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MIAMI DADE COLLEGE
DISTRICT BOARD OF TRUSTEES

DIVISION OF
ADMINISTRATIVE HEARINGS

NADER+MUSEU I LIMITED
LIABILITY LIMITED PARTNERSHIP, A
FLORIDA LIMITED PARTNERSHIP

Petitioner,

vs.

AGENCY CASE NO.: 2016-02
DOAH CASE NO.: 16-4947BID

MIAMI DADE COLLEGE, AN AGENCY OF
THE STATE OF FLORIDA,

Respondent

and

PRH INVESTMENTS, LLC/THE RELATED
GROUP

Intervenor.

FINAL ORDER

On September 20, 2016, Administrative Law Judge ("ALJ"), Robert L. Kilbride, of the Division of Administrative Hearings ("DOAH") submitted an Amended Recommended Order of Dismissal concerning the Formal Bid Protest filed by Nader+Museu I LLLP ("Petitioner"). A copy of the Amended Recommended Order is attached hereto as Exhibit A. Miami Dade College ("MDC") filed Exceptions to the Amended Recommended Order, which is attached hereto as Exhibit B. On October 10, 2016, Petitioner filed its Responses to MDC's Exceptions, which is attached hereto as Exhibit C.

This matter came before the District Board of Trustees of Miami Dade College ("Board") on October 17, 2016, for final agency action to consider the Amended Recommended Order and

resolution of MDC's Exceptions and Responses filed by Petitioner. The Board has jurisdiction and has authorized the Board Chair and the Secretary to the Board and College President to execute this Final Order. After review of the entire record, the Amended Recommended Order, MDC's Exceptions, and Petitioner's Responses, and being otherwise fully advised in these proceedings, this Final Order is issued.

PROCEDURAL BACKGROUND

In May 2015, Petitioner submitted an unsolicited proposal to MDC for a public-private partnership relating to the redevelopment of a 2.6-acre parcel of land located on MDC's Wolfson Campus in Miami, Florida. The proposal contemplated a cultural arts center, conference center, theatre, art museum, parking garage and residential towers. In October 2015, MDC accepted Petitioner's proposal and subsequently initiated a competitive solicitation process. In total, four separate proposals were received by various companies, including Petitioner, PRH Investments, LLC/The Related Group ("Related"), Gregg Covin Development/Oppenheim Architecture ("Covin"), and Pi Art Tech and Trade Center at MDC, LLC ("Pi Art"). On March 28, 2016, the Evaluation Committee held a public meeting, during which the Committee considered and ranked the four proposals. On April 4, 2016, MDC published a Notice of Intended Decision ("First Intended Decision"), which eliminated Pi Art from consideration. On April 19, 2016, the Board authorized MDC to negotiate with the three remaining proposers, but also specified that negotiations should be undertaken simultaneously in an effort to obtain the best value for MDC. The remaining proposers were invited to submit an enhanced proposal containing each proposer's best offer.

On July 12, 2016, the Evaluation Committee held another public meeting, during which the Committee reviewed and ranked the three proposers in the following order: (1) Related with

470 points, (2) Petitioner with 425 points, and (3) Covin with 355 points. On July 19, 2016, MDC published another Notice of Intended Decision (“Second Intended Decision”), recommending that the Board authorize MDC to negotiate a comprehensive agreement with Related. In response, Petitioner filed a Notice of Protest of the Second Intended Decision, as well as a Formal Petition.

On August 25, 2016, MDC referred the matter to the DOAH, which assigned an ALJ to resolve the alleged bid protest. By subsequent order, Related was granted leave to intervene. On September 20, 2016, the ALJ entered an Amended Recommended Order of Dismissal of Petitioner’s Formal Bid Protest concluding that the referral of the case to DOAH was premature as the Second Intended Decision did not constitute a cognizable “intended decision” as contemplated by Rule 28-110.002(2), Florida Administrative Code, or Section 120.57(3)(b), Florida Statutes.

In response to the Amended Recommended Order, MDC filed Exceptions thereto and is challenging the ALJ’s findings of fact and conclusions of law. On October 10, 2016, Petitioner timely filed its Responses to MDC’s Exceptions. On October 17, 2016, the Board held a hearing to resolve MDC’s Exceptions and ultimately decide whether the Amended Recommended Order would be adopted in whole or in part.

STANDARD OF REVIEW

Section 120.57(3)(f), Florida Statutes, defines the burden of proof necessary in successfully protesting an invitation to negotiate procurement:

[T]he burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protests, . . . 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.

§ 120.57(3)(f), Fla. Stat.

Further, the standard of review of the agency's proposed action in such a proceeding has been 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. The hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.

Emerald Correctional Management v. Bay County Bd. of County Comm'rs, 955 So. 2d 647, 651 (Fla. 1st DCA 2007); *Scientific Games, Inc. v. Dittler Bros., Inc.*, 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991)(*per curiam*)(citations and quotations marks omitted).

As to the exceptions filed concerning the findings of fact, Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the ALJ's findings of fact "unless the agency first determines from a review of the entire record, and state with particularity in the order, that the findings of fact were not based on competent substantial evidence. § 120.57(1)(l), Fla. Stat.; *Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 – 63 (Fla. 1st DCA 2007). In addition, Section 120.57(1)(k), Florida Statutes, provides that "an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2006); *Belleau v. Dep't of Env'tl. Prot.*, 695 So. 2d 1305, 1307.

(Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *Arand Construction Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986); *Walker v. Bd. of Prof'l Eng'rs*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006). Following such a determination, the agency also lacks the authority to make independent or supplemental findings of fact. *See, e.g., City of North Port, Fla. v. Consol. Minerals, Inc.*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, also authorizes an agency to reject or modify an ALJ's conclusion of law and interpretations of administrative rules "over which it has substantive jurisdiction." *Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cty.*, 746 So. 2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep't of Env'tl. Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985). Agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such interpretations are "permissible." *Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996). Lastly, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as, or more reasonable than, that which was rejected or modified. § 120.57(1)(l), Fla. Stat.; *Scientific Games, Inc.*, 586 So. 2d at 1131.

RULING ON EXCEPTIONS

The Board's resolution is based on the written arguments of counsel, review of the entire record as properly filed by MDC, and the analysis provided to the Board by its counsel, as set forth expressly below.

Ruling on MDC's Exception No. 1

As to MDC's Exception No. 1, which contests in part Conclusion of Law Paragraph 19, the Board hereby grants the exception in part. MDC's Procedures 1010 and 1011 clearly indicate that the College President provides a recommendation to the Board as to which proposer MDC should first begin to negotiate a comprehensive agreement with.

As the Board has substantive jurisdiction over its procedures, including the bid process to authorize negotiations for a comprehensive agreement with a proposer as appropriate, it is permitted to modify the ALJ's Conclusion of Law. Moreover, the Board finds that its substitute Conclusion of Law is as or more reasonable than the ALJ's Conclusion of Law. § 120.57(1)(l), Fla. Stat.; *G.E.L. Corp. v. Dep't of Env'tl. Prot.*, 875 So. 2d 1257, 1263-64 (Fla. 5th DCA 2004); *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d 1140; *Barfield*, 805 So. 2d 1008; *L.B. Bryan & Co.*, 746 So. 2d 1194; *Scientific Games, Inc.*, 586 So. 2d at 1131. Therefore, based upon the foregoing, Conclusion of Law Paragraph 19, second sentence, will be modified in part to read as follows:

In essence, the Evaluation Committee would make a recommendation to the College President and the College President would make a recommendation to the Board of Trustees for the authority to negotiate a comprehensive agreement with the first candidate PRH, followed by similar negotiations with other proposers if necessary.

Ruling on MDC's Exception No. 2

As to MDC's Exception No. 2, which contests in part Conclusion of Law Paragraph 20, The Board hereby grants the exception in part. MDC's Procedures 1010 and 1011 clearly indicate

that the College President provides a recommendation to the Board as to with which proposer MDC should first begin to negotiate a comprehensive agreement. In addition, as Pi Art was eliminated from consideration after the issuance of the First Intended Decision, the negotiation process could only potentially be repeated twice rather than three times if the negotiations with Related proved unfruitful.

As the Board has substantive jurisdiction over its procedures, including the bid process to authorize negotiations for a comprehensive agreement with a proposer as appropriate, it is permitted to modify the ALJ's Conclusion of Law. Moreover, the Board finds that its substitute Conclusion of Law is as or more reasonable than the ALJ's Conclusion of Law. § 120.57(1)(l), Fla. Stat.; *G.E.L. Corp.*, 875 So. 2d at 1263-64; *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d 1140; *Barfield*, 805 So. 2d 1008; *L.B. Bryan & Co.*, 746 So. 2d 1194; *Scientific Games, Inc.*, 586 So. 2d at 1131. Therefore, based upon the foregoing, Conclusion of Law Paragraph 20, second and third sentences, will be modified in part to read as follows:

For instance, the Second Intended Decision issued contemplated that the College President would present a recommendation to the Board of Trustees, to negotiate with PRH first, and then would enter into a detailed comprehensive agreement with PRH. However, if a suitable agreement was not reached with PRH, the College would then move on to the next proposer to repeat the process all over again, potentially two times.

Ruling on MDC's Exceptions Nos. 3 and 4

As to MDC's Exceptions Nos. 3 and 4, which contest Conclusions of Law Paragraphs 22 and 27 respectively, the Board hereby denies the exceptions. As previously stated, an agency has the authority to reject or modify an ALJ's conclusion of law or interpretations of administrative rules over which the agency has substantive jurisdiction. § 120.57(1)(l), Fla. Stat.; *G.E.L. Corp.*, 875 So. 2d at 1263-64. If the agency indeed possesses jurisdiction, an agency must also state with particularity the reasons for a rejection or modification, and must also show that the substitute

conclusion of law is at least as reasonable as the ALJ's conclusion of law. *Id.*; *Scientific Games, Inc.*, 586 So. 2d at 1131. Section 120.57(1)(k), Florida Statutes, provides that "an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

In this case, MDC has failed to provide the Board with a sufficient legal basis for rejecting or modifying the ALJ's conclusions of law. Specifically, MDC's Exceptions are devoid of any legal argument, and merely cite to a portion of the Second Intended Decision. Further, MDC has not proffered any argument or evidence as to why the language cited to within the Second Intended Decision is at least as reasonable as the ALJ's conclusion of law. Thus, MDC's Exceptions Nos. 3 and 4 are denied. *See* § 120.57(1)(k), Fla. Stat.; Fla. Admin. Code R. 28-106.217(1) (2013); *see also Pellet v. Fla. Dept. of Fin. Serv.*, Case No. 11-4054 (DOAH Aug. 23, 2012) (rejecting Respondent's exception for failure to state a legal basis for the exception); *Centurylink Pub. Communications, Inc. v. Dept. of Corrections*, Case No. 14-2828BID (DOAH Oct. 6, 2014).

Ruling on MDC's Exception No. 5

As to MDC's Exception No. 5, which contests in part Conclusion of Law Paragraph 31, the Board hereby grants the exception in part. MDC's Procedures 1010 and 1011 clearly indicate that the College President provides a recommendation to the Board as to with which proposer MDC should first begin to negotiate a comprehensive agreement.

As the Board has substantive jurisdiction over its procedures, including the bid process to authorize negotiations for a comprehensive agreement with a proposer as appropriate, it is permitted to modify the ALJ's Conclusion of Law. Moreover, the Board finds that its substitute Conclusion of Law is as or more reasonable than the ALJ's Conclusion of Law. § 120.57(1)(l),

Fla. Stat.; *G.E.L. Corp.*, 875 So. 2d at 1263-64; *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d 1140; *Barfield*, 805 So. 2d 1008; *L.B. Bryan & Co.*, 746 So. 2d 1194; *Scientific Games, Inc.*, 586 So. 2d at 1131. Therefore, based upon the foregoing, Conclusion of Law Paragraph 31 will be modified in part to read as follows:

Additionally, and perhaps more compelling, is that the Second Intended Decision constituted only a recommendation by the College President as to a negotiation procedure, without any decision or intended decision being approved or issued by the Board of Trustees.

Ruling on MDC's Exception Nos. 6-22

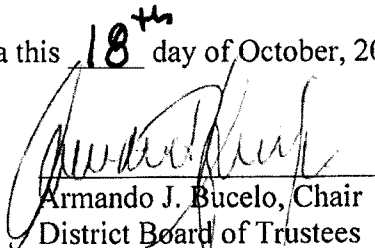
As to MDC's Exceptions Nos. 6 through 22, which contest Findings of Fact Paragraphs 1, 2, 4, 7, 9, 10, 13 and 14, the Board hereby denies the exceptions in their entirety as no legal basis for the aforementioned exceptions has been identified as required by Section 120.57(1)(k), Florida Statutes. Further, the scope of the Board's review of the ALJ's Findings of Fact is limited to ascertaining whether the existing factual findings are supported by competent substantial evidence. § 120.57(1)(l), Fla. Stat.; *see also Wills*, 955 So. 2d 61. If a finding of fact is supported by substantial competent evidence, which MDC does not dispute in this case, the agency has no authority to make independent or supplemental findings of fact. *See, e.g., Consol. Minerals*, 645 So. 2d at 487; *see also Pellet*, Case No. 11-4054.

In this case, based upon a review of the entire record, the Board finds that the ALJ's Findings of Fact are based upon competent substantial evidence. Accordingly, the Board is not permitted to reinterpret evidence ruled upon by the ALJ or modify the Findings of Fact as set forth in MDC's Exceptions. § 120.57(1)(l), Fla. Stat.; Fla. Admin. Code R. 28-106.217(1); *Walker*, 946 So. 2d at 605; *Consol. Minerals*, 645 So. 2d at 487; *Arand Construction Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623; *Heifetz v. Dep't of Business Regulation*, 475 So. 2d 1277 (Fla. 1st DCA 1985). Therefore, MDC's Exceptions Nos. 6 through 22 are denied.

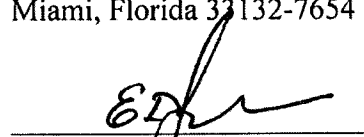
ORDER

In accordance with the foregoing, the Amended Recommended Order, including its Findings of Fact and Conclusions of Law, as modified herein, is hereby adopted.

DONE and **ENTERED** in Miami, Florida this 18th day of October, 2016.



Armando J. Bucelo, Chair
District Board of Trustees
Miami Dade College
300 N.E. 2nd Avenue, Room 1410
Miami, Florida 33132-7654



Dr. Eduardo J. Padrón,
Secretary to the District Board of Trustees
& Miami Dade College President
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Filed with the Secretary to the District Board of Trustees & Miami Dade College President, this 18th day of October, 2016.

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NOTICE OF RIGHT TO APPEAL

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rule of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Agency Clerk (Secretary to the District Board of Trustees and Miami Dade College President, Dr. Eduardo J. Padrón), Miami Dade College, 300 N.E. 2nd Avenue, Room 1410, Miami, Florida 33132-7654, and a second copy, accompanied by the filing fees prescribed by law, with the Third District Court of Appeal, 2001 S.W. 117th Avenue, Miami, Florida 33175, or in the district court of appeal in the appellate district where the party resides. The notice of appeal must be filed within thirty (30) days of rendition of the order to be reviewed.