

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BOSTON CULINARY GROUP, INC.,
d/b/a CENTERPLATE,

Petitioner,

vs.

Case No. 17-4509BID

UNIVERSITY OF CENTRAL FLORIDA,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II of the
Division of Administrative Hearings heard this case, as noticed,
on September 6, 2017, in Orlando, Florida.

APPEARANCES

For Petitioner: Cindy A. Laquidara, Esquire
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For Respondent: Michael D. Crosbie, Esquire
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STATEMENT OF THE ISSUE

The issue in this de novo proceeding is whether the intended action of Respondent, University of Central Florida (University), to award a concessions and food services management contract to Ovation Food Services, L.P., d/b/a Spectra Food Services and Hospitality (Spectra), is contrary to the statutes, regulations, or policies governing the University, or contrary to competition, arbitrary, or capricious. The standard of proof for this proceeding is whether the proposed contract award is clearly erroneous, contrary to competition, arbitrary, or capricious. Petitioner, Boston Culinary Group, Inc., d/b/a Centerplate (Centerplate) bears the burden of proof.

PRELIMINARY STATEMENT

This is a dispute about which vendor will receive a ten-year contract to provide concessions services to facilities located at the University. Centerplate held the contract, which recently ended, for ten years. After going through an Invitation to Negotiate (ITN) process, the University decided to award the contract to Spectra. Centerplate timely protested that intended decision, complying with all procedural requirements.

Centerplate requested a formal administrative hearing on its protest. On August 8, 2017, the University referred the matter to the Division of Administrative Hearings (Division) to conduct the hearing as provided by Florida Board of Governors

(BOG) Regulation 18.002(13). The undersigned conducted the hearing on September 6, 2017.

Centerplate presented live testimony from Salvatore Ferrulo, Kevin Mitchell, Myrnellie Nido, and Zachary Williams.

Centerplate Exhibits 1 through 13 and 15 through 47 were admitted. Initially Centerplate Exhibits 44 through 47 were presented as rough drafts of transcripts. After the hearing, Centerplate provided finished transcripts on a USB drive, which were accepted into evidence as substitutes for the rough drafts.

The undersigned reserved ruling on admissibility of Centerplate Exhibit 14. The University objected to the exhibit on attorney/client privilege grounds. The University's Proposed Recommended Order did not address the issue.

Exhibit 14 is a string of emails, including some to and from a University attorney, asking about the legal considerations in contracting for concessions with a company related to another company that already provides services to the University. Other emails are from non-lawyers forwarding the lawyer's emails and commenting on them. The emails were not prepared to conduct litigation or in anticipation of imminent litigation or an imminent adversarial administrative proceeding. The emails are public records and not privileged. Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), cert. den., Lightbourne v. McCollum, 553 U.S. 1059, 128 S. Ct. 2485, 171 L. Ed. 2d 777 (2008); N. Miami v.

Miami Herald Pub. Co., 468 So. 2d 218 (Fla. 1985); Orange Cty. v. Fla. Land Co., 450 So. 2d 341 (Fla. 5th DCA 1984); Tober v. Sanchez, 417 So. 2d 1053 (Fla. 3d DCA 1982); See Fla. AGO 98-21 (interpreting § 286.011(8), Fla. Stat.). The objection to Exhibit 14 is overruled. Exhibit 14 is admitted.

Centerplate and the University presented live testimony from Mrynellie Nido. The University offered testimony by designated deposition excerpts from David Hansen and Ronnie Lamkin.

Centerplate designated additions to the deposition excerpts. The University did not object. It presented testimony by deposition from Rick Falco (also provided as a video recording). University Exhibits 1 through 6 and 8 were admitted. University Exhibit 7 was used for demonstrative purposes only.

The parties' joint exhibits 1 through 18 were admitted. The parties made closing arguments.

The parties timely filed Proposed Recommended Orders, after seeking and receiving on extension of time which waived the requirements of BOG Regulation 18.002(13)(i). The undersigned considered the Proposed Recommended Orders in preparation of this Recommended Order. The Post-Hearing Order rendered September 7, 2017, reserved ruling upon the University's demand for attorney's fees and costs until this matter is disposed of by final order that is not appealed, the conclusion of any appeal, or agreement of the parties.

FINDINGS OF FACT

Participants and Facilities

1. The University is located in Orlando, Florida. In 2017, it was the nation's second largest university by student enrollment. Florida founded the University in 1963. The University's various campuses include a number of athletic and performance facilities. For purposes of this matter, they are the CFE Arena, The Venue (a multipurpose facility adjoining the Arena), Brighthouse Networks Stadium, the John Euliano Park Baseball Complex, the UCF Softball Complex, and the UCF Soccer and Track Complex. All of these facilities have food and drink concessions available to people attending events. For some events at some facilities, alcoholic beverages are also available.

2. The stadium seats 45,241 persons. It has 11 concessions stands with 59 points of sale, one catering kitchen, and 15 portable carts.

3. The baseball complex seats 2,000 persons and can accommodate 3,600 people. It has one concessions stand with two points of sale, two carts with two points of sale and one concessions trailer with six points of sale.

4. The softball complex seats 507 people. It has one concessions stand. The soccer and track complex accommodates more than 2,000 people.

5. The University also has a 2007 16-foot Concessions Grill Trailer. The concessionaire may use the trailer and all the concessions stands. In fiscal year 2016, University concessions generated over \$2.1 million in sales.

6. Spectra is a wholly owned subsidiary of Comcast Corporation. Spectra provides concessions, venue management, and related hosting and entertainment services in various facilities. There is no question about Spectra's ability to provide concessions to the University.

7. Centerplate provides food and beverage programs, including concessions, at locations throughout North America and the United Kingdom. Its customers include National Football League stadiums, Super Bowl venues, and the Hard Rock Stadium. There is no question about Centerplate's ability to provide concessions to the University.

8. Since 2007, Centerplate has held a ten-year contract to provide concessions and alcoholic beverages at the Arena, the Stadium, the Softball fields, and the Baseball fields. The University's Director of Purchasing and Centerplate's President executed the contract. It has expired.

9. Aramark and Levy are each providers of concessions services much like those offered by Centerplate and Spectra.

10. The UCF Stadium Corporation is an entity that the ITN identifies as a part owner of the Brighthouse Stadium.

11. The UCF Athletic Association, Inc. (Association) is a direct support organization^{1/} that the ITN identifies as a part owner of the Brighthouse Stadium and overseer of all athletic events except those conducted at the Arena. However, David Hansen, the University's Executive Associate Athletic Director and Chief Operating Officer for the Association testified that the University owns the stadium and that the Association only manages the stadium. But he also testified that the University business services unit is the concessions contract manager. The Association has a procurement process. It could have selected the Stadium concessionaire if it chose to do so.

12. The UCF Convocation Corporation (Convocation Corporation) is also a university direct support organization. It owns and oversees operation of the Arena and events there. The Convocation Board of Directors consists mainly of University executives and University Board of Trustees members. The Convocation could have selected the Arena concessionaire if it chose to.

Development of the ITN

13. In January 2016, the University, the Athletic Association, and the Convocation Corporation began preparing for the end of the Centerplate contract and the letting of a new concessions contract.

14. Curt Sawyer began the planning process for determining who would provide concessions services after Centerplates' contract ended. Mr. Sawyer is the Associate Vice President for University Services. Someone, most likely Mr. Sawyer, determined that the University would use an ITN process. The Board of Governors and University rules do not define an ITN.

15. The University's rule for procurement services names three competitive procurement processes: Invitation to Bid, Request for Proposal, or Invitation to Negotiate. University of Central Florida (UCF) Rule 7-130(2)(a) says that all three shall state the criteria to be used for evaluating proposals. The rule prohibits using criteria not stated in the Invitation to Bid, Request for Proposal, or Invitation to Negotiate. Other parts of rule 7-130 impose notice and advertisement requirements applicable to all three processes. The rule does not expound upon the nature an ITN or how it differs from the other procurement processes.

16. BOG Regulation 18.002, titled "Notice and Protest Procedures for Protests Related to a University's Contract Procurement Process," mentions ITN once. It states,

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 university

announces its intent to award a contact, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered.

BOG Regulation 18.002(19). This regulation also does not explain what an ITN is.

17. The ITN's definitions section, 2.17, does define ITN.

It states:

Invitation to Negotiate- A written solicitation, for goods or services, where factors other than price are to be considered in the award determination. These factors may include such items as Respondent's experience, project plan, design features of the product(s) offered, etc. ITN is used when the specifications cannot be identified; the end result is explained and we want qualified companies to offer their solutions for consideration.

18. January 28, 2016, Mr. Sawyer e-mailed Tracy Slavik to "schedule a contracts' planning meeting that includes the six men above [copied on the e-mail]. The primary contract to discuss is concessions, although I'd like to also briefly touch on pouring rights as well." This meeting was to begin planning and drafting the ITN. It was the start of drafting a document to explain the result the University wanted and to develop requirements and statements of work for the ITN.

19. The six men referred to are Gregory Robinson, Kevin Sowers, Michael Shumack, Brad Stricklin, David Hansen, and Brian Hixenbaugh.

20. Mr. Robinson is the University Director of Procurement Services. Mr. Sowers is University Director of Business Services and under Mr. Sawyer on the University organizational chart. Mr. Shumack is with University Business Services. Mr. Hansen is Executive Associate Athletic Director for the University and Chief Operating Officer of the Association.

21. Brian Hixenbaugh has been Spectra's General Manager for the venue operations services Spectra provided for the Arena the past six years. Mr. Hixenbaugh appears on the University organization chart under Mr. Sawyer, although a dotted line borders the box containing his name. He attended Mr. Sawyer's direct report meetings. Mr. Hixenbaugh's email address is a University email address, Brian.Hixenbaugh@ucf.edu. Mr. Hixenbaugh has worked for Spectra since 2006.

22. Mr. Sawyer met with Mr. Robinson, Mr. Sowers, Mr. Shumack, Mr. Hansen, Mr. Stricklin, and Mr. Hixenbaugh to discuss concessions contract planning on February 19, 2016. The fact that Mr. Hixenbaugh was directed to attend the meeting and the absence of evidence that he did not attend support an inference that he attended.

23. After the meeting, on the same day, Mr. Sawyer emailed Ms. Slavik asking her to schedule a follow-up meeting 60 days out, around April 15, 2017. The email identified "Contract planning discussion" as its subject and listed "Takeaways and

follow-ups: Concessions agreement" to include in the meeting notes. Mr. Sawyer copied Mr. Sowers, Mr. Shumack, Mr. Robinson, Mr. Stricklin, Mr. Hansen, and Mr. Hixenbaugh.

24. This follow up email to the individuals invited to the February meeting, and its timing, are further evidence reasonably supporting an inference that the people invited to the meeting attended it, including Mr. Hixenbaugh. There is no evidence indicating that Mr. Hixenbaugh did not attend the meeting.

25. The email copied Myrnellie Nido. Ms. Nido is the University's Associate Director of Procurement Services.

26. The email also copied the email address scarr@athletics.ucf.edu. This is the email address of Scott Carr.

27. Mr. Sawyer's "takeaways and follow-ups" were:

- Benchmark other schools -- DH
- Determination of who owns stadium stands' equipment -- DH, Kevin;
- Confirm separate contracts
- Timing of non-renewal letter (after football, during basketball?)
- ITN
 - 1) Although separate ITN's, crafted simultaneously
 - 2) Fan engagement and experience emphasized: tremendous customer service
 - 3) Brand coordination between multiple facilities, pricing, coordination between UCFCC and AA, MOU,
 - 4) ITN crafting teams
 - 5) ITN releases and timeline
 - 6) Other

28. These items are all substantive considerations for an ITN to provide concessions services. Most are addressed in the ITN or the review process in one way or another.

29. Mr. Sawyer sent another email with the subject "Contract Planning Discussion" on April 26, 2016, asking Ms. Slavik to "schedule a follow-up discussion." Mr. Sawyer sent this email to the people, including Mr. Hixenbaugh, copied with his January 28 and February 19, 2016, emails. The wording of the email and the fact that the email is dated about 60 days after the February 19, 2016, email requesting a meeting is competent, persuasive evidence that the requested meeting occurred in April and that the people asked to participate did. It is also reasonable to infer that people asked to participate in a meeting did so, in the absence of any evidence to the contrary. There is no evidence indicating that Mr. Hixenbaugh did not attend the meeting.

30. The April 26, 2016, email listed the following substantive subjects for the meeting, all of which figured in the ITN or its evaluation process:

- Stadium power needs for stands
- How many themed stands
- consultant feedback for stadium and arena
- pricing discussion
- capital needs discussion
- RFP timeline
- RFP structure
- Other

31. The email asked Ms. Slavik to schedule the meeting about 45 days out, or around June 10, 2016.

32. Mr. Sawyer copied Mr. Sowers, Mr. Shumack, Mr. Robinson, Ms. Nido, Mr. Hixenbaugh, Mr. Hansen, Mr. Stricklin, and Scott Carr. On April 27, 2016, Ms. Slavik sent the other recipients an email proposing meeting dates and times between June 6 and June 10, 2016.

33. On June 9, 2016, Mr. Robinson sent Mr. Hixenbaugh an email, copied to Ms. Nido and Mr. Sawyer, advising of concerns raised by Spectra's interest in seeking the concessions contract. The email states:

Hi Brian: I am not sure what is the proper name: Spectra, Spectra by Comcast, or Comcast Spectacor (website not clear) but I just learned that your company is interested in submitting a proposal for the upcoming concessions contract. If true, unfortunately, we won't be able to take advantage of you and your affiliates' expertise in discussing the pending ITN because having the company involved in any way, by Fla., Statute would eliminate Spectra from being eligible to submit a proposal. We thought you would like to know that, and I can explain further if you want to call.

Talk soon.

Greg"

34. Mr. Robinson's concern was well founded. The University, in its rules, takes a strong stand against potential vendors being involved in preparing an ITN or other document soliciting bids or proposals.

35. Mr. Hixenbaugh's involvement in the ITN development process stimulated more emails. The emails make it clear that there were also conversations about the subject that are not part of the record.

36. At 9:09 a.m., on July 25, 2017, Mr. Shumack emailed Mr. Robinson and Ms. Nido, with a copy to Mr. Sowers, reporting that he and Mr. Sowers had discussed the next step in the ITN process. The email advised that the next step was for a consultant the University engaged to assist with the ITN, Chris Bigelow, to come to the University and begin discussions with "Arena and Stadium stakeholders to determine their goals, objectives and expectations-regarding pricing, commissions, contract structure, fan-experience, etc."

37. At this point, having engaged a consultant and conducted at least two meetings about the concessions contract, the University had fully embarked on the ITN development, with Mr. Hixenbaugh's assistance and participation.

38. Mr. Shumack's July 25 email stated that Mr. Sowers had raised a concern that Mr. Hixenbaugh's company Spectra planned to pursue the concessions contract. The text of the email merits reproduction here because it conveys the University's knowledge of the issue and desire to nonetheless continue Mr. Hixenbaugh's participation in the ITN preparation.

39. Mr. Shumack wrote:

The concern Kevin [Sowers] has raised is the person/company (Brian Hixenbaugh with Global Spectrum) that manages the CFE Arena is also planning to bid on the new Concessions contract. So if we include Brian in the discussions it may appear that Global Spectrum (now called Spectra) had some influence in the construction of the ITN/contract (which would be true). However, we would like to have Brian's feedback and involvement in the new ITN/contract since he has been involved with managing the Arena for a while and would most likely have useful information/feedback on how to improve the future contract.

What is your advice on this – include Brian in the discussions or do not include?

40. Mr. Robinson replied at 10:56 a.m., on July 2, 2016 that Mr. Hixenbaugh could not participate in "data gathering or discussions. The email continues, "He [Mr. Hixenbaugh] acknowledged understanding via phone a few days later." The email refers to an attachment that is not part of the record.

41. Mr. Shumack replied: "Thanks Greg. That's what Kevin and I thought. I didn't know Brian asked you this question too."

42. Further emails plainly about the same subject, despite cryptic wording, followed. For some reason the University was working to circumvent its own rules 7.130(10) and 7.130(6)(c).

43. On July 27, 2016, at 8:36 a.m., Mr. Sowers emailed Mr. Sawyer with a copy to Mr. Shumack saying: "Mike [Schumack] and I want to meet with Greg [Robinson] and Nellie [Nido] on how

best to communicate or what limits we may have in relations to the concessions contract. Do you want to be a part of that discussion?"

44. Mr. Sawyer wasted no time. His 9:55 a.m. reply to Mr. Sowers stated: "Kevin, I've got my one-on-one with Greg [Robinson] this afternoon, why don't I discuss this with him a bit at that time and lay the groundwork for you and Mike [Shumack] to have a follow-up discussion with him to nail down the specifics." Mr. Sowers forwarded the email to Mr. Shumack.

45. The next morning Mr. Sawyer emailed Mr. Sowers with a copy to Mr. Robinson reporting the result of his conversation. His email stated:

Kevin: Greg and I had a good discussion referencing Concessions' yesterday. We think there is a way forward that would entail all relevant parties in the room for a general discussion (AA, Spectra, B.S., Purchasing, Consultant). In preparation for that discussion, however, we will need to establish the objectives of the discussion and then stick to those objectives. This will be the last discussion that Spectra will be involved with: afterwards the strategic tone of the conversations will be a bit more proprietary in nature.

It would probably be a good idea for you to have a short conversation with Greg yourself; afterward let's establish the objectives, make sure Greg is supportive of the structure, then let's move forward in setting up the discussion. Once we get into the new semester and football season schedules will get much more convoluted.

46. Nothing in the record explains why Spectra was a relevant party because it manages the venue but Centerplate, which provides concessions services at all venues, was not a relevant party.

47. Mr. Shumack scheduled and held the next concessions contract meeting on August 29, 2016, from 1:30 p.m. to 3:30 p.m. The email scheduling the meeting at the Business Services Conference Room identified Mr. Sawyer, Mr. Sowers, Mr. Hansen, Mr. Carr, Mr. Robinson, Ms. Nido, Mr. Bigelow, and Mr. Hixenbaugh as participants.

48. Mr. Bigelow, the consultant, prepared a comprehensive five-page agenda for the meeting. Agenda items included the "Mission of Food and Beverage," current and future customer experience, all-inclusive food and beverage ticket sales with all-inclusive pricing, local brands as subcontractors, catering kitchen, sponsorship versus popular foods, staffing, training, the number of points of sale, point of sale systems, digital signage, planned Stadium and Arena renovations, insurance, minimum commissions, reserve accounts and much more.

49. The agenda also contained a two-page chart of action items with target dates for completion.

50. On August 30, 2016, Mr. Shumack emailed Mr. Sowers a detailed three-page summary of the August 29, 2016, meeting that Mr. Hixenbaugh attended. It identified a wide ranging number of

issues covered and conclusions reached. They include, but are not limited to, a preference for a "management fee contract," breaking the services sought into a base contract with two optional, additional contracts, the term of the contract, the amount of capital investment wanted from the vendor, the contract management structure, upgrades to power sources, upgrades to communications, upgrades to point of service terminals, and additional food stand locations. These agenda items and more would resurface in the ITN and would be discussed with the Final Decision Maker in meetings of the evaluators considering the responses to the ITN and serving as a negotiating team.

Mr. Shumack forwarded the email to Mr. Robinson later that day.

51. A November 2016 series of emails also supports finding that Mr. Hixenbaugh attended the meeting. The series starts with a November 2016 email from Mr. Sawyer to University counsel, Jordan Clark, ostensibly asking if contracting with two subsidiaries of Spectra, one managing the Arena and one providing concessions, created any issues.

52. Mr. Clark replied to clarify the question as asking if the question was, is it "legal (in Florida) for an affiliated/related company of Spectra to be awarded the concessions contract?"

53. Mr. Sawyer replied, "I don't think I have much doubt that it would be legal, I'm just trying to figure out if there's

a perception or optics or 'other' type of lens for this particular structure that I should be careful of before we go down the road of issuing an RFP." Mr. Sawyer did not disclose Mr. Hixenbaugh's involvement in creating the ITN or that his involvement was the real subject of concern.^{2/}

54. Mr. Clark sent an email setting forth the limited facts provided him and identifying possible risks and liabilities. He concluded, "Big picture, if the selection is done by the book, then there is not much that is out of the ordinary for this structure." Mr. Sawyer forwarded Mr. Clark's email to Mr. Robinson.

55. Mr. Robinson emailed back asking if Mr. Sawyer thought Mr. Jordan's opinion was "enough." Mr. Robinson's response included this understatement,

Jordan states everything will be fine if we have a by-the-books selection process, but the perfect process may have already been somewhat tainted because Spectra was at the table during some of the strategy meetings. His opinion has me more concerned than assured and I feel we are on a thin limb without clear cut legal support.

56. Mr. Robinson suggests reviewing the issue with a "high placed" individual in "Audit" with a lawyer and Mr. Sowers present. The record does not reveal how all that went.

57. Why including Mr. Hixenbaugh in the ITN development was so compelling is a mystery. The persistent push to keep

Mr. Hixenbaugh involved contrasts markedly with the absence of any sign of efforts to involve a Centerplate representative. Using the stated rationale for Mr. Hixenbaugh's involvement, Centerplate's involvement would have been very helpful since it had ten years of experience providing concessions at the facilities.

58. What is not a mystery is that Mr. Sawyer, Mr. Sowers, and Mr. Shumack demonstrated an affinity for Mr. Hixenbaugh and his participation in the ITN process that could only have favored his employer, Spectra.

59. Two reasonable inferences follow from the facts proven by a preponderance of the evidence. One is that several people involved in development of the ITN favored or depended upon Mr. Hixenbaugh.

60. The other is that Mr. Hixenbaugh participated substantively in preparing the ITN and that the University knew this was a problem.

61. Participating in the ITN development would provide a vendor the competitive advantages of having a hand in shaping the ITN, a head start on preparing a proposal, and a fuller understanding of the University's desires and priorities. Mr. Hixenbaugh participated in the meetings and gained a competitive advantage for Spectra.

62. To the extent that a participant in the ITN development meetings served as an ITN evaluator, attending the development meetings would give a vendor with a representative involved in the development meetings significant competitive advantages. Those advantages include insight into how the evaluators viewed the various items discussed and an opportunity to establish a trusting relationship with the future evaluators in a collegial activity with a shared objective.

63. Mr. Sowers, Mr. Shumack, Mr. Hansen, and Mr. Carr served on the ITN drafting committee, working with and relying on Mr. Hixenbaugh. They were four of the six evaluation committee members (67 percent) evaluating a proposal by Mr. Hixenbaugh's company in which Mr. Hixenbaugh figured prominently.

64. The proposed timeline from Ms. Nido contemplated distributing the ITN November 1, 2016, and posting the intent to award on March 3 or 6, 2017. Instead, the University posted the ITN on February 28, 2017, and posted the intent to award on July 20, 2017.

65. The record is silent about further ITN development activities between August 29, 2016, and February 28, 2017, when the University issued the ITN.

66. The ITN crafting meetings were not publicly noticed or open to the public.

Terms of the ITN

67. The ITN begins with a statement of the University's goal for the concessions contracts, an explanation of the "base contract" plus two optional contracts structure, and an exposition about the facilities and their affiliated entities.

68. The ITN identifies the University's goal as creating "an innovative, state-of-the-art concessions program." The University wanted the program to focus on several facets including customer service, quality, affordability, increased market share, creative concepts that include local and national brands, facility investment, and "a Commission structure commensurate to the University's stature."

69. The ITN sought proposals for a base contract to provide concession services to general admission areas. The University intended to award a single base concession contract for all of the identified facilities.

70. The ITN also created two optional contracts that vendors could seek. One was for catering/premium services at the Arena. The other was for catering/premium services at the Stadium. The ITN makes clear that the optional contracts may be awarded separately, in conjunction with the base contract, or not at all.

71. The ITN described the University's relationships with other entities like this:

Note that the Stadium and Arena facilities are owned and operated by two different organizations within the University. The UCF Stadium Corporation and the Athletics Association (a.k.a. Stadium) oversees all of the athletic events except for those events at the Arena which are overseen by the UCF Convocation Corporation (a.k.a. Arena). Concessionaire will be required to track and report sales data and commissions separately for each organization. The University intends that the Concessionaire operate in a manner that recognizes and maintains the distinction between these two University organizations.

72. The ITN provided general information about the University, its services, enrollment, social clubs, service organizations, the student body, and its football team.

73. The ITN stated that the University intended to award the contract around August 1, 2017. It established May 3, 2017, as the date for submitting and opening proposals.

74. The ITN required submission of all communications or inquiries during the ITN process to Ms. Nido.

75. The ITN set up a pre-proposal conference for interested parties that included visits to all of the concessions locations.

76. The ITN created weighted criteria for evaluation of the base contract award. Appendix I, the evaluation scoring sheet reproduced below, listed the criteria and maximum points that could be awarded for each. The ITN goes on to elaborate about each of the criteria.

77. This is the scoring sheet.

Evaluation for Base-Contract Award

Section	Evaluation Criteria: For Award of Base Contract	Max Points	Points Awarded
5.1 5.2 5.3	Stadium: Commissions Structure; Facility Investment proposal; Technology Investment proposal	35	
5.1 5.2 5.3	Arena: Commissions Structure; Facility Investment proposal; Technology Investment proposal	35	
5.4	Branded and other Subcontracted Products	20	
5.5	Organizational & Staffing Plan	20	
5.6	Training Programs	15	
5.7	Customer Service & Quality Control	20	
5.8	General Admissions Menu	15	
5.9	Transition Plan	15	
5.10	Financial Projections	5	
5.11	Company History and Qualifications	5	
5.12	Event Information Recaps and Reporting	5	
5.13	Creative Design Concepts	5	
5.14	Conformance to ITN Conditions	5	
	Total Possible Points	200	

78. The ITN established procedures for the ITN process from the publication date until the University took final agency action. They included information about the posting procedure, statements about public records obligations, statements emphasizing that the University was not bound to accept any offer, a general description of the evaluation committee functions, licensing requirements, and parking registration.

79. ITN Section 2.13 prohibited any responding vendor from discussing its offer or communicating with "any UCF employees,

agents, representatives, Evaluation Committee members or representatives of UCF except as expressly requested by UCF in writing." It warned that violation of the communication restriction might result in rejection of the vendor's offer.

80. Section 2.17 defined words and phrases used in the ITN. They include the ITN definition above, "Sole Point of Contact," equipment, costs, facilities, branded products, university provided equipment, and "Smallwares."

81. The ITN defines "sole point of contact" thus: "The Procurement Services department Representative or designee to who Respondents shall address any questions regarding the solicitation or award process." For this project, Ms. Nido was the sole point of contact.

82. The ITN defined "smallwares" as "the servicewares, utensils, crockery, glassware, dishware and cutlery used in the Concessionaire operation."

83. Section 2.21 set the contract term at ten years, beginning around August 1, 2017.

84. Section 4 of the ITN stated the program requirements. Section 4.1a sets the concessionaire's duties and responsibilities as operating the program on its own credit, providing all needed merchandise and equipment at its own expense, engaging necessary labor, obtaining needed supplies, ensuring proper sanitation, and obtaining needed services.

85. The products and services section (4.2) required, among other things, use of local and branded products, working with local not-for-profit organizations, surveys and reporting of pricing at comparable venues, obtaining needed permits and licenses, marketing, employee training, and quality control.

86. The ITN stated that the concessionaire was required to work directly with the Athletics Association and the Convocation Corporation.

87. It also outlined an allocation of responsibilities between the University and the concessionaire for a range of things, including utilities, equipment, premises maintenance, trash removal, and equipment maintenance.

88. The ITN required would-be concessionaires to indicate how they intended to develop and promote their marketing plan; indicate strategies to highlight new products; indicate customer development and retention plans; propose a quantitative mechanism to evaluate the level of services, menu and overall quality; and provide an organization chart with staffing levels.

89. Further, the ITN required responding vendors to, at a minimum, submit a commissions structure proposal; a financial investment proposal; a technology investment proposal; a branded and other subcontracted products proposal; an organization and staffing plan; a description of available training programs; a proposed impartial quantitative mechanism to evaluate services,

menu, and quality; proposed menus; a description of a detailed transition plan; financial projections; a company history and statement of qualifications; samples of event information reports; and a description of proposed concessionaire area design concepts.

90. The ITN included a number of attachments. They included the scoring chart reproduced previously, a financial offer form seeking commissions for each year of operation, a form for listing intended branded products, a form for describing and valuing facility investment, a list of university-supplied equipment, the current Centerplate menu and pricing, and diagrams of the facilities.

ITN Evaluation Process

91. Sections 2.1 through 2.9 of the ITN created a process for evaluating and selecting a proposal. As noted earlier, the ITN identified Ms. Nido as the sole point of contact for vendors. It allowed for vendor questions and disagreements with some of the ITN requirements and set forth a timeline.

92. The ITN set up a pre-proposal conference for interested parties that included visits to all of the concessions locations.

93. The ITN set the date and time for opening proposals as Wednesday, May 3, 2017, at 2:00 p.m.

94. The ITN made clear that a person chosen by the University would be the Final Decision Maker with sole authority

to determine what was in the best interest of the university and then "make the final decision" The Decision Maker had the authority to assign individuals to provide advice and assistance.

95. The ITN required the Decision Maker to establish an evaluation committee and required the committee to review and rank all responsive offers. Committee members were required to evaluate the proposals using the weighted criteria in the table reproduced in paragraph 77 above.

96. Once responses were opened, evaluators were not permitted to meet as a group or consult with others about their evaluation. They were to function independently during the evaluation. Once their initial evaluations had been concluded and reviewed by the Decision Maker, he could convene the committee to discuss their evaluations. The ITN did not bind the Decision Maker to follow the committee's evaluations.

97. The ITN broadly empowered the Decision Maker. His authority included the right to negotiate with vendors "whose proposals(s) may represent the best interest of the university." Centerplate's assertion that the University could not negotiate until after it had concluded which proposal was in the best interest of the University is not correct.

98. The Decision Maker could convene a negotiating team made up of the evaluators or others. He also could, as he did,

seek the advice of others such as Mr. Bigelow. Final authority to select the successful vendor rested with the Decision Maker.

Evaluation and Decision Making

99. The University issued the ITN on February 28, 2017.

100. Mr. Sawyer designated Rick Falco, the director of the University's Student Union, as the Decision Maker.

101. Centerplate and Spectra representatives attended a pre-proposal meeting at UCF on March 14, 2017.

102. Centerplate, Aramark, Spectra, and Levy all timely responded to the ITN with proposals to provide base concessions for all of the University facilities, catering/premium services at the Arena, and catering/premium services at the Stadium.

103. The proposals of Aramark and Levy did not provide for separating the base and premium proposals.

104. Mr. Sowers, Mr. Shumack, Michelle Foote, Mr. Hansen, Ronnie Lamkin, and Mr. Carr formed the proposal evaluation committee. All but Ms. Foote and Mr. Lamkin had served on the drafting committee with Mr. Hixenbaugh.

105. On May 8, 2017, Ms. Nido conducted an orientation meeting for the evaluators, followed by a confirming email, providing guidance on how to perform their task.

106. The evaluators completed their ITN scoring sheets and submitted them to Ms. Nido.

107. In turn, she provided them to Mr. Falco. The evaluators gave Spectra an aggregate score of 1,043. They gave Centerplate an aggregate score of 857. According to Mr. Hansen, the two proposals were not that far apart.

108. Mr. Falco decided to meet with the evaluation committee, morphing it into an evaluation/negotiation committee.

109. The consultant, Mr. Bigelow, prepared an "evaluation Matrix of the Proposals" and provided it to Mr. Falco and Ms. Nido on May 17, 2017. Ms. Nido or Mr. Falco provided it to the evaluation/negotiation committee members on May 26, 2017, after the committee members completed and submitted their scoring sheets. Consequently, it could not have affected their scoring. However, Mr. Falco, who was the Decision Maker, considered the matrix when deciding which vendor to negotiate with.

110. Mr. Bigelow's matrix included an evaluation of the net present value of the proposals that he described as "Shows the Net Present Value of each offer that creates an 'apples to apples' comparison leveling the investment and commissions."

111. The ITN required all respondents to present their financial offers in a chart identified as Attachment A-1 to the ITN seeking commission revenue projections for each year of the contract and proposed annual investments. Spectra completed the chart. Centerplate chose to present a tiered commission proposal that did not fit into the chart categories. This made the

concept of an "apples to apples" comparison sensible. However, Mr. Bigelow's report does not explain how he calculated his comparison. There is also no testimony explaining it.

112. Mr. Bigelow's chart for the revenue projections does not present an "apples to apples" comparison. It presents "adjusted" revenue columns for years one through ten. For reasons unknown, the chart for Spectra, but not for Centerplate, includes a column titled "Original Year." This resulted in Mr. Bigelow, and therefore Mr. Falco, using 11 years of revenue for Spectra and only ten years of revenue for Centerplate. The total gross receipts amount in the Spectra "Original Year" column is \$2,486,453. This amount is more than the \$2,446,453 difference between the total gross receipts amount of \$31,613,424 for Spectra and \$29,166,971 for Centerplate. Subsequent use of the values that included the "original year" amount flawed the report's evaluation of the revenue proposals to the benefit of Spectra. Mr. Falco and the evaluation/negotiation team were not aware of this error.

113. Mr. Bigelow's report contains another revenue calculation error. In calculating revenue from subcontractor sales, he failed to account for the reduction in commissions paid to the University caused by payment of a commission to subcontractors. This too made the revenue figures for the Spectra proposal considered by Mr. Falco artificially high.

114. The unrebutted testimony of Salvatore Ferrulo on the subject of the financial projection errors in Mr. Bigelow's report was persuasive, credible, and supported by a review of the documents. Mr. Ferrulo's work experience qualified him to analyze the report. The University did not offer rebuttal evidence, such as the testimony of Mr. Bigelow, to explain his report.

115. The University's response to the errors in the revenue analysis is to say they do not matter because the evaluators did not see them until after they scored the proposals. The response is not persuasive. The evaluators saw Mr. Bigelow's report before their post-scoring negotiating team discussions with Mr. Falco. More importantly, Mr. Falco saw and considered the flawed report. This means that the decision about which vendor to negotiate with was informed by an error in Spectra's favor of nearly 2.5 million dollars.

116. Mr. Falco and the evaluation/negotiation committee met on May 31, 2017. The group agreed that the University would only engage a concessionaire for the base concessions contract. This decision eliminated Aramark and Levy from consideration because their proposals indicated they would not accept an award of only a base contract.

117. This left Spectra and Centerplate competing for the base contract.

118. At the May 31, 2017 meeting, Mr. Falco, after discussions with the evaluation/negotiation committee, concluded that he had questions for Spectra and wanted to enter negotiations with Spectra.

119. At this meeting, the participants first discussed their desire to avoid extending the Centerplate contract and allow Spectra to begin services before the contract was approved and final.

120. At the May 31, 2017, meeting, Mr. Falco decided that for strategic purposes he did not want to publicly eliminate Centerplate from the ITN process. However, Mr. Falco did not choose to negotiate with Centerplate.

121. The group discussed time pressures created by the delays in the ITN process and July schedule for the Board of Trustees and its committees. Mr. Shumack pointed out that the University could extend the existing contract if they ran out of time. A participant identified as "Person X" in the transcript opposed the idea saying, "I'm not interested in that." Most likely Mr. Sowers is Person X. He is the only participant who is not otherwise identified as speaking during the meeting.

122. On June 1, 2017, University Procurement Services sent Spectra a list of questions and topics about its proposal and invited Spectra to negotiate.

123. Also on June 1, 2017, the University notified Spectra that it had decided to award only a base concessions contract. The University did not tell Centerplate about this decision until July 5, 2017.

124. On June 16, 2017, University Procurement Services sent Spectra another email inviting it to a June 23 in-person meeting, providing additional information about the meeting, and submitting questions. They included a request to lower some menu prices, a request for resumes of other general manager candidates, an explanation of how Spectra intended to share staff between concessions and venue management, and an inquiry about the branded foods it intended to offer.

125. On June 21, 2017, Spectra representatives who came for the meeting asked University Athletics and Arena staff for walk-through tours of the facilities. The staff obliged. Mr. Hansen knew of the planned tour and saw no issue with it. He provided the keys needed to conduct the walk-through.

126. There is no record of the tour or testimony about what was said. Inferring that the tour participants did not conduct the entire tour in complete silence with no communications between the University staff and the Spectra representatives is reasonable.

127. The tour violated the prohibition of ITN Section 2.13. It should not have happened. The tour concerned Ms. Nido and Mr. Robinson because it violated ITN communication restrictions.

128. In a June 21, 2017, email Mr. Hansen asked Mr. Falco to see if Spectra was "willing to work with us at-risk before their contract is approved by the BOT in late July. . . . I don't think either side wants to wait until late July to begin planning."

129. Mr. Falco, Mr. Bigelow, Ms. Nido, Procurement Services staff, and the evaluation/negotiation committee met with Spectra representatives on June 23, 2017, for about an hour and a half.

130. Mr. Hixenbaugh played a prominent role in the discussions. He said that he would be the main contact for the contract. Mr. Hixenbaugh advocated the Spectra proposal to a group that included four of the people he worked with during development of the ITN.

131. Committee members voiced their concerns about the quick transition selecting Spectra would require.

132. In the meeting, Spectra emphasized the synergies, including shared staff and expertise, with its Arena management that its proposal offered.

133. During the meeting, the University told Spectra it was going to request best and final offers.

134. At some point, after the meeting with Spectra, Ms. Nido, Mr. Shumack, Mr. Hansen, Mr. Carr, and Mr. Lamkin met to the discuss the contract. The meeting transcript does not provide a date.

135. Their wide ranging discussions included concerns about the time pressure, questions about the accuracy of the Spectra financial projections involving branded items, Spectra's ability to transition into the contract in August, and concerns about Spectra's ability to have its point of sale systems operating.

136. Mr. Shumack raised the option of extending the existing contract again. Again, Person X was adamantly opposed. In this meeting, Person X was probably Mr. Carr, since the other participants are identified by name when they speak.

137. In this meeting, Mr. Hansen reveals that he knew of the unauthorized walk-through of the facilities an hour before it happened and provided someone named Julian the keys to conduct the walk-through. He did nothing to stop it. Mr. Falco did nothing about it.

138. None of the negotiation sessions were publicly noticed or open to the public. Neither was the facility walk-through.

139. On July 5, 2017, University Procurement Services sent Centerplate a series of questions about its proposal, for appearances' sake. Centerplate responded on July 7, 2017.

140. On July 7, 2017, the University's Procurement Services solicited a best and final offer from Spectra and Centerplate.

141. Both responded with proposals that increased the contract's financial benefit to the University.

142. Mr. Falco evaluated the best and final offers from Spectra and Centerplate without consulting further with the evaluation committee.

143. Mr. Falco decided that the University should award the Contract to Spectra.

144. On July 20, 2017, Mr. Falco presented his decision to the University's Board of Trustees' Finance Committee and to the full Board.

145. Also on July 20, 2017, University Procurement Services posted its Intent to Award, indicating that Spectra had made the successful proposal.

146. On July 21, 2017, Centerplate filed and served the University with its notice of intent to protest.

147. On July 31, 2017, Centerplate filed and served its formal protest.

After the Protest

148. Sometime after July 31, 2017, Convocation Corporation and the Association entered into short-term contracts with Spectra. The contracts provide for goods and services very similar to those proposed in Spectra's response to the ITN. This

fact is further evidence of the bias toward Spectra in the process. The University maintains that the short-term contracts are of no moment because it is not a party to them.

149. The murky relationships among the University, the Association, and the Convocation Corporation make the contracts relevant to the issue of fairness in the process. Throughout the ITN development and evaluation process, the three entities functioned as one and as if they had authority to bind each other in contracts.

150. The indicia of the gestalt of the three organizations include the uncertainty about whether the Association or the University owns the Stadium, this ITN where the University is selecting and contracting with the concessionaire for facilities the other two may own and do operate, and the fact that the University signed the last contract, although the Association and Stadium Corporation owned the Stadium at the time. The ITN's statement that the University must maintain fire and extended coverage on the facilities, which it may or may not own, is further indicia of the organizations viewing themselves as one and acting as one. The fact that the Association and the Convocation Corporation have a procurement process and could have contracted for concessions for the Stadium and the other University facilities they own or manage without the University is further evidence of blurred lines between the organizations.

151. The University had three, more straightforward, options for securing concession services while this matter pends. First, UCF Rule 7.130(3)(h)1. gives the University authority to make emergency procurements. Second, UCF rule 7.130(6)(c) allows the University to extend an existing contract for as long as 12 months while a bid dispute pends. Third, BOG Regulation 18.002(7), which requires that the University stop the contract award process when it receives a formal protest until the protest is resolved, permits the University to continue the award process if the President states in writing that continuing the award process without delay is necessary to avoid an immediate and serious danger to the public health, safety or welfare. The fact that the University eschewed these options for an artifice buttresses the determination that the process was biased in Spectra's favor and contrary to competition.

CONCLUSIONS OF LAW

152. Centerplate urges declaring the University's Intent to Award invalid and rejecting all proposals to the ITN. It advances four grounds for rejecting all proposals. First Centerplate argues that Mr. Hixenbaugh's participation in drafting the ITN and the Spectra negotiation team's pre-negotiation tour of University facilities were contrary to competition and clearly erroneous. Second, it argues that the financial errors in Mr. Bigelow's matrix make the decision to award to Spectra clearly erroneous,

arbitrary, and capricious. Third, it argues that the ITN precluded the University from negotiating with Spectra until Mr. Falco had determined that Spectra's proposal was in the best interest of UCF. Fourth, Spectra argues that the University's failure to notice meetings of the ITN negotiation team violated Florida's Sunshine Act and the ITN process.

153. Centerplate also argues that the contracts of the Association and Convocation with Spectra violate the suspension provision of BOG Regulation 18.002(7)(a) and that sanctions should be imposed.

Jurisdiction, Burden of Proof, and Standard of Review

154. The Division has jurisdiction of the parties and the subject matter of this proceeding by virtue of section 120.65(6), Florida Statutes (2017),^{3/} BOG Regulation 18.002(13), and the contract between the Division and the University executed June 29, 2004.

155. The standard of review and standard of proof for the protest to the University's intended award do not require a determination that the University made the best decision or the decision that the trier-of-fact would have made.

156. This is a de novo proceeding to determine if the University's intended decision to award the contract to Spectra "is contrary to the governing statutes, regulations, or policies or the specifications of the ITN. The standard of proof is whether

the proposed award is clearly erroneous, contrary to competition, arbitrary, or capricious." BOG Reg. 18.002(13)(f). Centerplate bears the burden of proof and must sustain its burden of proof by a preponderance of the evidence. Id.

157. The wording of BOG Regulation 18.002(13)(f) is virtually identical to the wording of section 120.57(3)(f), Florida Statutes, governing challenges to state agency procurements. Consequently interpreting the rule as opinions and orders have interpreted the statute is reasonable. See Cone v. Dep't of Health, 886 So. 2d 1007 (Fla. 1st DCA 2004) (Court interpreted similarly worded statutes similarly.) This also is the approach of both parties in their Proposed Recommended Orders.

Contrary to Governing Regulations

Hixenbaugh Participation

158. Mr. Hixenbaugh's involvement in drafting the ITN was contrary to governing regulations. UCF Rule 7.130(6)(c) disqualifies any person or firm that "participates in the drafting of a competitive solicitation or specifications" from contracting with the University about the subject matter involved. UCF Rule 7.130(10) similarly excludes vendors stating, "In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft . . . Invitations to Negotiate shall be excluded from competing for such procurements."

Application of these University rules disqualifies Spectra from contracting with the University for the concessions contract.

159. The University's argument on this issue is that Mr. Hixenbaugh worked for a different Spectra organization, not the one that submitted a proposal, and that Mr. Hixenbaugh did not participate in the ITN meetings. The facts belie the argument.

160. As Spectra's response to the ITN and later presentation to the Final Decision Maker made clear, the concessions arm of Spectra and the venue management arm are closely allied, share personnel, exchange expertise, and support each other in fulfilling contracts. For example, Spectra's response to the ITN touted Mr. Hixenbaugh as one of three experienced managers in the "on-site management team" for the proposed contract. The response states:

The current food and beverage provider at CFE Arena [Centerplate] ultimately reports to Brian [Hixenbaugh]; therefore, making this transition will be natural for Brian and seamless for the University. With six years' experience at UCF, Brian embodies the spirit of the Knights and will bring new life to the food and beverage operation at the UCF Athletic Facilities.

161. Claims that the various Spectra entities function entirely separately and independently or that a party doing business with the concessions arm of Spectra would not know about the venue management arm and vice versa are not persuasive or credible.

162. The rule also does not require that the University know of the vendor's participation. The anti-competitive effects of vendor participation do not depend upon the University knowing that the vendor is participating.

163. The Spectra proposal featured Mr. Hixenbaugh's participation. He was an active participant in the negotiation session. Mr. Robinson's June 9, 2016, email makes it clear that the University and Mr. Hixenbaugh knew Mr. Hixenbaugh's company was likely to seek the contract. Yet the University went to some lengths to continue Mr. Hixenbaugh's participation in meetings, including the August 29, 2016, meeting.

164. The preponderance of the evidence proved Mr. Hixenbaugh attended the meetings to which he was invited. Concluding that a person who is repeatedly invited to meetings, repeatedly provided recaps of the meeting, and invited to the next meeting participated in the meetings is a reasonable and fair inference.

165. For the August 29, 2016, meeting, upon which the University focuses its "non-attendance" argument, evidence of Mr. Hixenbaugh's attendance is persuasive. This is the meeting for which a July 28, 2016, email documents Mr. Robinson and Mr. Sawyer creating a "way forward" to include Mr. Hixenbaugh. The same email refers to Spectra as a relevant party for the ITN discussion. Additionally, the August 29 meeting was just one of several that Mr. Hixenbaugh attended.

166. Mr. Robinson's email in the string about Mr. Jordan's legal guidance supports concluding that Mr. Hixenbaugh participated in the meeting. Mr. Robinson says that the process was "somewhat tainted because Spectra [Mr. Hixenbaugh] was at the table during some of the strategy meetings." Also, all of the evidence of Mr. Hixenbaugh's participation was unrebutted.

The Unilateral Walk-Through

167. Section 2.13 of the ITN prohibited a responding vendor from communicating about its offer with any UCF employees except as requested by the University in writing. The pre-negotiation walk-through of the facilities, enabled by Mr. Hansen, a member of the evaluation/negotiation committee, violated this prohibition.

Clearly Erroneous

168. Agency action is "clearly erroneous" if it is without rational support and, consequently, the trier-of-fact 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).

169. The facts show that the University violated its rules excluding would-be vendors from participating in developing the ITN specifications. The record offers no rational support for the University's actions. The most reasonable conclusion is a definite and firm conviction that a mistake has been committed. Including Mr. Hixenbaugh in the ITN development meetings was clearly erroneous. U.S. v. U.S. Gypsum Co., 333 U.S. at 395. The

same is true for the Spectra walk-through before the negotiation session.

Contrary to Competition

170. Mr. Hixenbaugh's participation and the walk-through did not just violate University rules. They were contrary to competition. Competitive bidding is designed to secure fair competition on equal terms for all bidders. Harris v. Sch. Bd., 921 So. 2d 725 (Fla. 1st DCA 2006). Axiomatically, providing one bidder a voice in shaping the ITN, providing one bidder advance notice of the ITN terms, and allowing that bidder to develop a relationship with the individuals who evaluate the bid and participate in the negotiation denies fair competition and places the bidders on unequal footing. Allowing the Spectra negotiating team to tour the University facilities before the negotiation session in violation of the ITN requirements, with University negotiation team member Mr. Hansen facilitating the tour, exacerbated the University's anti-competitive behavior.

171. Both University actions undermined the fairness of the ITN process and denied the University the benefits of fair competition for its contract. They were contrary to competition. Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931).

172. Furthermore the preponderance of the evidence proves the University had a bias toward Spectra in the process. The determined efforts to keep Spectra engaged in the ITN development

process, the casual assent to Spectra's pre-negotiation facility walk-through, the insistence by some of the evaluator/negotiators to avoid extending Centerplate's contract, and the ruse of the Association and the Convocation Corporation contracting with Spectra while this protest is resolved all lead to this conclusion.

173. The bias is contrary to competition. At the least, it creates the appearance and opportunity for favoritism. Ensuring that there is no opportunity for favoritism and that all businesses vying for a public contract are on an equal footing are two fundamental purposes for competitive bidding. Sutron Corp. v. Lake Cty. Water Auth., 870 So. 2d 930, 933 (Fla. 5th DCA 2004). The University did not fulfill those purposes in letting the concessions contract.

Financial Scoring

174. Mr. Bigelow's matrix of the revenue projections was incorrect. The error favored Spectra by nearly 2.5 million dollars.

175. Mr. Bigelow's report was not available to the evaluators when they scored the proposals. The report was, however, available to and considered by Mr. Falco. He was the Decision Maker. An error of this magnitude in the information considered by the Decision Maker is material. See Tropabest Foods, Inc. v. State, Dep't of Gen. Servs., 493 So. 2d 50 (Fla.

1st DCA 1986) (Deviation from bid specifications is material only if it gives one bidder a substantial advantage over another.). It undermined Mr. Falco's ability to determine the relative value to the University of both proposals. Mr. Falco's decision to negotiate only with Spectra was based in part upon this material error.

176. "An action is 'arbitrary if it is not supported by logic or the necessary facts,' and 'capricious if it is adopted without thought or reason or is irrational.'" Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38 (Fla. 1st DCA 2006). The matrix error resulted in Mr Falco's decision lacking logical support and deprived him of facts needed for a reasonable differentiation between the two responses. This makes the decision to award the contract to Spectra arbitrary and capricious.

Premature Negotiation

177. Centerplate's argument that the ITN precluded the University from negotiating with Spectra until Mr. Falco had determined that Spectra's proposal was in the best interest of the University is incorrect. The plain language of the ITN permits the Decision Maker to negotiate with a vendor whose proposal may be in the best interest of the University. The decision was not contrary to the ITN specifications, clearly erroneous, contrary to competition, arbitrary, or capricious.

Sunshine Violation

178. Centerplate does not cite to any statute for its claim that the University meetings violated Florida's Government in the Sunshine Laws, chapter 286, Florida Statutes, and that all of the actions which sprung from them are therefore invalid. None of the meetings of the evaluators were publicly noticed or open to the public. All but one were recorded. In fact, the recordings are exhibits in this proceeding. Only the May 8, 2017, orientation meeting for the evaluators was not recorded.

179. Centerplate asserts that the May 8 and May 31, 2017, meetings of the evaluation committee should have been publicly noticed. Presumably, Centerplate relies upon section 286.011(1), Florida Statutes (2017). It provides:

All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

180. The meetings were not intended to result in official acts being taken and they did not. They were to provide information to the evaluators and to Mr. Falco. At that point,

the committee had no decision-making authority or authority to make recommendations. The evaluators were functioning as Mr. Falco's staff. The May 8, 2017, meeting was only to advise the committee members of their duties and the rules governing them. It was not intended to be and was not a meeting where decisions were made. The May 31, 2017, meeting was a discussion of the evaluation scores and the proposals. Again the evaluators made no recommendations. In addition, it was recorded.

181. Citizens of State v. Beard, 613 So. 2d 403 (Fla. 1992), and Occidental Chemical Co. v. Mayo, 351 So. 2d 336 (Fla. 1977), cited by Centerplate, do not support its argument. The opinions distinguish between advisory meetings with staff (such as the evaluator meetings), meetings of decision makers, and meetings with staff who also participate in the decision-making by advocating a viewpoint. In addition, section 286.0113 exempts the negotiation meetings from the notice and public meeting requirements of section 286.011(1).

182. Without citation to authority, the University argues that the Division of Administrative Hearings lacks jurisdiction to consider or interpret chapter 286. In light of the determinations above, there is no need to address this one sentence argument of the University's Proposed Recommended Order.

Imposition of Sanctions

183. Centerplate asks for imposition of sanctions on the University for the post-protest concessions contracts with Spectra. It relies upon section 120.65(7), Florida Statutes. That statute permits an Administrative Law Judge to impose any reasonable sanctions, except contempt, if a party violates the Division's rules. Centerplate does not identify any Division rules that it claims the University has violated. There are none.

184. Centerplate also relies upon section 120.569(2)(f). That statute empowers Administrative Law Judges to impose sanctions for failure to comply with subpoenas, orders directing discovery, and violations of the applicable Florida Rules of Civil Procedure. Again, Centerplate does not identify any University action described in the authorization to impose sanctions.

185. Finally, Centerplate relies upon the authorization of BOG Regulation 18.002(17) to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just speedy, and inexpensive determination of all aspects of the protest." Again Centerplate does not explain how the complained of contracts with Spectra fall within that authorization. The undersigned does not find that they do.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, the University of Central

Florida, enter a final order declaring the Intent to Award invalid and rejecting all proposals to Invitation to Negotiate Number ITN1617NCSA.

DONE AND ENTERED this 21st day of November, 2017, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of November, 2017

ENDNOTES

^{1/} A direct support organization is a Florida not for profit corporation organized and operated exclusively to receive, hold, operate, and invest property for a state university. § 1004.28, Fla. Stat. (2017).

^{2/} Mr. Sawyer's strong interest in the ITN and the significance of Spectra manifests in November 9, 2016, emails between him and Mr. Robinson. Mr. Sawyer is adamant that he should be the Final Decision Maker for the ITN. Mr. Robinson replies that Mr. Sawyer' relationship with Mr. Hixenbaugh and Spectra "may have a subconscious effect on your [Mr. Sawyer's] decision and afford them a slight advantage over non-existing partners." Yet Mr. Sawyer is the person who organized and ran the ITN development meetings.

^{3/} All citations to Florida Statutes are to the 2017 codification unless otherwise noted.

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RIGHT OF REVIEW

Pursuant to Regulation 18.002(13)(j), within 14 days after rendition of this Recommended Order, the President of the University of Central Florida shall issue a Preliminary Order and serve the parties with a notice of such order. If the Protestor takes exception to the Preliminary Order, the Protestor must timely file its written exceptions with the President within 14 days after the date the Preliminary Order is issued. The Preliminary Order shall provide that, "This Preliminary Order is the Final Order unless the Protestor files written exceptions to the Preliminary Order with the President no later than 14 days after the date this Preliminary Order is issued."