

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CYRIACKS ENVIRONMENTAL  
CONSULTING SERVICES, INC.,

Petitioner,

vs.

Case No. 16-0769BID

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

DB ECOLOGICAL SERVICES, INC.,

Intervenor.

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CYRIACKS ENVIRONMENTAL  
CONSULTING SERVICES, INC.,

Petitioner,

vs.

Case No. 16-3530BID

DEPARTMENT OF TRANSPORTATION,

Respondent.

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RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes (2016),<sup>1/</sup> before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on September 14, 15, and 16, 2016, in Tallahassee, Florida, and by

video teleconference on September 19 and 20, 2016, at sites in Fort Lauderdale and Tallahassee, Florida.

APPEARANCES

For Petitioner: Joseph A. Sorce, Esquire  
Joseph A. Sorce & Associates, P.A.  
3211 Ponce de Leon Boulevard, Suite 200  
Coral Gables, Florida 33134

For Respondent: Richard E. Shine, Esquire  
Department of Transportation  
605 Suwannee Street, Mail Stop 58  
Tallahassee, Florida 32399

For Intervenor: Gigi Rollini, Esquire  
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2618 Centennial Place  
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

The issues in these consolidated cases are: (1) whether the decision by Respondent, Department of Transportation, to reject all bids for the contract at issue was illegal, arbitrary, dishonest, or fraudulent; and (2) if so, whether Respondent's actions in cancelling the notice of intent to award the contract at issue to Cyriacks Environmental Consulting Services, Inc., ("CECOS") and requiring the submittal of new price proposals were clearly erroneous, contrary to competition, arbitrary, or capricious.<sup>2/</sup>

PRELIMINARY STATEMENT

On October 1, 2015, Respondent, Department of Transportation, issued Request for Proposal RFP-DOT-15/16-4004PM

(the "RFP") for the District-wide Mitigation, Wildlife, and Environmental Support Services contract ("Contract") for Respondent's District IV.

On November 3, 2015, Respondent posted its intent to award the Contract to CECOS.

On November 5, 2015, Intervenor, DB Ecological Services, Inc. ("DB"), filed a Notice of Protest, notifying Respondent of its intent to challenge the award of the Contract to CECOS. That same day, Respondent posted a cancellation of the intent to award the Contract to CECOS.

On November 9, 2015, Respondent issued an addendum to the RFP, addressing an ambiguity in the price proposal provisions for a specific section of the RFP and requesting the vendors who previously had submitted proposals in response to the RFP to submit new price proposals. Also on November 9, 2015, DB withdrew its Notice of Protest to the intent to award the Contract to CECOS.

On November 13, 2015, CECOS filed a Notice of Protest of Respondent's action in issuing an addendum to the RFP to require the vendors to submit new price proposals. Thereafter, on November 23, 2015, CECOS filed a Petition for Formal Hearing ("First Petition") challenging Respondent's decisions to cancel the notice of intent to award the Contract to CECOS and requiring the vendors to submit new price proposals.

On December 17, 2015, Respondent posted notice that it had rejected all proposals and that a new procurement would be undertaken for the Contract. On December 22, 2015, CECOS filed a Notice of Protest regarding Respondent's decision to reject all proposals. On January 4, 2016, CECOS filed a Petition for Formal Hearing ("Second Petition") challenging Respondent's decision to reject all bids and re-solicit the Contract. The Second Petition was referred to DOAH on February 12, 2016, and has been assigned Case No. 16-0769. Intervenor became a party to that case on February 29, 2016. The final hearing initially was scheduled for March 7 and 8, 2016, but was continued until April 25 and 26, 2016.

Meanwhile, on January 4, 2016, Respondent issued an Order of Dismissal Without Prejudice ("First Order of Dismissal"), dismissing the First Petition on the basis that because Respondent had decided to reject all bids (which it characterized as having "cancelled the procurement and rescinded all agency action"), Respondent's actions in cancelling the intent to award the Contract to CECOS and requiring the submittal of new price proposals were "extinguished and CECOS' protest was moot." The First Order of Dismissal gave CECOS ten days to file "written evidence of why the matter [was] not moot." In response, CECOS filed a Motion to Immediately Consolidate and Refer Protest and This Motion to DOAH to Have a

Settlement Meeting, to Show Cause and to Vacate Order on January 14, 2016. On January 29, 2016, Respondent issued an Amended Final Order dismissing CECOS' First Petition as moot. CECOS appealed Respondent's dismissal of its First Petition to the First District Court of Appeal; that case was assigned Case No. 1D16-0810.

Pursuant to motion, on April 11, 2016, the ALJ then assigned to Case No. 16-0769 stayed that proceeding pending the outcome of the appeal in Case No. 1D16-0810. Thereafter, CECOS dismissed its appeal in Case No. 1D16-0810 and Respondent referred CECOS' First Petition to DOAH; that case was assigned Case No. 16-3530 and has been consolidated with Case No. 16-0769.

On August 30, 2016, the consolidated cases were set for final hearing to be conducted on September 14 and 15, 2016. On September 13, 2016, the cases were transferred to the undersigned to conduct the final hearing and prepare this Recommended Order.

The final hearing was held on September 14, 15, 16, 19, and 20, 2016. Pursuant to the parties' stipulation, Joint Exhibits 1 through 30 were admitted into evidence. CECOS presented the testimony of Wendy Cyriaks, Mary Clark, Guillermo Guzman, Jessica Rubio, Steven Braun, Margaret Simpkins, and Christine Perretta. CECOS' Exhibits 8, 9, and 10 were admitted

without objection, and CECOS's Exhibits 2, 3, 4, 11, and 18 were admitted into evidence over objection.<sup>3/</sup> CECOS proffered one exhibit that was not admitted into evidence.<sup>4/</sup> Respondent presented the testimony of Jessica Rubio and Ann Broadwell. DB presented the testimony of Christine Perretta.

The eight-volume Transcript was filed on October 10, 2016, and the parties initially were given ten days, until October 20, 2016, to file proposed recommended orders. Thereafter, CECOS requested a ten-day extension of the time in which to file proposed recommended orders. This request was granted, and the parties were given until October 27, 2016, to file their proposed recommended orders. The parties' proposed recommended orders were timely filed and duly considered in preparing this Recommended Order.<sup>5/</sup>

#### FINDINGS OF FACT

##### I. The Parties

1. Respondent is the state agency that issued the RFP to procure the Contract for Respondent's District IV.

2. CECOS is an environmental consulting and services firm that submitted a response to the RFP, seeking award of the Contract.

3. DB is an environmental consulting and services firm that submitted a response to the RFP, seeking award of the Contract. DB was granted party status to DOAH Case No. 16-0769

by Order dated February 29, 2016, and by Order dated March 9, 2016, was determined to have standing in that case as a party whose substantial interests were affected by Respondent's decision to reject all proposals.

## II. Overview of the Procurement Process for the Contract

4. Respondent issued the RFP on or about October 1, 2015. The RFP sought to obtain support services related to environmental impacts review for projects in Respondent's District IV work program; wetland mitigation design; construction, monitoring, and maintenance; permitting of mitigation sites; exotic vegetation control and removal in specified locations; relocation of threatened, endangered, or rare flora and fauna; permit compliance monitoring; and other services specified in the RFP. The RFP stated Respondent's intent to award the Contract to the responsive and responsible proposing vendor<sup>6/</sup> whose proposal is determined to be most advantageous to Respondent.

5. The responses to the RFP were scored on two components: a technical proposal, worth a total of 60 points, that addressed the proposing vendor's experience, qualifications, and capabilities to provide high-quality desired services; and a price proposal, worth a total of 40 points, that addressed the proposed price without evaluation of the separate cost

components and proposed profit of the proposing vendor, compared with that proposed by other vendors.

6. The price proposal evaluation was based on the following formula: (Low Price/Proposer's Price) X Price Points = Proposer's Awarded Points.

7. The Special Conditions section of the Advertisement portion of the RFP, paragraph 3, stated in pertinent part:

In accordance with section 287.057(23), Florida Statutes, respondents to this solicitation or persons acting on their behalf may not contact, between the release of the solicitation and the end of the 72-hour period following the agency posting the notice of intended award, . . . any employee or officer of the executive or legislative branch concerning any aspect of this solicitation, except in writing to the procurement officer or as provided in the solicitation documents. Violation of this provision may be grounds for rejecting a response.

The period between the release of the solicitation and the 72-hour period after posting of the intended award is commonly referred to as the "cone of silence."

8. The Special Conditions section of the Advertisement portion of the RFP, paragraph 19, informed vendors that Respondent reserved the right to reject any or all proposals it received.

9. Exhibit B to the RFP, addressing compensation, limited compensation for all authorizations for work performed under the



Contract to a total of \$5,000,000. Exhibit B stated that the schedule of rates listed in the Price Proposal Form C (i.e., the rates submitted for the sections comprising Exhibit C to the RFP) would be used for establishing compensation.

10. On October 7, 2015, Respondent issued Addendum 1 to the advertised RFP. Addendum 1 revised Exhibit A to the RFP, the Scope of Services; and also revised Exhibit C to the RFP, the Bid Sheet, to provide it in Excel format. As revised by Addendum 1, Exhibit C consists of an Excel spreadsheet comprised of six sections, each of which was to be used by the responding vendors to propose their rates for the specified services being procured in each section of the Bid Sheet.

11. Section 6 of the Excel spreadsheet, titled "Trees, Shrubs [sic], and Ground Cover, consists of eight columns and 258 rows, each row constituting a plant item on which a price proposal was to be submitted. The columns are titled, from left to right: No.; Scientific Name; Common Name; Unit; Estimated of [sic] number of Unites [sic]; Rate; Extension (Unit X Rate); and Multiplier 2.5 (Price X 2.5). Each row of the spreadsheet in Section 6 identified, as a fixed requirement for this portion of the proposal, the specified type of plant, unit (i.e., plant size), and estimated number of units (i.e., number of plants).

12. For each row of the Section 6 spreadsheet, only the cells under the "Rate" column could be manipulated. Vendors

were to insert in the "Rate" cell, for each row, the proposed rate for each plant item. The cells under all other columns for each row were locked, and the RFP stated that any alteration of the locked cells would disqualify the vendor and render its proposal non-responsive.

13. The instructions to Exhibit C, Section 6<sup>7/</sup> stated:

Trees, Shrubs [sic], and Ground Cover

Price of plants shall include project management, field supervision, invoicing, installation, mobilization of traffic, water throughout the warranty period, fertilizer and [sic] six (6) month and demobilization, minor maintenance guarantee. Installation of plant material shall be per the Scope of Services. All planting costs shall include the cost to restore area to pre-existing conditions (i.e., dirt, sod, etc.).

14. On October 20, 2015, Respondent issued Addendum 2, and on October 29, 2015, Respondent issued Addendum 3. Both addenda changed Respondent's schedule for reading the technical proposal scores, opening the sealed price proposals, and posting the intended awards.

15. Addenda 1, 2, and 3 were not challenged.

16. However, a key dispute in these consolidated proceedings is whether the Addendum 1 Bid Sheet in Section 6 and the instructions for completing that Bid Sheet were ambiguous, or whether Respondent reasonably believed them to be ambiguous.

17. The vendors were to submit their responses to the RFP, consisting of their technical proposals and price proposals, by October 16, 2015. CECOS, DB, and four other vendors timely submitted responses to the RFP.

18. On November 2, 2015, the scores for the technical proposals submitted by the vendors were presented to the Selection Committee ("SC") at a noticed meeting. DB received the highest number of points on the technical proposal portion of the RFP.

19. The SC met again on November 3, 2015. At that time, Respondent's Procurement Officer, Jessica Rubio, read the total awarded points for each vendor's price proposal, as well as each vendor's total combined points—i.e., total points for technical proposal and price proposal.

20. CECOS received the highest number of points for the price proposal portion of the RFP, and also received the highest total combined points.

21. Respondent recommended, and the SC concurred, that Respondent should award the Contract to CECOS.

22. At 10:00 a.m. on November 3, 2015, Respondent posted the Proposal Tabulation, constituting its notice of intent that CECOS would be awarded the Contract.<sup>8/</sup>

23. CECOS submitted a price proposal of \$4,237,603.70. DB submitted a price proposal of \$9,083,042.50. The other four

vendors' price proposals ranged between \$4,540,512.90 and \$5,237,598.55.

24. The "cone of silence" commenced upon Respondent's posting of the Proposal Tabulation, and ended 72 hours later, on November 6, 2015, at 10:00 a.m.

25. As discussed in greater detail below, after the Proposal Tabulation was posted, Respondent discovered an apparent ambiguity in Exhibit C, Section 6, regarding the instructions to that section and the inclusion of the "2.5 Multiplier" column on the Bid Sheet. After an internal investigation, Respondent decided to cancel its intent to award the Contract to CECOS.

26. On November 5, 2015, Respondent posted a notice that it was cancelling the intent to award the Contract to CECOS.

27. On November 5, 2015, DB filed a Notice of Protest, stating its intent to challenge the award of the Contract to CECOS. Thereafter, on November 9, 2015, DB contacted Respondent by electronic mail ("email") to withdraw its Notice of Protest.<sup>9/</sup>

28. Due to the apparent ambiguity in Exhibit C, Section 6, on November 9, 2015, Respondent issued Addendum 4 to the RFP. Addendum 4 required the responding vendors to submit new price proposals for all sections (i.e., sections 1 through 6) of Exhibit C to the RFP. Addendum 4 also established a new timeline for a mandatory pre-bid conference to be held on

November 12, 2016; set a sealed price proposal due date of November 19, 2016; and identified new dates for opening the price proposals and posting the Notice of Intended Award of the Contract.

29. On November 12, 2015, Respondent conducted a mandatory pre-bid conference to address Addendum 4. The participating vendors expressed confusion and posed numerous questions regarding the submittal of new price proposals and their technical proposals.

30. Immediately following the pre-bid conference, Respondent issued Addendum 5, which consisted of a revised Exhibit A, Scope of Services; revised Exhibit C, Bid Sheet in Excel format for all six sections; and responses to the questions posed at the pre-bid conference.<sup>10/</sup>

31. The Addendum 5 Bid Sheet comprising Exhibit C, Section 6, was substantially amended from the version that was published in Addendum 1. Specifically, the column previously titled "Rate" was changed to "Rate Per Unit"; the "Extension (Unit X Rate)" and "Multiplier 2.5" columns were deleted; and a new column titled "Proposed Cost (Rate per Unit X Est. No. of Units)" was added. Additionally, the instructions for Section 6 were substantially amended to read: "'Rate Per Unit' must include all costs associated with the purchase, installation, watering, fertilization, project management, field supervision,

travel, invoicing, labor, maintenance of traffic, mobilization and demobilization, staking and guying, maintenance of planting site throughout the 180[-]day plant warranty." These amendments were intended to clarify that the proposed rate for each plant unit was to include all overhead costs associated with performance of the Contract with respect to that particular unit.

32. On November 13, 2015, CECOS filed a Notice of Protest to Respondent's issuance of Addendum 4, requiring the vendors to submit new price proposals.

33. Thereafter, on November 23, 2015, CECOS filed the First Petition challenging Respondent's decision, announced in Addendum 4, to require the responding vendors to submit new proposals for the price proposal portion of the RFP, and its decision to cancel the notice of intent to award the Contract to CECOS.<sup>11/</sup>

34. Once CECOS filed its Notice of Protest on November 13, 2015, Respondent ceased all procurement activity directed toward awarding the Contract.

35. On December 17, 2015, Respondent posted notice that it was rejecting all proposals and that the Contract would be re-advertised through issuance of a new RFP.

36. On December 22, 2015, CECOS filed a Notice of Protest, and on January 4, 2016, filed its Second Petition challenging

Respondent's decision to reject all proposals and re-advertise the Contract.

### III. Bases for Respondent's Actions

37. Shortly after Respondent posted the Proposal Tabulation noticing its intent to award the Contract to CECOS, Christine Perretta, owner and president of DB, sent an email to Respondent, then called Rubio to inquire about Respondent's decision to award the Contract to CECOS. The evidence shows that these contacts occurred sometime on or around November 3, 2016.<sup>12/</sup>

38. In her telephone discussion with Rubio, Perretta inquired about how to file a notice of protest<sup>13/</sup> and also asked whether Respondent had reviewed the vendors' price proposals for correctness or accuracy, or had simply chosen the lowest price proposal. In the course of the discussion, Perretta informed Rubio that DB had submitted a "loaded" rate for each plant unit—meaning that DB's rate proposed for each plant item in the "Rate" column on the Section 6 Bid Sheet consisted not only of the cost of the plant item, but also the cost for all associated overhead services listed in the instructions to Section 6 and in the RFP Advertisement, paragraph 18(v), plus compensation.<sup>14/</sup>

39. Rubio could not clearly recall whether, in the course of their discussion, Perretta had inquired about the use of the 2.5 multiplier, and there is conflicting evidence as to whether

Perretta related her view that CECOS may not be able to perform the Contract based on the price proposal it had submitted. In any event, as a result of Rubio's discussion with Perretta, Rubio determined that she needed to review Exhibit C, Section 6.

40. In the course of her investigation, Rubio called Wendy Cyriaks, owner and president of CECOS.<sup>15/</sup> Cyriaks confirmed that CECOS had submitted an "unloaded" rate for each plant item—meaning that it had included only the cost of each plant item in the "Rate" column on the Section 6 Bid Sheet, and had not included, in the proposed rate for each plant item, the cost of the associated overhead services listed in the instructions to Section 6 or RFP Advertisement, paragraph 18(v), or compensation. Cyriaks told Rubio that CECOS expected that its overhead costs and compensation for each item would be covered through use of the 2.5 multiplier.

41. Also in the course of her investigation, Rubio asked Bogardus whether he had intended the 2.5 multiplier to be used to cover all costs, including vendor compensation, associated with obtaining, installing, and maintaining the plant items listed in Section 6. Bogardus initially confirmed that his intent in including the 2.5 multiplier on the Section 6 Bid Sheet was to cover all of the overhead costs and compensation. However, the persuasive evidence establishes that Bogardus



subsequently agreed with Rubio that the 2.5 multiplier should not have been included in Section 6.

42. Pursuant to her discussions with Perretta and Cyriaks, Rubio realized that the wide discrepancy between DB's and CECOS' price proposals was due to their differing interpretations of the instructions in Section 6 regarding plant item rates and the inclusion of the "2.5 Multiplier" column in the Section 6 Bid Sheet.

43. Rubio testified, persuasively, that the inclusion of the "2.5 Multiplier" column rendered Exhibit C, Section 6, of the RFP ambiguous. To that point, the RFP does not contain any instructions or discussion on the use of the 2.5 multiplier. Therefore, to the extent the multiplier was intended to be used by the vendors to build overhead costs and compensation into their price proposals, the RFP fails to explain that extremely important intended use—leaving the significance and use of the multiplier open to speculation and subject to assumption by the vendors in preparing their price proposals. Rubio reasonably viewed DB's and CECOS' divergent interpretations of the instructions and the inconsistent use of the 2.5 multiplier as further indication that Section 6 was ambiguous. She explained that in order for Respondent to ensure that it is procuring the most advantageous proposal for the State, it is vitally important that the RFP be clear so that responding vendors

clearly understand the type of information the RFP is requesting, and where and how to provide that information in their price proposals.

44. Rubio persuasively testified that in her view, the instructions in Section 6 had, in fact, called for a loaded rate, but that CECOS had erroneously assumed, based on the inclusion of the "2.5 Multiplier" column in the Section 6 Bid Sheet, that overhead and compensation for each plant item would be covered through use of the 2.5 multiplier, and that as a consequence, CECOS incorrectly proposed unloaded rates for the plant items. In Rubio's view, CECOS' error was due to the ambiguity created by the unexplained and unsupported inclusion of the 2.5 multiplier in Section 6. Rubio testified that CECOS had been awarded the Contract because it had submitted the lowest price proposal, but that its proposal was based on an unloaded rate for the plant items, contrary to the instructions for Section 6. In Rubio's view, CECOS' price proposal was unresponsive, and CECOS should not have been awarded the Contract.

45. Rubio also testified, credibly and persuasively, that the use of the 2.5 multiplier in Section 6 for compensation purposes rendered the RFP arbitrary. Respondent's District IV historically has not used a 2.5 multiplier for compensation purposes for commodities contracts, and no data or analyses

exist to support such use of a 2.5 multiplier.<sup>16/</sup> This rendered the RFP both arbitrary and unverifiable with respect to whether it was structured to obtain the most advantageous proposal for the State.

46. To this point, Rubio credibly explained that Respondent's existing environmental mitigation services contract with Stantec was procured through the "Invitation to Negotiate" ("ITN") process. In that procurement, Respondent negotiated to obtain the best value for the State. The ITN bid sheet contained a 2.5 multiplier that was used only for weighting purposes to evaluate and determine which firms would be "short-listed" for purposes of being invited to negotiate with Respondent for award of the contract. Importantly—and in contrast to the RFP at issue in this case—the multiplier in the ITN was not used to determine the final prices, including compensation, to install trees, shrubs, and ground cover under that contract.

47. Rubio also testified, credibly, that the Bid Sheet was structurally flawed because it did not allow the vendor to clearly indicate the "unit price" inclusive of all overhead costs, and that this defect would result in Respondent being unable to issue letters of authorization to pay invoices for the cost of installing the plant items or compensating for work performed.

48. For these reasons, Respondent determined that it needed to cancel the intent to award the Contract to CECOS. As noted above, Respondent posted the cancellation of the intent to award the Contract on November 5, 2015.

49. At a meeting of the SC conducted on November 9, 2015, Respondent's procurement staff explained that the intent to award the Contract had been cancelled due to ambiguity in the instructions and the Bid Sheet for Exhibit C, Section 6. Ultimately, the SC concurred with Respondent's cancellation of the intent to award the Contract to CECOS and agreed that the vendors should be required to submit new price proposals.

50. Thereafter, on November 9, 2015, Respondent issued Addendum 4, announcing its decision to solicit new price proposals from the responding vendors.

51. Respondent conducted a pre-bid meeting with the vendors on November 12, 2015, and immediately thereafter, issued Addendum 5, consisting of a revised Scope of Services and a substantially revised Bid Sheet for all six sections of Exhibit C.

52. As previously discussed, the Section 6 Bid Sheet issued in Addendum 5 was revised to, among other things, delete the "2.5 Multiplier" column and the column previously titled "Rate" was changed to "Rate Per Unit." Also as discussed above, the instructions to Section 6 were revised to clarify that the

"Rate Per Unit" provided for each plant unit must contain all costs associated with the purchase, installation, watering, fertilization, project management, field supervision, invoicing, labor, maintenance of traffic, and other costs specified in the instructions—i.e, constitute a loaded rate. All of these changes were made in an effort to clarify, for the benefit of all vendors, the specific information that Respondent needed to be provided in the price proposals.

53. Rubio testified, credibly, that in requiring the vendors to submit new price proposals pursuant to revised Exhibit C, Respondent did not give, or intend to give, any vendor a competitive advantage over any of the other vendors, nor did Respondent place, or intend to place, CECOS at a competitive disadvantage by requiring the vendors to submit new price proposals pursuant to revised Exhibit C.

54. As noted above, once CECOS filed its Notice of Protest, Respondent ceased all procurement activity directed toward awarding the Contract. Consequently, the vendors did not submit new price proposals and the scheduled meetings at which the new price proposals would be opened and the intended awardee announced were cancelled.

55. On December 17, 2015, Rubio briefed the SC regarding the problems with the RFP and described her concerns about proceeding with the procurement. She explained that

Respondent's procurement staff was of the view that the instructions in Section 6, as previously published in Addendum 1, were ambiguous because they did not clearly provide direction on how to complete the Bid Sheet for that section. Additionally, the Section 6 Bid Sheet, as structured in Addendum 1, did not allow the vendors to provide a plant unit rate that was inclusive of all overhead costs. To this point, she noted that unless the vendors provided a loaded rate—i.e., one that included all overhead costs—Respondent would not be able to issue work orders for any plant items in Section 6.<sup>17/</sup> She explained that these flaws constituted the bases for Respondent's decision, announced on November 9, 2015, to require the submittal of new price proposals.

56. Rubio further explained that in Respondent's rush to issue a revised Scope of Services as part of Addendum 5, mistakes had been made<sup>18/</sup> and Respondent's Environmental Office needed more time to carefully review the Scope of Services and Bid Sheet, to ensure the RFP was correctly drafted and structured so that the Contract could be accurately solicited and procured. Additionally, the vendors—including Mark Clark of CECOS—had expressed confusion regarding the revised Bid Sheet and submitting new price proposals, and some vendors had inquired about submitting new technical proposals. Further, under the revised procurement schedule issued as part of

Addendum 4 on November 9, 2015, the vendors had a very compressed timeframe in which to prepare and submit their new price proposals, heightening the potential for mistakes to be made.

57. Because of these substantial problems and concerns with the RFP, Rubio recommended that Addendum 5 be rescinded, that all vendor proposals (both technical and price) be rejected, and that the entire procurement process be re-started. The SC concurred with her recommendation.

58. As noted above, on December 17, 2015, Respondent rejected all proposals and announced that the Contract would be re-solicited in the future through issuance of another RFP.

#### IV. CECOS' Position

59. CECOS takes the position that the RFP and the Section 6 Bid Sheet published in Addendum 1 were not ambiguous. Specifically, CECOS contends that the use of the 2.5 multiplier in Section 6 clearly indicated that Respondent was seeking an unloaded rate for the plant items listed on the Section 6 Bid Sheet. In support of this position, CECOS notes that all of the vendors other than DB had submitted unloaded rates for the plant items in Section 6. CECOS contends that this shows that Section 6 was not ambiguous, and that DB simply did not follow the RFP instructions—of which it was fully aware—in preparing and submitting its price proposal.<sup>19/</sup>

60. CECOS also contends that Rubio's failure to contact the other vendors to determine if they found the instructions or use of the 2.5 multiplier in Section 6 ambiguous evidences that Rubio's conclusion that Section 6 was ambiguous lacked any factual basis, so was itself arbitrary.

61. CECOS asserts that Bogardus' intent to use a 2.5 multiplier for compensation purposes was evidenced by its inclusion on the Section 6 Bid Sheet, that its use on the Section 6 Bid Sheet did not render the RFP flawed, and that Bogardus' intent to compensate using the multiplier should control the structure of compensation paid under Section 6.<sup>20/</sup>

62. CECOS also notes that the use of the 2.5 multiplier on the Section 6 Bid Sheet mirrors the 2.5 multiplier in the existing environmental mitigation support services contract with the current contractor.<sup>21/</sup> CECOs further contends that there was no material difference, with respect to structuring compensation for the plant items, between the ITN process used for procuring the existing contract and the RFP process used to procure this Contract. As additional support for its argument that the use of the 2.5 multiplier in Section 6 was valid, CECOS points to a request for proposal for environmental mitigation services issued by Respondent's District VI. In that contract, a 2.5 multiplier was used for compensation purposes, albeit for specific plant items that were not contained in the original



list of specific plant items for which rate proposals had been solicited in the request for proposal.

63. CECOS further contends that Respondent—and, most particularly, Rubio—did not conduct a thorough investigation into the historic use of 2.5 multipliers in Respondent's commodities contracts. CECOS argues that as a consequence, Respondent's determination that the use of the 2.5 multiplier rendered the Section 6 Bid Sheet structurally flawed and arbitrary was unsupported by facts, so was itself arbitrary and capricious.

64. CECOS asserts that cancelling the notice of intent to award the Contract to CECOS and requiring the vendors to submit new price proposals placed CECOS at a competitive disadvantage and was contrary to competition because once the Proposal Tabulation was posted, the other vendors were informed of the price that CECOS had bid, so knew the price they had to beat when the Contract was re-solicited.

65. CECOS also points to what it contends are procedural irregularities with respect to Respondent's treatment of, and communication with, CECOS and DB once Respondent decided to cancel the notice of intent to award the Contract to CECOS. Specifically, CECOS contends that Respondent did not respond to its calls or email asking why the intent to award the Contract to CECOS had been cancelled. CECOS also contends that

Respondent communicated with DB on substantive matters during the "cone of silence." CECOS further notes that Respondent did not convene a resolution meeting within the statutorily-established seven-day period after CECOS filed its First Petition, but instead held the meeting over 60 days later, on January 28, 2015, and that even then, Respondent did not engage in good faith negotiation to resolve the challenge.

66. Finally, CECOS contends that Respondent's decision to reject all proposals and start the procurement process anew was predicated on a series of arbitrary and erroneous decisions (discussed above) that created confusion, so that Respondent's ultimate decision to reject all proposals was itself arbitrary and capricious.

67. CECOS asserts that it followed the instructions in the RFP in preparing its price proposal, submitted the lowest price proposal, and is ready, willing, and able to perform the Contract at the rates it proposed in its response for Section 6. On that basis, CECOS contends that it is entitled to the award of the Contract.

#### V. Findings of Ultimate Fact

68. CECOS bears the burden in this proceeding to prove that Respondent's decision to reject all proposals was arbitrary, illegal, dishonest, or fraudulent.<sup>22/</sup> Even if CECOS were to meet this burden, in order to prevail it also must

demonstrate that Respondent's actions in cancelling the intent to award the Contract and requiring the submittal of new price proposals were clearly erroneous, arbitrary, capricious, or contrary to competition. For the reasons discussed herein, it is determined that CECOS did not meet either of these burdens.

The Multiplier Rendered Section 6 Ambiguous, Arbitrary, and Structurally Flawed

69. As discussed in detail above, Respondent decided to cancel the intent to award the Contract to CECOS and to require the submittal of new price proposals by the vendors only after it had conducted an extensive investigation that included a careful review of numerous provisions in the RFP and the instructions to Section 6 and had analyzed the structure of Section 6 in relation to other provisions in the RFP.

70. That investigation showed that nowhere in the RFP was the use of the 2.5 multiplier in Exhibit C, Section 6, discussed or explained. Thus, to the extent the multiplier was to be used in determining reimbursement for overhead costs and compensation, the RFP failed to explain this extremely important point, leaving the multiplier's purpose, use, and significance open to speculation and assumption by the vendors in submitting their price proposals. This rendered the multiplier's use in Section 6 ambiguous. This ambiguity is further evidenced by DB's and CECOS's widely divergent price proposals for Section 6,

and the credible testimony of Perretta and Cyriaks regarding their differing views of the purpose of the 2.5 multiplier.

71. The credible, persuasive evidence establishes that the ambiguity in Section 6 caused the vendors to have differing interpretations of the manner in which they were to propose plant unit rates in Section 6; that the vendors submitted plant price proposals predicated on differing assumptions; and that this resulted in Respondent being unable to fairly compare the price proposals for purposes of obtaining the most advantageous proposal for the State.

72. On these bases, Respondent reasonably concluded<sup>23/</sup> that the inclusion of the 2.5 multiplier in Section 6, rendered that portion of the RFP ambiguous.

73. As extensively discussed above, the credible, persuasive evidence also establishes that Respondent concluded, based on its investigation and review of Section 6, that inclusion of the 2.5 multiplier rendered Section 6 both arbitrary and structurally flawed.<sup>24/</sup>

74. The credible, persuasive evidence further establishes that Rubio investigated Respondent's use of multipliers in commodities procurements and contracts to the extent necessary and appropriate for her to reasonably conclude that the use of the 2.5 multiplier in Section 6 rendered this portion of the RFP ambiguous, arbitrary, and structurally flawed.<sup>25/</sup>

75. In sum, the credible, persuasive evidence establishes that Respondent engaged in a thorough and thoughtful investigation before concluding, reasonably, that the inclusion of the 2.5 multiplier in Exhibit C, Section 6 rendered that portion of the RFP ambiguous.

Respondent's Actions Were Not Contrary to Competition

76. Although the evidence shows that CECOS may suffer some competitive disadvantage because competing vendors were informed of the lowest "bottom line" price they would have to beat, it does not support a determination that Respondent's decisions to cancel the intent to award the Contract to CECOS and require the vendors to submit new price proposals were contrary to competition. To that point, in Addendum 5, Respondent substantially restructured the Section 6 Bid Sheet and also amended the Bid Sheet comprising the other price proposal sections in Exhibit C, so that CECOS' and the other vendors' price proposals submitted in response to Addendum 5 may have substantially changed from those submitted in response to Addendum 1. In any event, it cannot be concluded that Respondent's decisions to cancel the intent to award the Contract to CECOS and require submittal of new price proposals are contrary to competition such that they should be overturned in this proceeding.

## Procedural Irregularities

77. CECOS also points to certain procedural irregularities in Respondent's treatment of, and communication with, CECOS once Respondent decided to cancel the notice of intent to award the Contract to CECOS and require submittal of new price proposals. CECOS apparently raises these issues in an effort to show that Respondent's actions were clearly erroneous, contrary to competition, arbitrary, or capricious.

78. The undisputed evidence establishes that Rubio communicated with both DB and CECOS during the "cone of silence" following the posting of its intent to award the Contract to CECOS. The undersigned determines that the "cone of silence" applied to Rubio and her communications with DB and CECOS within the 72-hour period following Respondent's posting of the intent to award the Contract. Specifically, she is an employee of Respondent's District IV Office, so is an employee of the executive branch of the State of Florida. Further, the evidence shows that her communications with both DB and CECOS during the "cone of silence" period dealt specifically with substantive, rather than "administrative" issues regarding the RFP and the vendors' price proposals. Accordingly, it is determined that these communications did, in fact, violate the "cone of silence."

79. However, this does not require that Respondent's decision to cancel the intent to award the Contract to CECOS be overturned. The credible, persuasive evidence shows that while DB's conversation with Rubio may have spurred Rubio to decide she should investigate the Section 6 instructions and use of the 2.5 multiplier, it was not the reason why Respondent ultimately determined that the intent to award the Contract should be cancelled. Rather, Respondent's discovery of the ambiguity and structural flaws in Section 6, through Rubio's investigation, was the reason that Respondent determined that the intent to award the Contract to CECOS should be cancelled.

80. In sum, the credible, persuasive evidence shows that notwithstanding Rubio's communications on substantive matters during the "cone of silence" with both DB and CECOS, the integrity of the procurement process was not undermined such that Respondent's decision to cancel the intent to award the Contract to CECOS was clearly erroneous, contrary to competition, arbitrary, or capricious.

81. CECOS failed to present persuasive evidence establishing that other procedural irregularities rendered Respondent's actions in cancelling the intent to award the Contract to CECOS and requiring the vendors to submit new price proposals were clearly erroneous, contrary to competition, arbitrary, or capricious.

Respondent's Decisions to Cancel Intent to Award the Contract and Require Submittal of New Price Proposals

82. Based on the foregoing, it is determined that CECOS did not meet its burden to show that Respondent's decisions in cancelling the intent to award the Contract to CECOS and requiring the vendors to submit new price proposals were clearly erroneous, contrary to competition, arbitrary, or capricious.

Respondent's Decision to Reject All Proposals

83. As noted above, CECOS contends that Respondent's decision to reject all proposals and start the procurement process anew was predicated on a series of arbitrary and erroneous decisions that created confusion, so that Respondent's ultimate decision to reject all proposals was itself arbitrary and capricious. However, the credible, persuasive evidence shows that Respondent's ultimate decision to reject all bids was factually supported and was reasonable.

84. As discussed above, Respondent initially decided to cancel the intent to award the Contract to CECOS and to require the vendors to submit new price proposals after it discovered the ambiguity and structural flaws resulting from the use of the 2.5 multiplier in Section 6. At that point, rather than rejecting all proposals, which would require the vendors to go to the time and expense of preparing completely new proposals,



it decided to instead only require the vendors to submit new price proposals.

85. Due to the interrelated nature of the six sections of Exhibit C comprising the complete price proposal for the RFP, Respondent determined revision of Section 6 would also require revision of the other five sections of Exhibit C, in order to ensure that they were internally consistent with each other.

86. At the mandatory pre-bid meeting preceding the issuance of Addendum 5, the participating vendors had numerous questions about the sweeping revisions to all six sections of Exhibit C, and they expressed confusion about the revisions and their effect on preparation of new price proposals. Some vendors also expressed concern that they may have to change their personnel in order to be able to accurately prepare new price proposals, raising the question whether the technical proposals needed to be revised.

87. As a result of vendor confusion and concern, and also because Respondent's Environmental Office needed additional time to carefully review and revise the RFP as needed, Respondent decided to reject all proposals and to start the procurement process anew.

88. Respondent's decision to reject all bids was made after fully considering all of the pertinent information regarding the ambiguity and structural flaws in Section 6,

vendor confusion and concern caused by Respondent's revisions to Exhibit C needed to address the ambiguity and flaws in Section 6, and Respondent's need for additional time to ensure that its RFP accurately and clearly solicited the needed environmental mitigation support services.

89. Accordingly, Respondent did not act arbitrarily in deciding to reject all bids.

90. Further, no persuasive evidence was presented to show that Respondent's decision to reject all bids was illegal, dishonest, or fraudulent.

#### CONCLUSIONS OF LAW

91. DOAH has jurisdiction over the subject matter of, and parties to, this proceeding, pursuant to sections 120.569 and 120.57(1).

92. These consolidated proceedings entail challenges to two public procurement decisions made by Respondent regarding the award of the Contract pursuant to the RFP. As discussed above, these decisions were, first, to cancel the notice of intent to award the Contract to CECOS and require the submittal of new price proposals, and, ultimately, to reject all proposals and re-start the procurement process.

93. As the entity initially awarded the Contract at issue in these proceeding, CECOS has standing to challenge Respondent's decisions at issue in Case Nos. 16-0769 and Case

No. 16-3530, which resulted in CECOS not being awarded the Contract as initially announced. By Order issued March 9, 2016, DB was determined to have standing in Case No. 16-3530.<sup>26/</sup>

94. These consolidated proceedings are governed by section 120.57(3), which states in pertinent part:

(3) ADDITIONAL PROCEDURES APPLICABLE TO PROTESTS TO CONTRACT SOLICITATION OR AWARD.—

Agencies subject to this chapter shall use the uniform rules of procedure, which provide procedures for the resolution of protests arising from the contract solicitation or award process. Such rules shall at least provide that:

(a) The agency shall provide notice of a decision or intended decision concerning a solicitation, contract award, or exceptional purchase by electronic posting. This notice shall contain the following statement: "Failure to file a protest within the time prescribed in section 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 chapter 120, Florida Statutes."

(b) Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision. With respect to a protest of 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, the notice of protest shall be filed in writing within 72

hours after the posting of the solicitation. The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based. Saturdays, Sundays, and state holidays shall be excluded in the computation of the 72-hour time periods provided by this paragraph.

(c) Upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.

\* \* \*

(f) In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the

agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

95. As the party challenging Respondent's proposed agency actions at issue, CECOS bears the burden of proof in these proceedings. § 120.57(3)(f), Fla. Stat.; State Contracting and Eng'g. Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

96. As an overarching principle, public bodies in Florida are legislatively afforded wide discretion in soliciting and accepting bids and proposals, and their procurement decisions, when based on an honest exercise of that discretion, will not be overturned, even if the decisions may appear erroneous and even if reasonable persons may disagree. Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505, 506 (Fla. 1982).

97. In Caber Systems, Inc. v. Department of General Services, 530 So. 2d 325, 336 (Fla. 1st DCA 1988), the court held that even if a protest has been filed challenging an agency's decision regarding the award of a contract, the

statutory provision<sup>27</sup> requiring the agency to stop the solicitation or contract award process pending resolution of the protest only means that the agency cannot continue the procurement process leading to the award of the contract; it does not mean that the agency is precluded from thereafter rejecting all bids. See LabCorp. V. Dep't of Health, Case No. 12-0846 (Fla. DOAH May 7, 2012; Fla. DOH Jun. 21, 2012) (confirming agency authority to reject all bids after a notice of award has been announced and bids have been made public). Accordingly, in this case, the threshold question is whether CECOS has demonstrated that Respondent's action in rejecting all proposals violated the applicable standard of review.

98. The standard of review applicable to CECOS' challenge to Respondent's action rejecting all proposals is whether that action was illegal, arbitrary, dishonest, or fraudulent. Id.; Dep't of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 914 (Fla. 1988).

99. This is a stringent burden. As the court stated in Gulf Real Properties, Inc. v. Department of Health and Rehabilitative Services, 687 So. 2d 1336, 1338 (Fla. 1st DCA 1997), an agency's rejection of all bids must stand, absent a showing that the purpose or effect of the rejection is to defeat the object and integrity of competitive bidding.

100. For the reasons discussed above, CECOS failed to meet its burden to show that Respondent's action rejecting all bids was illegal, arbitrary, dishonest, or fraudulent. To the contrary, the evidence shows that Respondent's decision to reject all bids was not arbitrary,<sup>28/</sup> and CECOS presented no evidence establishing that Respondent's action was illegal, dishonest, or fraudulent.

101. If it had been determined that Respondent's action in rejecting all bids was illegal, arbitrary, dishonest, or fraudulent, then the question would become whether Respondent's action in cancelling its statement of intent to award the Contract to Petitioner was clearly erroneous, contrary to competition, arbitrary, or capricious.

102. Although not necessary to address because CECOS failed to prevail on the threshold issue regarding Respondent's decision to reject all bids, it is also concluded that CECOS failed to show that Respondent's decisions to cancel the award of the Contract to CECOS and require the vendors to submit new price proposals was not clearly erroneous, contrary to competition, arbitrary, or capricious. To the contrary, as discussed above, the evidence established that Respondent's decision was correct, was not contrary to competition, and was rationally reached following a thorough investigation and analysis, so was not arbitrary or capricious.

103. Accordingly, CECOS failed to meet the applicable burdens in both Case No. 16-0769 and in Case No. 16-3530.

RECOMMENDATION

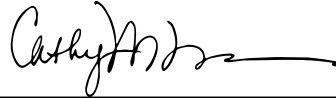
Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Department of Transportation:

1. Issue a final order in Case No. 16-0769 finding that the rejection of all proposals in response to Request for Proposal RFP-DOT-15/16-4004PM was not illegal, arbitrary, dishonest, or fraudulent; and

2. Issue a final order in Case No. 16-3530 finding that the decisions to cancel the award of the Contract for Request for Proposal RFP-DOT-15/16-4004PM to CECOS and to require the vendors to submit new price proposals for Request for Proposal RFP-DOT-15/16-4004PM were not clearly erroneous, contrary to competition, arbitrary, or capricious.



DONE AND ENTERED this 30th day of December, 2016, in  
Tallahassee, Leon County, Florida.



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CATHY M. SELLERS  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of December, 2016.

ENDNOTES

<sup>1/</sup> All references are to Florida Statutes 2016 unless otherwise stated.

<sup>2/</sup> In Case No. 16-3530, CECOS has challenged both Respondent's decision announced on November 5, 2015, to cancel the intent to award the contract at issue to CECOS, and Respondent's decision announced on November 9, 2015, in Addendum 4, to require the submittal of new price proposals. Although CECOS did not file a Notice of Protest within 72 hours of Respondent's posting of the cancellation of intent to award the Contract to CECOS, the cancellation cannot be fairly read to provide a clear point of entry notifying CECOS and the other vendors of their right to challenge the cancellation of the intent to award. Respondent's cancellation of the intent to award consisted of three documents. One was an Advertisement issued on November 5, 2015, at 5:14:25 p.m., identifying the Commodity Number, posting a link to the document constituting the cancellation of intent to award, and stating that the Advertisement ended on November 9, 2015, at 5:06 p.m. Another listed the project number and project description, and stated that the posting of the intent to award was cancelled and would be reviewed by the Selection Committee on Monday, November 9, 2015. The third document consisted of the Proposal Tabulation that previously had been

posted, with "CANCELLED" written across the face. Although the Proposal Tabulation notified the vendors of the right to challenge the Proposal Tabulation and the timeframe for doing so, no separate notice language was provided for Respondent's cancellation of the intent to award. Further, given that one of the cancellation documents stated that the matter would be "reviewed" at a subsequent meeting, it was reasonable for CECOS to assume that the cancellation decision may be reversed. Under these circumstances, it cannot be concluded that Respondent provided a clear point of entry that informed the vendors of their right to challenge the cancellation of the intent to award. See Fla. Optometric Ass'n v. Bd. of Optometry, 567 So. 2d 928, 935 (Fla. 1st DCA 1990) (for a notice to be legally sufficient to provide a clear point of entry, it must clearly inform regarding the nature of the agency's decision, as well as the process and timeframe for challenging that decision). Accordingly, the 72-hour timeframe for CECOS to file a Notice of Protest to challenge the cancellation of the intent to award the Contract did not commence, so did not expire. See Manasota-88 v. Dep't of Env'tl. Reg., 417 So. 2d 846 (Fla. 1st DCA 1982). Therefore, CECOS timely asserted its challenge to that action in the Petition for Formal Hearing filed on November 23, 2015, which challenges both Respondent's decision to cancel the intent to award the Contract to CECOS, and Respondent's decision to re-solicit the price proposals for the RFP.

<sup>3/</sup> For purposes of evidentiary rulings in the record, CECOS' exhibit numbers were keyed to its exhibit numbers on the table included in the parties' Joint Pre-hearing Stipulation, rather than to the numbers on the binder tabs in CECOS' exhibits notebook.

<sup>4/</sup> This exhibit, which consisted of the Joint Response to Petitioner's Amended Motion to Compel Discovery and Petitioner's Amended Response to Department's Motion for Protective Order, was excluded on relevance grounds.

<sup>5/</sup> The parties waived the 30-day deadline for issuance of this Recommended Order.

<sup>6/</sup> Proposing and responding vendors are collectively referred to as "vendors" in this Recommended Order.

<sup>7/</sup> The instructions for Section 6, as published in Addendum 1, were not revised from those initially published for that section.

8/ The Proposal Tabulation states, in pertinent part:

X [placed next to the awardee's name—here, CECOS] indicates apparent awarded vendor, but does not constitute an acceptance of any offer created by the vendor's proposal. No binding contract will be deemed to exist until such time as a Purchase Order or written acceptance by the [D]epartment has been issued. If irregularities are subsequently discovered in the vendor's proposal . . . or otherwise fails to comply with the request for proposal requirements, the Department has the [r]ight to . . . reject all proposals, or act in the best interest of the Department.

9/ DB withdrew its Notice of Protest by email sent at 8:52 a.m., shortly before the SC's November 9, 2015, meeting which started at 9:00 a.m. Respondent's clerk's office stamped a paper copy of DB's email at 11:10 a.m.; however, there is no persuasive evidence showing that DB did not, in fact, send its email withdrawing its Notice of Protest before the SC meeting convened at 9:00 a.m. Furthermore, even if it were determined that DB did not withdraw its Notice of Protest by the start of the SC meeting, there was no persuasive evidence presented showing that this short time discrepancy of slightly more than two hours, in any way tainted the fairness of the procurement process in these proceedings.

10/ Addendum 5 was not challenged.

11/ See supra note 2.

12/ There is no dispute that Perretta's email contact and telephone discussion with Respondent occurred during the "cone of silence."

13/ Rubio directed Perretta to Respondent's Office of General Counsel where she obtained information regarding filing a notice of protest.

14/ As discussed below, Perretta testified, credibly, that she did not interpret the 2.5 multiplier column as constituting the means by which the vendors were to include their overhead costs and compensation, because the "2.5 Multiplier" column was not manipulable on the Bid Sheet, no other section in Exhibit C had

a multiplier column, and the RFP did not include any discussion about the use of the multiplier. Perretta testified, credibly, that to the extent she considered the purpose of the "2.5 Multiplier" column on the Section 6 Bid Sheet, she assumed that it was an internal weighting factor to be used by Respondent in evaluating the price proposals.

<sup>15/</sup> Rubio's discussion with Cyriaks also took place during the "cone of silence."

<sup>16/</sup> Rubio testified, credibly, that Respondent previously has used multipliers in RFPs to assign different relative weights to specific RFP sections for purposes of evaluating proposals, but that they do not use multipliers in commodities for compensation purposes in contracts. Based on her discussion with Bogardus, she realized that in this case, the 2.5 multiplier in Section 6 had not been included as a weighting factor, but instead had been included to be used for compensation purposes, without supporting data to show that its use in the RFP would secure the most advantageous proposal for the State.

<sup>17/</sup> In response, CECOS asserts that Respondent could mathematically calculate its unit price for each plant item in Section 6, and that it would have to do so for invoicing purposes in any event. However, Rubio credibly testified that this would constitute manipulating CECOS' price proposal to render it responsive to the RFP requirements, and that Respondent is prohibited by law from doing so.

<sup>18/</sup> For example, the RFP, as initially published, had erroneously included a discussion of engineering services in the Scope of Services Section. That discussion had been removed as part of Addendum 1, but had inadvertently been added back into the RFP in Addendum 5.

<sup>19/</sup> To this point, CECOS notes that the RFP expressly limited the total compensation for work performed under the Contract at \$5,000,000, so DB should have known that its price proposal of \$9,083,042.50 was not in conformance with the RFP requirements. CECOS dismisses DB's interpretation of the 2.5 multiplier as being the mistake of an inexperienced proposing vendor.

<sup>20/</sup> However, as discussed above, the credible evidence shows that Bogardus subsequently agreed with Rubio that the 2.5 multiplier should not have been included in the Section 6 Bid Sheet.

<sup>21/</sup> In essence, CECOS argues that its interpretation of the purpose of the 2.5 multiplier in Section 6 is correct because it is consistent with CECOS' prior experience with the use of multipliers in other contracts with Respondent, including the existing environmental services contract with Stantec. However, as discussed herein, the terms of the RFP document provided no reasonable basis for CECOS to assume that the 2.5 multiplier was being used in this procurement in the same manner in which it had been used in prior procurements.

<sup>22/</sup> See paragraph 97, *infra*.

<sup>23/</sup> The evidence establishes that Rubio diligently investigated the ambiguity issue before concluding that the 2.5 multiplier rendered Section 6 ambiguous. Once she had determined, by reviewing the RFP document itself, that two vendors had reasonably interpreted the multiplier to have different meanings, it was unnecessary for her to poll the other vendors for their views on that issue. To that point, Rubio did not rely solely on CECOS' or DB's opinions as to whether inclusion of the multiplier rendered Section 6 ambiguous; she also reviewed the RFP document in arriving at her conclusion that including the 2.5 multiplier rendered Section 6 ambiguous.

<sup>24/</sup> On this point, Rubio credibly distinguished the District VI environmental services procurement and contract on which CECOS relies to bolster its position that the use of the 2.5 multiplier in Section 6 of the RFP was valid. In the District VI procurement and contract, the 2.5 multiplier is used for compensating vendors for specific plant items that were not included in the list of specified plant items in the RFP. Rubio explained, persuasively, that under those limited circumstances, the vendor may need to act on short notice to obtain plant items that were not specifically identified in the RFP, so are paid an administrative fee consisting of the price of the plant unit multiplied by a 2.5 multiplier. This administrative fee covers the cost of, and compensates the vendor for, obtaining these items only under these limited circumstances. For this reason, the use of the 2.5 multiplier in the District VI procurement document is not comparable to, so cannot be to support the validity of, the use of the 2.5 multiplier in the RFP at issue in these proceedings.

<sup>25/</sup> Rubio has served as Respondent's District IV Procurement Officer (i.e., as manager of the District IV Procurement Office) for eight years and has reviewed numerous procurement instruments during her tenure, so she is extremely knowledgeable

regarding the range of procurement instruments. Based on her extensive knowledge and experience, as well as her investigation of Section 6 of the RFP, it is determined that Rubio's decision regarding the invalidity of use of the 2.5 multiplier in Section 6 was not arbitrary or capricious.

<sup>26/</sup> CECOS did not appeal the March 9, 2016, Order regarding DB's standing and DB's standing was not raised in the Joint Pre-hearing Stipulation as an issue that would be tried in the final hearing.

<sup>27/</sup> This provision currently is codified at section 120.57(3)(c). At the time Caber was decided, that provision was codified at section 120.53(5)(c).

<sup>28/</sup> An arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chem. Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1982).

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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.