheet with the number of points that was to be given each bidder based on their pricing. This number was reached by calculating total value based on total cost and then price per square footage. To calculate the points that should be assessed to each bidder based on cost, Mr. Dombroskie took the lowest proposed cost, assigned the maximum points (in this case 30), and then divided the other costs into that lowest cost. He then multiplied that factor by the 30 allotted points to reach a scoring amount based on cost.

31. The recommended supplier, pursuant to the tabulation results, was AFS with a score of 94 points. Jani-King was the second highest scored supplier with a score of 83.65 points. No one on the Evaluation Committee scored AFS a zero in financial ability for failure to submit audited financial statements.

32. The Bid Award Notice, provided prior to Jani-King's protest being filed, stated that if an agreement was not reached with AFS, the District would negotiate with the second highest scored bidder.

33. The District does not have blanket discretion to decide what requirements of the RFP it may waive; and accordingly, the District must adhere to the material requirements of its RFP.

34. AFS's submission of reviewed, rather than audited financial statements, was a material deviation from the requirements of the RFP, and was not a minor irregularity.

35. The RFP provided that non-responsive proposals would be discarded. Nonetheless, the AFS proposal was improperly reviewed and scored.

36. The District never informed Jani-King or any other potential bidders that the requirement for each bidder to provide audited financial statements would be waived.

37. The District's decision to allow bids with reviewed financial statements, but without audited financial statements, was contrary to the requirements of the RFP.

38. The District's decision to allow bids with reviewed financial statements, but without audited financial statements, was clearly erroneous based upon the requirements of the RFP.

39. The District's decision to allow bids with reviewed financial statements, but without audited financial statements, provided a competitive advantage to AFS over other responders who complied with the requirements of the RFP; and thus, the District's decision was contrary to competition.

40. The District's decision to allow bids with reviewed financial statements, but without audited financial statements, is unsupported by facts or logic when the RFP and Evaluation

Committee Instructions expressly mandate that each responder must provide audited financial statements.

41. If the AFS bid was properly deemed to be non-responsive, then Jani-King would have been the highest scored responsive bidder.

CONCLUSIONS OF LAW

42. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. See §§ 120.569 and 120.57, Fla. Stat. (2015); Dep't of Lottery v. Gtech Corp., 816 So. 2d 648, 651 (Fla. 1st DCA 2001).

43. As the second highest bidder, Jani-King has standing to file this bid protest. Section 120.57(3) provides that any person who is "adversely affected" by the agency action may file a protest. A second ranked low bidder has standing to challenge an award to the low bidder based on non-responsiveness and other factors, but a third or lower ranked bidder generally does not have standing since, even if successful in the protest of the award to the low bidder, the award would then go to the second ranked low bidder. Preston Carroll Co. v. Fla. Keys Aqueduct Auth., 400 So. 2d 524 (Fla. 3d DCA 1981).

44. Chapter 287, Florida Statutes, establishes the various methods for the procurement of commodities and services by governmental entities. The District utilized a request for

proposals as the method for procurement of the contract at issue. Section 287.057(1)(b), Florida Statute, describes that method of procurement as follows:

(b) Request for proposals. An agency shall use a request for proposals when the purposes and uses for which the commodity, group of commodities, or contractual service being sought can be specifically defined and the agency is capable of identifying necessary deliverables. Various combinations or versions of commodities or contractual services may be proposed by a responsive vendor to meet the specifications of the solicitation document.

* * *

4. The contract shall be awarded by written notice to the responsible and responsive vendor whose proposal is determined in writing to be the most advantageous to the state, taking into consideration the price and other criteria set forth in the request for proposals. The contract file shall contain documentation supporting the basis on which the award is made.

45. Section 287.012(26) defines a "responsive" submission to a solicitation as "a bid, or proposal, or reply submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation." A "responsive vendor" is defined by section 287.012(27) as "a vendor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation."

46. Section 120.57(3)(f) provides that:

[T]he burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

47. The nature of the de novo review in a bid protest proceeding has been established as follows:

[T]he phrase "de novo hearing" is used to describe a form of intra-agency review. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency. See Intercontinental Properties, Inc. v. State Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3d DCA 1992).

State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d, 607, 609 (Fla. 1st DCA 1998).

48. The standard of review of the agency's proposed action in a bid protest proceeding has been generally described as follows:

[A] "public body has wide discretion" in the bidding process and "its decision, when based on an honest exercise" of the discretion, should not be overturned "even if it may appear erroneous and even if reasonable persons may disagree." Dep't of Transp. v.

Groves-Watkins Constructors, 530 So.2d 912, 913 (Fla. 1988) (quoting Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d 505 (Fla. 1982)). "The hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly." Groves-Watkins, 530 So.2d at 914.

Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991).

49. Section 120.57(3)(b) provides in pertinent part that "[t]he formal written protest shall state with particularity the facts and law upon which the protest is based." In order to place the parties on notice of the issues for disposition in a bid protest proceeding, a petitioner must allege specific facts and how the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. See Hamilton v. Dep't of Bus. & Prof'l Reg., 764 So. 2d 778 (Fla. 1st DCA 2000), (citing Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996)); Anchor Towing, Inc. v. Dep't. of Transp. & Sunshine Towing, Inc., Case No. 04-1447BID (Fla. DOAH Sept. 23, 2004; Fla. DOT Dec. 1, 2004, remanded on other grounds Apr. 18, 2005). Based upon the parties' Prehearing Stipulation, the issues for consideration in this proceeding are limited to the two remaining issues alleged by Jani-King in its Formal Bid Protest Petition:

- AFS's submission of reviewed rather than audited financial statement should have

resulted in AFS being deemed non-responsive. Furthermore considering and accepting the AFS bid without audited financial statements is contrary to competition and an abuse of discretion; and

- The scoring methodology of the financial statements was arbitrary, as evidenced by AFS' receiving superior scores in financial ability, where Jani-King produced the requested documentation and was objectively the better candidate.

50. Since the undersigned has determined that the AFS submittal was non-responsive to the RFP, and that determination is dispositive to the outcome of this proceeding, it is unnecessary to address the second issue.

51. Jani-King, as Petitioner, has the burden to establish that AFS's proposal materially deviated from the terms, conditions, and specifications of the RFP such that the District's decision to award the contract to AFS was clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.; Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

52. 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." U.S. 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 its plain meaning and intent. Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004). In such a case, "judicial deference need not be given" to the agency's interpretation. Id.

53. An act is "contrary to competition" if it runs contrary to the objectives of competitive bidding, which have been long held:

to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense

Wester v. Belote, 138 So. 2d 721, 723-24 (Fla. 1931); see also Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977). In that regard, public officials do not have the power "to make exceptions, releases and modifications in the contract after it is let, which will afford opportunities for favoritism, whether any such favoritism is practiced or not." Wester v. Belote, 138 So. 2d at 724. The public policy regarding exceptions and releases in contracts applies with equal force to the contract procurement.

54. An "arbitrary" action is "one not supported by facts or logic, or despotic." A "capricious" action is "one which is

taken without thought or reason or irrationally." Agrico Chem. Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978); see also Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). 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., Inc. v. Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

55. Section 287.001 establishes the legislative intent that public procurement be intrinsically fair and open, and that it also eliminate the appearance and opportunity for favoritism so as to preserve public confidence in the process, and provides that:

The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically; and that documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in the process by which commodities and contractual services are procured.

56. That legislative intent has been applied to determine whether an action is contrary to competition as follows:

Thus, from Section 287.001 can be derived an articulable standard of review. Actions that are contrary to competition include those which:

- (a) create the appearance of and opportunity for favoritism;
- (b) erode public confidence that contracts are awarded equitably and economically;
- (c) cause the procurement process to be genuinely unfair or unreasonably exclusive;
or
- (d) are unethical, dishonest, illegal, or fraudulent.

Syslogic Tech. Servs., Inc. v. So. Fla. Water Mgmt. Dist.,
Case No. 01-4385BID (Fla. DOAH Jan. 18, 2002; SFWMD Mar. 6,
2002).

57. As to the ability of an agency to overlook items in a proposal that clearly meet the definition of a "material deviation" from its written specifications, it is clear that "a public body is not entitled to omit or alter material provisions required by the RFP because in doing so the public body fails to 'inspire public confidence in the fairness of the [RFP] process.'" Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Comm'rs, 955 So. 2d 647, 652 (Fla. 1st DCA 2007) (citing Dep't of Lottery v. Gtech Corp., 816 So. 2d 648, 651 (Fla. 1st DCA 2001)).

58. Every deviation from the RFP is not material and does not mandate rejection of the proposal. The District reserved the

right to waive minor irregularities. The standard for determining whether a variance is a material deviation or a minor irregularity is as follows:

"Although a bid containing a material variance is unacceptable, not every deviation from the invitation is material." Robinson Elec. Co. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982); Tropabest Foods, Inc. v. State, Dep't of Gen. Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986) (citation omitted); Glatstein v. Miami, 399 So. 2d 1005 (Fla. 3d DCA) review denied, 407 So. 2d 1102 (Fla. 1981). "It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest, 493 So. 2d at 52; Harry Pepper & Assocs., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

Procacci Commer. Realty v. Dep't of HRS, 690 So. 2d 603, 606 (Fla. 1st DCA 1997).

59. The competitive advantage that is conferred on a proposer when an agency chooses to ignore a clear and unambiguous requirement that is applicable to all other potential vendors has been described as follows:

59. The touchstone of these tests for materiality--substantial advantage--is an elusive concept, to say the least, easier to state than to apply. Obviously, waiving any defect that might disqualify an otherwise winning bid gives the beneficiary of the waiver an advantage or benefit over the other bidders. In practice, differentiating between, on the one hand, "fair" advantages--i.e. those that are tolerable because they do not defeat the object and integrity of the competitive procurement

process--and "unfair" (or intolerable) advantages, on the other, is exceptionally difficult; and, making matters worse, there are not (as far as the undersigned is aware) many generally recognized, consistently applied, neutral principles available for the decision-maker's use in drawing the distinction between a "substantial" advantage and a "mere" advantage.

60. That said, the undersigned believes that a bidder's noncompliance with a specification which was designed to winnow the field--especially one which prescribes particular characteristics that the successful bidder must possess--should rarely, if ever, be waived as immaterial. This is because such a provision acts as a barrier to access into the competition, potentially discouraging some would-be participants, namely those who lack a required characteristic, from submitting a bid.

Phil's Expert Tree Serv. v. Broward Cnty. Sch. Bd., Case No. 06-4499BID, RO at 29-30 (Fla. DOAH Mar. 19, 2007; BCSB June 11, 2007); see also Syslogic Tech. Servs., Inc. v. So. Fla. Water Mgmt. Dist., Case No. 01-4385BID, RO at 63 n.23 (Fla. DOAH Jan. 18, 2002; SFWMD Mar. 6, 2002) ("Of course, it will usually not be known how many, if any, potential proposers were dissuaded from submitting a proposal because of one project specification or another. That is why specifications that have the capacity to act as a barrier to access into the competition . . . should generally be considered material and non-waivable for that reason.").

60. The audited financial statements specification was designed to provide credible and independent assurance that the successful proposer had adequate financial resources to purchase the necessary equipment and supplies, hire and pay personnel, and otherwise successfully provide janitorial services to the District for the initial 45 to 60 days of the contract period. Those whose financial wherewithal was not adequate to start up and sustain operations during this period, a fact which would be disclosed on audited financial statements, would be discouraged from expending the substantial effort necessary to develop and submit a proposal given the likelihood of an adverse responsiveness determination. Thus, the requirement to submit audited financial statements could have prevented some interested vendors from submitting proposals.

61. A bidder preparing a proposal in response to the RFP would not reasonably have expected the requirement for audited financial statements to be waived by the District. Furthermore, waiving the requirement of audited financial statements creates the appearance and opportunity for favoritism, erodes public confidence that contracts are awarded equitably and economically, and causes the procurement process to be genuinely unfair or unreasonably exclusive.

62. The requirement that all responders provide a copy of the last two years' audited financial statements with their

proposals was a clear, direct, and mandatory requirement of section VI.C. of the RFP, and the failure to do so was a substantial and material deviation from the terms, conditions, and specifications of the RFP. It was not a minor irregularity. Such failure requires the rejection of AFS's proposal under the express terms of the RFP, to wit "Proposals received which do not contain ALL items listed in this section will be considered non-responsive." The District's effort to excuse AFS's intentional failure to meet the reasonable terms of section VI.C. of the RFP was clearly erroneous, arbitrary and capricious, and contrary to competition.

63. Deeming a bid non-responsive for failure to provide audited financial statements as required by an RFP is supported by the findings in other administrative cases. In Syslogic Technology Services, Inc. v. South Florida Water Management District, supra, the ALJ found a bid non-responsive where the proposal did not include audited financial statements as required by the RFP. This was despite arguments from the District that other portions of the RFP could mean compiled, reviewed or audited. The ALJ concluded that the District's acceptance of a proposal that was non-responsive due to non-waivable material irregularities was contrary to law and contrary to competition. As ALJ Van Laningham concluded in Syslogic:

Second, applying the ejusdem generis principle, it is evident that unaudited financial statements (besides being logically excluded by the requirement that such be independently audited), are simply not of the same general kind or class as independently audited financial statements and annual reports. The items specifically mentioned carry an indicium of reliability—outside scrutiny or comment—that self-prepared financial papers lack. (footnote omitted). For that additional and independent reason, it is impermissible to interpret Subsection 2.5.E.2 in the manner that the District suggests.

Syslogic Technology Services, Inc., supra., RO at ¶ 80.

64. The AFS proposal contained a material deviation from the RFP. That deviation, involving the failure to provide relevant, material, and required information in response to unambiguous instructions to do so, gave AFS a competitive advantage over the other vendors. The deviation from the terms, conditions, and specifications was not a minor irregularity. Thus, the AFS proposal should be rejected.

65. Finally, at the final hearing the District raised, for the first time, the issue of whether Jani-King's submittal was responsive to the RFP, since it did not include audited financial statements for the Jani-King franchisee that would actually be performing the contracted labor. The District's eleventh hour attack on the Jani-King submittal is rejected, not only because the issue was not raised in the parties' Prehearing Stipulation (see Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.,

174 So. 3d 1037 (Fla. 4th DCA 2015)), but because the Jani-King submittal has not been timely challenged (by AFS or any other co-bidder) and thereby placed at issue in this proceeding. Moreover, the District itself concluded that Jani-King's submittal was responsive, and scored it accordingly.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Escambia County School Board, enter a final order that adopts the Findings of Fact and Conclusions of Law set forth herein. It is further RECOMMENDED that the contract issued in response to Request for Proposal, Solicitation Number 161301, entitled "Custodial Services" be awarded to Enmon Enterprises, LLC, d/b/a Jani-King of Pensacola, as the highest scoring responsive vendor.

DONE AND ENTERED this 26th day of August, 2016, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
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Filed with the Clerk of the
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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.