

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CADY STUDIOS, LLC, A FLORIDA  
CORPORATION,

Petitioner,

vs.

Case No. 18-0134BID

SEMINOLE COUNTY SCHOOL BOARD,

Respondent.

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RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1) and (3), Florida Statutes (2018),<sup>1/</sup> on September 12 and 27, 2018, in Sanford, Florida.

APPEARANCES

For Petitioner: Seldon J. Childers, Esquire  
Christina R. Childers, Esquire  
Childers Law, LLC  
2135 Northwest 40th Terrace, Suite B  
Gainesville, Florida 32605

For Respondent: Sarah H. McDonald, Esquire  
School Board of Seminole County  
400 East Lake Mary Boulevard  
Sanford, Florida 32773-7127

STATEMENT OF THE ISSUE

Whether the decision of Respondent, Seminole County School Board, not to include Petitioner, Cady Studios, LLC, in its

award of a yearbook and photography services contract was contrary to its governing statutes, rules, or the solicitation specifications.

PRELIMINARY STATEMENT

This matter involves Cady Studios, LLC's ("Cady Studios"), protest to the Seminole County School Board's ("School Board") Notice of Intended Decision to award contracts for districtwide yearbook and photography services ("Photography Services") through RFP #17180001P-LL.

Following a competitive solicitation, the School Board determined not to offer Cady Studios a contract for its Photography Services.

The School Board posted its Notice of Intended Decision on September 28, 2017. On November 9, 2017, Cady Studios filed a Notice of Protest challenging the School Board's award of the Photography Services. Cady Studios subsequently filed its Petition and Formal Written Protest with the School Board on November 27, 2017. (The School Board contends that Cady Studios untimely filed its Notice of Protest, and therefore, this administrative dispute must be dismissed. The issue of the timeliness of Cady Studios' bid protest is addressed below in the Conclusions of Law section.)

On January 8, 2018, the School Board referred Cady Studios' protest to the Division of Administrative Hearings ("DOAH") for

assignment to an Administrative Law Judge ("ALJ") to conduct a chapter 120 evidentiary hearing.

The final hearing was held on September 12 and 27, 2018.<sup>2/</sup> At the final hearing, Cady Studios presented the testimony of Luangel Lowder, Cheryl Olson, Dr. Trent Daniel, and Jimmy Smith. The School Board also called Luangel Lowder, Cheryl Olson, and Dr. Trent Daniel during its case in chief. School Board Exhibits 1 through 50 were admitted into evidence. Cady Studio Exhibits 1 through 70 were admitted into evidence.<sup>3/</sup>

A three-volume Transcript of the final hearing was filed with DOAH on or before October 18, 2018. At the close of the hearing, the parties were advised of a ten-day deadline after receipt of the hearing transcript to file post-hearing submittals. Cady Studios requested a ten-day extension of the filing timeframe, which was unopposed, and which was granted. Cady Studios subsequently moved for an (unopposed) additional 14-day extension to file the post-hearing submissions, which was also granted.<sup>4/</sup> Both parties filed Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

#### FINDINGS OF FACT

1. Respondent, School Board, operates the public school system established for the School District of Seminole County, Florida. See § 1001.30, Fla. Stat. The School Board oversees 37 elementary schools, 12 middle schools, nine high schools, and

seven special centers. The Seminole County School District includes over 67,000 students.

2. The School Board is an authorized governmental entity allowed to contract for commodities or services using the competitive solicitation process set forth in section 287.057, Florida Statutes. See §§ 1010.04 and 1001.41(4), Fla. Stat.

3. On July 18, 2017, the School Board published [Request for Proposal] #17180001P-LL, Yearbook and Photography Services (the "RFP"). Through the RFP, the School Board solicited qualified vendors to provide Photography Services to Seminole County Public Schools. The initial contract for the Photography Services runs for three years, with a possible extension of another two years. Prior to this RFP, the School Board had never used a request for proposal to solicit the Photography Services.

4. Thirteen photography and yearbook vendors, including Cady Studios, responded to the RFP. Ultimately, as further explained below, the School Board determined to offer the top seven vendors a contract to provide the Photography Services. Cady Studios was ranked eighth. Consequently, Cady Studios was not selected under the RFP.

5. Cady Studios is a family-owned portrait company based in Florida and has provided school portrait services since 1998. Cady Studios has partnered with over 50 schools in central

Florida, and is an approved vendor in 35 Florida school districts.

6. The School Board published the RFP, as well as an Addendum, on VendorLink and Demand Star websites. The School Board used these two on-line platforms to disseminate information regarding the solicitation to interested vendors. The School Board provided links to VendorLink and Demand Star on the district's website.

7. After the School Board posted the RFP on July 18, 2017, the School Board did not receive any protests to the terms, conditions, or specifications contained in the RFP.<sup>5/</sup> Pertinent to this matter, Cady Studios never protested the RFP's terms, conditions, or specifications, or the School Board's decision to competitively solicit bids for the Photography Services under section 287.057.

8. As stated in the RFP, the School Board conducted a pre-proposal conference on July 27, 2017. During this meeting, the School Board offered interested vendors the opportunity to ask questions about the RFP, as well as educate themselves about the process. Cady Studios did not attend the pre-proposal conference.

9. On August 2, 2017, the School Board posted an Addendum to the RFP which requested specific pricing information for the

Photography Services to be offered to high schools, middle schools, and/or elementary schools in Seminole County.

10. Proposals for the Photography Services were due on August 15, 2017. Thirteen school photography and yearbook vendors, including Cady Studios, presented proposals in response to the RFP. RFP, Section V, directed each vendor to deliver "One (1) original, One (1) copy, and ten (10) electronic [USB] thumb drive version[s]" of its proposal to the School Board.

11. To score the proposals, as set forth in RFP, Section IV, 1.A, the School Board formed an Evaluation Committee. The voting members consisted of an executive director from an elementary school, a middle school, and a high school (or their designees), as well as a local business advisory member. A non-voting School Board member was also included on the Evaluation Committee.

12. The individuals selected to serve as the voting members of the Evaluation Committee included Dr. Trent Daniel (Principal, Lake Brantley High School); Byron Durias (Principal, Sanford Middle School); Tina Langdon (Principal, Sabal Point Elementary School); and Donald Miller (Business Advisory Member). Karen Almond served as the non-voting School Board member.

13. After the School Board assembled the Evaluation Committee, the four voting members received training on the

RFP's scoring procedure. The training was conducted by Luangel Lowder, the School Board's Purchasing Agent, on August 17, 2017. Ms. Lowder drafted and prepared the RFP. She also facilitated the RFP process. Ms. Lowder distributed training notes to each evaluator, which included guidance on how to score the proposals. In her written comments, Ms. Lowder wrote, "The Vendor Submittals are on Individual Jump Drives. I do have a hard copy if needed."

14. Ms. Lowder also provided "Adjectival Descriptor Rating Guidelines," which the voting members were to use to score the proposals. Regarding a score of "0," the guidelines explained:

Unsatisfactory (0): Not responsive to question. "Unsatisfactory" is defined as a response not meeting the requirements without major revisions and proposes an unacceptable risk. "Unsatisfactory" demonstrates a misunderstanding of the requirements; the approach fails to meet performance or capability standard and contains major omissions and inadequate detail to assure the evaluator that the respondent has an understanding of the requirement.

15. RFP, Sections IV and V, also listed the specific evaluation criteria, as well as the adjectival scoring system, the Evaluation Committee was to use to determine each vendor's score. RFP, Section V, directed that "[e]ach response shall be organized and presented in the following sequence and will include the following at a minimum":

- Tab 1-Respondent's Profile and Submittal Letter (Non-Scored)
- Tab 2-Experience of Personnel (Weighted Value 25)
- Tab 3-Technical Approach Methodology (Weighted Value 30)
- Tab 4-References (Weighted Value 10)
- Tab 5-Fee Schedule (Weighted Value 35)
- Tab 6-Confidential Materials, Financial Statement and Litigation (Non-Scored)
- Tab 7-Exceptions to Draft Contract (Non-Scored)
- Tab 8-Addenda (Non-Scored)
- Tab 9-Required Documents (Non-Scored)

16. The proposals were to be scored on a scale of 0 to 4 with a score of 0 as the least favorable, and a score of 4 as the most favorable in all sections. RFP, Section IV, 1.C, noted that a vendor's response would receive a score of 0 if it was "Unsatisfactory: Not responsive to the question." The RFP did not provide objective measures for the evaluators to score the proposals. Instead, the School Board relied on the experience and judgment of each evaluator as to what score to award in each category.

17. The RFP notified vendors that, after the proposals were evaluated, the Evaluation Committee might conduct interviews or presentations from a shortlist of vendors.

18. Per the terms of the RFP, the School Board required each winning vendor to enter into a Master Services Agreement. The Master Services Agreement was to ensure that each vendor for the Photography Services complied with, and operated under, the same terms and conditions. These standard terms and conditions included, but were not limited to, requirements for background



checks, licenses, certificates of insurance, as well as the use of a common commission's structure. Thereafter, the School Board intended for each district school to select a company from the list of approved vendors from whom they desired to obtain the Photography Services.

19. After the 13 vendors presented their proposals on August 15, 2017, the School Board distributed a thumb [USB] drive from each vendor to each Evaluation Committee member. At that point, each committee member separately scored each proposal using the four weighted criteria listed in RFP, Section V: Experience of Personnel (25 points), Technical Approach Methodology (30 points), References (10 points), and Fee Schedule (35 points).

20. On September 21, 2017, the Evaluation Committee convened a "short-list meeting" to discuss the scores each committee member awarded to each vendor.

21. When Cady Studios' proposal came up for review, two committee members, Dr. Trent Daniel and Byron Durias, announced that the USB drives they had been given for Cady Studios were blank. Dr. Daniel had tried her USB drive on two computers with similar results: the USB drive did not contain any files.

22. Ms. Lowder then asked both members if they wished to review another USB drive or a paper copy of Cady Studios' presentation so that they could score its proposal. Dr. Daniel

declined. On her score sheet for Cady Studios, Dr. Daniel wrote before the short-list meeting, "could not read USB - empty." During the discussion between the other evaluators, Dr. Daniel added: "notes, experience limited, reference from school, senior package high, presentation of bid, partnership w/ Herff Jones." At the end of the discourse, because she had no proposal to score, Dr. Daniel disclosed to the Evaluation Committee that she awarded Cady Studios a score of "0" in every category.

23. Mr. Durias, however, was willing to evaluate Cady Studios during the short-list meeting. Therefore, Ms. Lowder provided him another USB drive that did contain Cady Studios' proposal. After his review, Mr. Durias awarded Cady Studios: 3 - Experience of Personnel, 2 - Technical Approach Methodology, 1 - References, and 2 - Fee Schedule.

24. Each USB drive that Tina Langdon and Donald Miller received for Cady Studios contained its proposal, which they scored. Ms. Langdon awarded Cady Studios: 3 - Experience of Personnel, 2 - Technical Approach Methodology, 3 - References, and 3 - Fee Schedule. Mr. Miller awarded Cady Studios: 3 - Experience of Personnel, 2 - Technical Approach Methodology, 3 - References, and 2 - Fee Schedule.

25. At the final hearing, Dr. Daniel explained that she passed on the opportunity to rescore Cady Studios' proposal

because, in her mind, a blank response (or USB drive) equated to a nonresponsive proposal. In other words, she scored what she had been given. Cady Studios' proposal was "unsatisfactory" because it contained no response to the questions. Dr. Daniel further commented that Cady Studios' failure to ensure that its proposal was properly copied onto all of its USB drives was irresponsible and unprofessional. This carelessness gave Dr. Daniel apprehension about the quality of service Cady Studios would provide if it could not follow the RFP's explicit directions.

26. Following the discussion and scoring of the vendors' proposals, the Evaluation Committee members ranked all 13 vendors by overall total weighted scores. The Evaluation Committee's final list of vendors and their scores read as follows:

Grad Images:	1335
Life Touch:	1290
Leonard's:	1272.5
Dean Stewart:	1140
Strawbridge:	1095
Josten's:	1030
Walsworth:	1010
Cady Studios:	720
Barksdale:	715
Nation Wide:	710
Monden Studios:	705
Herff Jones:	670
Ritoba:	585

As shown above, Cady Studios received the eighth highest score.

27. The Evaluation Committee then discussed which vendors it should invite back for informal interviews. After a brief deliberation, the Evaluation Committee reached a consensus that it should extend an interview to the top seven vendors on the scoring list. Dr. Daniel and Ms. Lowder explained that this division was chosen because of the "natural break" in the scores between the seventh ranked vendor (Walsworth) and the eighth ranked vendor (Cady Studios). Ms. Lowder relayed that the relatively large scoring differential between Walsworth (1010) and Cady Studios (720) (nearly 300 points) appeared to separate the top vendors from the others. Therefore, to narrow down the list of vendors to those most qualified to provide the Photography Services, the Evaluation Committee chose this gap as the dividing line. Dr. Daniel relayed that she had previously used this "natural break" scoring technique in cheerleading and dance competitions.

28. Ms. Lowder testified that the RFP did not establish an exact number of vendors the School Board should select to provide the Photography Services. Neither did the RFP state how the vendors were to be condensed, if at all. The Evaluation Committee, however, felt that the number of approved vendors should be limited. A truncated list of vendors would provide a more manageable group for the School Board to oversee to ensure that each vendor offered a similar pricing structure and

consistent services. This action would also make it easier for individual schools to select the vendor with which they desired to work.

29. As a result of the Evaluation Committee's "natural break" methodology, Cady Studios was not grouped with the winning vendors for the Photography Services. As a non-selected vendor, Cady Studios was not authorized to offer Photography Services to the district schools for the length of the RFP contract period (3 to 5 years).

30. Cheryl Olsen serves as the School Board's Director of Purchasing and Distribution. In this role, she supervised the procurement activities. After the Evaluation Committee's short-list meeting, Ms. Olsen prepared a "Short List Letter" for the top seven vendors. The letter notified the vendors of their ranking on the short list and invited them back for informal interviews with the Evaluation Committee. On September 22, 2017, Ms. Lowder forwarded Ms. Olsen's letter to the seven short-listed vendors. The interviews were scheduled for September 28, 2017.

31. On September 28, 2017, the Evaluation Committee met with each of the seven short-listed vendors. Following the interviews, the Evaluation Committee decided that the School Board should offer the Photography Services to all seven short-listed vendors.

32. That afternoon, Ms. Olsen drafted a Notice of Intended Decision announcing the intent to award the RFP to the top seven vendors. Ms. Olsen posted the Notice of Intended Decision on-line through both VendorLink and Demand Star. The Notice of Intended Decision stated:

The Purchasing and Distribution Services Department hereby notifies all firms of an intended decision regarding the award of the [RFP] as outlined below or attached.

The firms on the attached list will be recommended to the School Board on October 17, 2017 with final contracts to be presented at a future meeting.

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 the proceedings under Chapter 120, Florida Statutes.<sup>[6/1]</sup>

Attached to the Notice of Intended Decision was the list of the seven vendors who the Evaluation Committee intended to recommend to the School Board for award of the RFP. Cady Studios was not included on the list.

33. On October 10, 2017, the School Board formally approved an award of the Photography Services to the seven vendors identified in the Notice of Intended Decision.

34. On November 7, 2017, the School Board entered into a Master Services Agreement with each of the seven winning vendors for the Photography Services. The initial term of the Master

Services Agreements runs from November 8, 2017, through November 7, 2020.

35. Jimmy Smith works as the Market Vice President for Cady Studios. In his role, Mr. Smith oversees all of Cady Studios' photography services in Florida. Mr. Smith prepared Cady Studios' proposal for the RFP.

36. Mr. Smith explained that he is familiar with the competitive solicitation process. He has previously submitted proposals on behalf of Cady Studios for school photography services in Pinellas, Hillsborough, and Brevard Counties. In a typical school portrait arrangement, the parents/students directly pay the studio for the photography services. The studio then pays a commission back to the school. Prior to the RFP, Cady Studios was an approved vendor for the School Board. Cady Studios had worked with approximately four schools in the Seminole County School District.

37. Mr. Smith was also familiar with VendorLink and Demand Star, the on-line platforms the School Board used to publish information regarding the RFP. Mr. Smith learned about the RFP after the School Board had already posted notice of the solicitation on July 18, 2017. However, by August 9, 2017, Mr. Smith had registered Cady Studios with VendorLink, and began receiving the notifications regarding the RFP.

38. On Sunday, September 24, 2017, Mr. Smith found out about the Evaluation Committee's short-list from another vendor. Mr. Smith then accessed the VendorLink website and spotted the Evaluation Committee's invitation to the seven top vendors to return for informal interviews. When he discovered that Cady Studios was not included on the list, he concluded that Cady Studios would not be awarded the Photography Services contract.

39. Mr. Smith promptly wrote an e-mail to Ms. Lowder. He asked her for any information as to why Cady Studios did not make the Evaluation Committee's shortlist.

40. Ms. Lowder received Mr. Smith's e-mail the following morning on Monday, September 25, 2017. She replied to Mr. Smith both through an e-mail, as well as a phone call. During the phone call, Ms. Lowder offered to meet with Mr. Smith for a "debriefing" to review the Evaluation Committee's decision. Ms. Lowder did not offer any information as to why Cady Studios was not included with the short-listed vendors. Ms. Lowder and Mr. Smith scheduled the debriefing meeting for Thursday, October 5, 2017.

41. In the meantime, Mr. Smith received the School Board's Notice of Intended Decision on September 28, 2017. He did not contact Ms. Lowder to reschedule the debriefing meeting.

42. On October 5, 2017, Mr. Smith met with Ms. Lowder and Ms. Olson for the debriefing meeting. They reviewed the results



of the Evaluation Committee's short-list meeting, as well as each evaluator's scores. During this meeting, Mr. Smith first discovered that one evaluator (Dr. Daniel) scored Cady Studios' proposal with a "0" in every category. Mr. Smith further learned that Cady Studios received this score because the USB drive Dr. Daniel had been given was blank.

43. At the final hearing, Mr. Smith adamantly declared that all 10 USB drives that he produced for the School Board contained Cady Studios' proposal. He had no idea why two of the drives were blank when opened by Dr. Daniel and Mr. Durias. Mr. Smith also pointed out (correctly) that the RFP contained no provisions regarding what an evaluator was supposed to do with a blank USB drive. The RFP certainly did not direct the evaluator to score the proposal with all zeros.

44. In his communications with Ms. Lowder, Mr. Smith never indicated that Cady Studios intended to protest the School Board's ranking of vendors, or challenge the School Board's decision in any other manner. However, on October 12, 2017, legal counsel for Cady Studios, Jeff Childers (Cady Studios' counsel in this administrative matter), wrote to Ms. Olsen questioning the results of the RFP. Mr. Childers referenced the fact that one evaluator failed "to assign any points in any category to Cady." Mr. Childers concluded by requesting that the School Board consider resolving this issue informally by

allowing Cady Studios "to join the other seven authorized proposers" to provide Photography Services to district schools.

45. On October 16, 2017, Ms. Olsen responded to Mr. Childers in a letter saying:

The Notice of Intent to Award this solicitation was posted on September 28, 2017 at 2:24 p.m. In accordance with School Board Policy 7.71, Resolution of Bid Protests, "Any person who claims to be adversely affected by a proposed award of a bid and who has standing to protest an award of a bid, may file a written notice of protest with the Office of the Superintendent or Clerk of the School Board not later than seventy-two (72) hours of the time of the posting of the bid tabulation."

Ms. Olsen then noted that, as of the date of her letter, Cady Studios had not filed a written notice of protest with the Office of the Superintendent or Clerk of the School Board.

46. At the final hearing, Ms. Olsen (as well as Ms. Lowder) explained that, because the School Board posted its Notice of Intended Decision on Thursday, September 28, 2017, the 72-hour deadline to file a protest fell on Tuesday, October 3, 2017. (Saturday, September 30, 2017, and Sunday, October 1, 2017, are excluded in the computation of the 72-hour time period. See § 120.57(3)(b), Fla. Stat.) The fact that Mr. Smith's debriefing meeting occurred two days after the 72-hour period had elapsed did not change the protest calculation.

47. As described above, the School Board's Notice of Intended Decision specifically stated, in pertinent part:

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 the proceedings under Chapter 120, Florida Statutes.

48. Similarly, RFP, General Purchasing Terms and Condition, Paragraph 10, entitled, **RFP TABULATIONS, RECOMMENDATIONS, AND PROTEST**, addressed the possibility of a bid protest and stated:

Failure to file a protest within the time prescribed in Section 120.57(3) Florida Statutes will constitute a waiver of proceedings under Chapter 120, Florida Statutes and School Board Rules.<sup>[7/]</sup>

49. Paragraph 10 also referenced School Board Policy 7.71, Resolution of RFP Protest, and included a link to the School Board's policy webpage where the Policy 7.71 could be accessed. Policy 7.71, Section V, states:

Notice of Protest - Any person who claims to be adversely affected by a proposed award of a bid and who has standing to protest an award of a bid, may file a written notice of protest with the Office of the Superintendent or Clerk of the School Board not later than seventy-two (72) hours of the time of the posting of the bid tabulation. In the event notice of intent to award a bid is issued by certified mail or express delivery service return receipt requested, the notice of protest must be filed on or before 4:30 p.m. on the third day following

the date of receipt of the notice. In computing the deadline for filing, Saturdays, Sundays, and legal holidays observed by the School Board shall be excluded.

50. Despite Ms. Olsen's letter, as well as the language regarding protests in the RFP and the Notice of Intended Decision, Cady Studios formally filed a Notice of Protest with the School Board on November 9, 2017.

51. At the final hearing, Mr. Smith acknowledged that 72 hours following the Notice of Intended Decision (not including Saturday and Sunday) fell on October 3, 2017. Therefore, to explain the delay in submitting Cady Studios' Notice of Protest, Mr. Smith testified that he did not become aware of the material deficiencies in the Evaluation Committee's review of Cady Studios' proposal until he met with Ms. Lowder on October 5, 2017. Mr. Smith further admitted that he was not fully aware that Cady Studios only had 72 hours in which to protest the Notice of Intended Decision. Instead, he relied on Ms. Lowder to explain the RFP process, as well as the basis for the Evaluation Committee's selection of the winning vendors. Consequently, Mr. Smith asserted that Cady Studios "was misled or lulled into inaction by" the School Board's (Ms. Lowder's) action of not scheduling a debriefing meeting until two days after the 72-hour protest window had closed. Mr. Smith

maintained that if he had been informed of the deadline, Cady Studios would have filed immediately.

52. Mr. Smith conceded that he was familiar with the protest language contained in the RFP's General Purchasing Terms and Conditions, and was generally aware that the RFP referred to section 120.57(3). Mr. Smith further disclosed that he had read RFP, Paragraph 10, which identified Policy 7.71. However, he did not click the link to actually read the policy.

53. Mr. Smith estimated that, by not making the School Board's list of approved vendors for the Photography Services, it will lose approximately \$2,000,000 worth of business and opportunity costs every year over the life of the contract.

54. At the final hearing, Ms. Lowder responded to Mr. Smith's testimony by pointing out that, even if Dr. Daniel had awarded Cady Studios with a "1" in each category, Cady Studios' score would only have increased to 820. As the next lowest score to Cady Studios was 1010, Cady Studios' adjusted score would still have fallen significantly below the top seven vendors. Continuing to conjecture, Ms. Lowder commented that if Dr. Daniel had given Cady Studios scores similar to the lowest score awarded by the other committee members, Cady Studios' score would have equaled 935. This score is still below the "natural break" threshold of 1010. On cross examination, however, Ms. Lowder agreed that if Dr. Daniel awarded Cady

Studios scores similar to the highest score awarded by the other committee members, Cady Studios would have received a score of 990--much closer to, but still below, the "natural break."

55. Ms. Lowder and Ms. Olsen also remarked that November 9, 2017, the date Cady Studios eventually filed its Notice of Protest, was 27 business days after the deadline to file a bid protest (and 25 business days after Mr. Smith learned the Evaluation Committee's scores at the debriefing meeting). Cady Studios' Notice of Protest was also submitted after the School Board had entered into a Master Service Agreement with each of the seven winning vendors.

56. As discussed in detail below, the evidence presented at the final hearing establishes that Cady Studios failed to timely file its notice of protest within 72 hours after the School Board posted its Notice of Intended Decision. Further, Cady Studios did not prove that it may circumvent the filing deadline based on the defense of equitable tolling. Therefore, Cady Studios' challenge of the School Board's intended award of the Photography Services must be dismissed.

#### CONCLUSIONS OF LAW

57. DOAH has jurisdiction over the subject matter and the parties to this competitive procurement protest pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes.

58. Cady Studios challenges the School Board's award of the Photography Services contract to the seven short-listed vendors, not including itself. Pursuant to section 120.57(3)(f), the burden of proof in this matter rests with Cady Studios as the party protesting the proposed agency action. See State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Section 120.57(3)(f) further provides that in a competitive procurement protest:

[T]he 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.

59. The School Board issued the request for proposals for the Photography Services under its general authority established in section 1001.32(2), Florida Statutes, as well as the more specific authority for purchasing nonacademic commodities and contractual services set forth in section 1010.04(2), Florida Statutes.<sup>8/</sup>

60. Section 1010.04(2) states that "[e]ach district school board . . . shall adopt rules . . . to be followed in making purchases." The School Board elected to competitively solicit vendors for the Photography Services in accordance with the

purchasing policies set forth in Florida Administrative Code Chapter 6A-1. Rule 6A-1.012(1)(e) provides that a district school board may competitively solicit contractual services through a request for proposals,

when it is not practicable for the district school board to specifically define the scope of work for which the commodity, group of commodities, or contractual service is required and when the district school board is requesting that a responsible vendor propose a commodity, group of commodities, or contractual service to meet the specifications of the solicitation document.

61. The School Board determined that a request for proposals was the most appropriate method to obtain the Photography Services based on its estimate that the aggregate value of those contractual services to Seminole County district schools would exceed \$50,000.<sup>9/</sup> The School Board considered the funds each school would receive for the benefit of its students or parents as "internal funds." Therefore, when initiating the competitive solicitation for the Photography Services, the School Board aggregated the cost of those services when determining the best format to identify the most reliable and responsible vendors.

62. To conduct the request for proposals for the Photography Services, the School Board followed the competitive solicitation process outlined in section 287.057, which



constitutes the "governing statute" for the RFP.<sup>10/</sup> The School Board's procurement was also guided by School Board Policy 7.71.

63. In the bid protest context, the phrase "de novo proceeding" describes a form of intra-agency review. The purpose of the administrative law judge's review is to "evaluate the action taken by the agency." J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013); and State Contracting, 709 So. 2d at 609. A de novo proceeding "simply means that there was an evidentiary hearing . . . for administrative review purposes" and does not mean that the ALJ "sits as a substitute for the [agency] and makes a determination whether to award the bid *de novo*." J.D., 114 So. 3d at 1133; Intercontinental Props., Inc. v. Dep't of Health & Rehab. Servs., 606 So. 2d 380, 386 (Fla. 3d DCA 1992). "The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." State Contracting, 709 So. 2d at 609.

64. Accordingly, Cady Studios, as the party protesting the School Board's award, must prove, by a preponderance of the evidence, that the School Board's action was either:

(a) contrary to its governing statutes; (b) contrary to its rules or policies; or (c) contrary to the specifications of the RFP. The standard of proof Cady Studios must meet to establish

that the award violates this statutory standard of conduct is whether the School Board's decision was: (a) clearly erroneous; (b) contrary to competition; or (c) arbitrary or capricious. §§ 120.57(3)(f) and 120.57(1)(j), Fla. Stat.; and AT&T Corp. v. State, Dep't of Mgmt. Servs., 201 So. 3d 852, 854 (Fla. 1st DCA 2016).

65. An agency action is "contrary to competition" if it unreasonably interferes with the purpose of competitive procurement. As described in Wester v. Belote, 138 So. 721, 722 (Fla. 1931):

The object and purpose [of the bidding process] . . . is to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values . . . at the lowest possible expense; and to afford an equal advantage to all desiring to do business . . . , by affording an opportunity for an exact comparison of bids.

In other words, the "contrary to competition" test forbids agency actions that: (a) create the appearance and opportunity for favoritism; (b) reduce public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are abuses, i.e., dishonest, fraudulent, illegal, or unethical. See § 287.001, Fla. Stat.; Harry Pepper & Assoc.,

Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

66. Section 120.57(3)(f) requires an agency action be set aside if it is "arbitrary, or capricious." 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 1978), cert. denied, 376 So. 2d 74 (Fla. 1979). A "capricious" action is one which is "taken without thought or reason or irrationally." Id.

67. To determine whether an agency acted in an "arbitrary, or capricious" manner involves consideration of "whether the agency: (1) has considered all relevant factors; (2) given actual, good faith consideration to the factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enter. v. Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has also been formulated by the court in Dravo Basic Materials Company v. Department of Transportation, 602 So. 2d 632, 632 n.3 (Fla. 2d DCA 1992), as follows: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious."

68. As an initial procedural matter, the School Board argues that Cady Studios waived its ability to protest the award of the Photography Services because it failed to timely file its notice of protest.

69. Pursuant to section 120.57(3), any person who is adversely affected by an agency's intended decision in a contract award process "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." Failure to file a notice of protest "shall constitute a waiver of proceedings under this chapter." See § 120.057(3)(b), Fla. Stat.

70. As detailed in the above Findings of Fact, the School Board posted its Notice of Intended Decision on September 28, 2017. Consequently, to meet the 72-hour window, Cady Studios was required to file a notice of protest no later than October 3, 2017 (not including Saturday, September 30, 2017, or Sunday, October 1, 2017). Cady Studios, however, did not submit its notice of protest until November 9, 2017. Therefore, Cady Studios failed to timely protest and waived its right to challenge the School Board's award under chapter 120. See Xerox Corp. v. Fla. Dep't of Prof'l Reg., 489 So. 2d 1230, 1231 (Fla. 1st DCA 1986) (ruling that the protest period is initiated upon the agency's posting of the notice of an intended decision, not

the date of a subsequent written communication from the agency to the unsuccessful bidder.).

71. The doctrine of equitable tolling, however, may excuse an untimely filed bid protest under the appropriate facts.

§ 120.569(2)(c), Fla. Stat. See Pro Tech Monitoring, Inc. v. Dep't of Corr., 72 So. 3d 277, 281 (Fla. 1st DCA 2011); Williams v. Dep't of Corr., 156 So. 3d 563, 565 (Fla. 5th DCA 2015) ("The doctrine of equitable tolling can be applied to extend an administrative filing deadline."). Under the doctrine of equitable tolling, a late-filed petition should be accepted when a party "has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum," provided that the opposing party will suffer no prejudice. Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1988); Madison Highlands, LLC v. Fla. Hous. Fin. Corp., 220 So. 3d 467, 472 (Fla. 5th DCA 2017).

72. In arguing for equitable tolling, Cady Studios contends that Mr. Smith contacted the School Board to question the intended award before the 72-hour protest deadline began to run. Cady Studios did not file its notice of protest prior to October 3, 2017, however, because it did not learn of the reasons for Cady Studios' low score until Ms. Lowder divulged that information at the debriefing meeting on October 5, 2017.

Because Ms. Lowder scheduled the debriefing meeting two days after the filing period had expired, Cady Studios argues that Mr. Smith was "misled or lulled" into not timely filing a notice of protest.

73. Based on the evidence in the record, the undersigned concludes that Respondent failed to establish a defense of equitable tolling of the 72-hour filing deadline. Equitable tolling does not require active deception or agency misconduct, but focuses rather on the applicant with a reasonably prudent regard for his rights. Machules, 523 So. 2d at 1134. Cady Studio's explanation as to why it failed to timely file a notice of protest does not establish that it was misled or lulled into inaction.

74. Initially, the RFP and solicitation documents contain clear and direct information regarding the process to protest the School Board's decision. RFP, Paragraph 10, plainly stated that:

Failure to file a protest within the time prescribed in Section 120.57(3) Florida Statutes will constitute a waiver of proceedings under Chapter 120, Florida Statutes and School Board Rules.

Regarding the School Board Rules, Paragraph 10 also referenced, as well as included a "clickable" link to, School Board Policy 7.71. Policy 7.71, Section V, provided:

Any person who claims to be adversely affected by a proposed award of a bid and who has standing to protest an award of a bid, may file a written notice of protest with the Office of the Superintendent or Clerk of the School Board not later than seventy-two (72) hours of the time of the posting of the bid tabulation.

75. In addition, the School Board's Notice of Intended Decision explicitly advised all vendors that any protest to the School Board's award must be filed "within the time prescribed in section 120.57(3)."

76. The undersigned concludes that the information contained in the School Board's RFP and the Notice of Intended Decision was sufficient to inform a reasonably prudent vendor of the necessity to file a protest of the School Board's intended award within the statutory 72-hour timeframe. The School Board's RFP, as well as its notice, referenced the proper legal authority. Further, Mr. Smith admitted that he read both the RFP and the Notice of Intended Decision, and that he knew the proper forum in which to file a notice of protest.

77. Moreover, no action by the School Board prevented Cady Studios from complying with the 72-hour filing deadline to challenge the Notice of Intended Decision. In her communications with Mr. Smith, Ms. Lowder did not make any comments that contradicted or waived the statutory time requirements or affirmatively led Mr. Smith to believe that he

need not submit a notice of protest by October 3, 2018. See Riverwood Nursing Ctr., LLC v. Ag. for Health Care Admin., 58 So. 3d 907, 910 (Fla. 1st DCA 2011) (concluding that the facts did not support equitable tolling where an agency informed the petitioner after the deadline for filing a request for hearing had expired that its late-filed request would be accepted as timely); and Xerox Corp., 489 So. 2d at 1231 (finding that "the informal and imprecise oral communications which [the protestor] has alleged" were "insufficient in form and substance to overcome the effect of the prior formal notice as to the necessity of a timely protest."). No evidence was offered to show that any other School Board employee misled Cady Studios into delaying the filing of a notice of protest.

78. Essentially, Cady Studios' failure to timely file its notice of protest was due to its own unfamiliarity with section 120.57(3), and lack of due diligence to determine its requirements. Neither Florida statutes nor case law place the onus on the agency to calculate a filing deadline for a vendor. Ms. Lowder's silence as to the protest time period when scheduling the debriefing meeting is not enough to establish that the School Board misled or lulled Cady Studios into inaction, or somehow prevented it from timely submitting a notice of protest. Consequently, Cady Studios has not demonstrated that it may invoke the defense of equitable



tolling.<sup>11/</sup> See Whiting v. Fla. Dep't of Law Enf., 849 So. 2d 1149, 1151 (Fla. 5th DCA 2003) (holding that the appellant's "mistaken belief as to when the time period ended" was insufficient to support a claim of equitable tolling); and Jancyn Mfg. Corp. v. State, Dep't of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999) (wherein the court refused to apply the equitable tolling doctrine where the failure "was the result of appellant's own inattention, and not the result of a mistake or agency misrepresentation.").

79. Accordingly, because section 120.569(2)(c) compels the dismissal of untimely petitions, and because equitable tolling provides no exception in this case, Respondent's request for an administrative hearing to protest the School Board's award of the Photography Services contract must be dismissed.

80. Although Cady Studios' petition must be dismissed due to the untimely filing of its notice of protest, Cady Studios did prove that the School Board's evaluation of its bid for the Photography Services was arbitrary or capricious. The evidence in the record establishes that, when scoring, the Evaluation Committee did not give Cady Studios' proposal reasonable, good faith consideration, nor was the score it received supported by facts or logic.

81. Initially, Cady Studios persuasively argues that every evaluator (i.e., Dr. Daniel) should have affirmatively reviewed

and scored the proposal it submitted in response to the RFP. Cady Studios indisputably presented a complete and timely paper copy of its proposal to the School Board, as well as copies on at least eight USB drives. As demonstrated by the scores from three of the four evaluators, Cady Studios' proposal adequately responded to each of the four criteria that were to be scored. Therefore, as a matter of fairness and impartiality, every Evaluation Committee member should have fully evaluated Cady Studios' proposal.

82. Regarding how an individual Evaluation Committee member was to react upon receiving a blank USB drive, the RFP did not contain any instructions. However, the RFP certainly did not direct the evaluators to either refuse to score, or score a proposal with all zeros. None of the scoring criteria in the RFP considered whether all ten of a vendor's USB drives contained a copy of the proposal. Neither did the RFP's Adjectival Descriptor Rating Guidelines include blank USB drives in the "Unsatisfactory (0)" category.

83. Secondly, the Evaluation Committee members clearly treated Cady Studios' proposal inconsistently. Two of the four evaluators were initially given blank USB drives from Cady Studios. At the Evaluation Committee's short-list meeting, Ms. Lowder offered each evaluator another copy of Cady Studios' proposal to score, either the paper version or one accessible

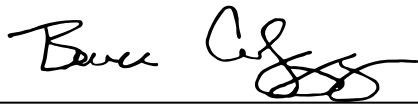
from another USB drive. One evaluator (Mr. Durias) was willing to, and did, fully score Cady Studios' proposal. The other evaluator (Dr. Daniel), declined to take advantage of this opportunity. Having one evaluator use a replacement USB drive to score a proposal, while another evaluator refused to do the same is not a consistent or sound manner in which to review a timely filed proposal in what should be a fair and impartial competitive solicitation process.

84. Finally, the School Board's argument that the short-listed vendors had such a clear lead in points over Cady Studios that Dr. Daniel's scores of "0" were inconsequential is unconvincing. The School Board cannot truly know whether the vendors who won the Photography Services contract actually had a "clear lead" over Cady Studios until its proposal was completely and fully evaluated under the scoring criteria set forth in the RFP. Accordingly, while the School Board's award of the Photography Services contracts should stand, and Cady Studios' petition must be rejected, the evidence does demonstrate that the School Board scored Cady Studios' proposal in an arbitrary or capricious manner.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Seminole County School Board enter a final order dismissing Cady Studios' protest as untimely filed.

DONE AND ENTERED this 23rd day of January, 2019, in Tallahassee, Leon County, Florida.



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J. BRUCE CULPEPPER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of January, 2019.

ENDNOTES

<sup>1/</sup> All statutory references are to the 2018 codification of the Florida Statutes, unless otherwise noted.

<sup>2/</sup> The parties jointly waived the requirement under section 120.57(3)(e) for the undersigned to commence the evidentiary hearing within 30 days after receipt of the formal written protest by DOAH. Thereafter, the initial final hearing was scheduled for April 24 and 25, 2018. Following good cause shown by Cady Studios, the final hearing was rescheduled for July 17, 2018. Thereafter, upon joint motion of the parties, the final hearing was rescheduled for September 12, 2018. The parties

were unable to complete the hearing on that date. The final hearing was reconvened on September 27, 2018, and completed on that date.

<sup>3/</sup> Cady Studios also proffered Exhibit 71 into the record. The undersigned did not admit Petitioner's Exhibit 71 into the evidence or used it as a basis for the finding of facts.

<sup>4/</sup> By requesting a deadline for filing post-hearing submissions beyond ten days after the final hearing, the 30-day time period for filing the Recommended Order was waived. See Fla. Admin. Code R. 28-106.216.

<sup>5/</sup> See RFP, General Purchasing Terms and Conditions, paragraph 5, entitled **POSTING OF RFP CONDITIONS/SPECIFICATIONS**, which stated:

In accordance with Florida Statute 120.57(3), 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, or awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice shall be filed in writing within 72 hours after the posting of the solicitation. Failure to file a specification protest within the time prescribed in Florida Statute 120.57(3) will constitute a waiver of proceeding under Chapter 120, Florida Statutes.

<sup>6/</sup> See § 120.057(3) (a), which states:

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."

<sup>7/</sup> The pertinent language is found in section 120.57(3)(b), which states:

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.

<sup>8/</sup> See also section 1001.41(4), Florida Statutes, which grants district school boards the general power to contract and further instructs that "The district school board shall constitute the contracting agent for the district school system."

<sup>9/</sup> See Rule 6A-1.012(7), which provides that:

Except as authorized by law or rule, competitive solicitations shall be requested from three (3) or more sources for any authorized commodities or contractual services exceeding \$50,000. Districts may not divide the procurement of commodities or contractual services so as to avoid this monetary threshold requirement. District school boards, by rule, shall set this amount or a lesser amount and shall establish purchasing policy relative to purchases of a dollar value less than this formal monetary threshold.

Section 287.057(1) also instructed the School Board to use the competitive solicitation processes described therein (including request for proposals) for procurement of contractual services valued in excess of \$35,000. (See § 287.017(2), Fla. Stat.)

<sup>10/</sup> Cady Studios argues that the School Board should not have used the request for proposals solicitation process in section 287.057 because the School Board is not "procuring" the Photography Services. Instead, the School Board was simply creating a list of photography vendors. Thereafter, the individual students (or their parents) would actually pay for the photographs or yearbooks, as desired.

The School Board, however, persuasively maintains that no statute or rule prevents it from using the competitive solicitation processes under section 287.057 for the procurement

of contractual services, regardless of the amount of the goods purchased. The School Board also credibly represents that it may elect to use a competitive solicitation process, even when it is not required to. See e.g. USF Coll. of Nursing v. Dep't of Health, 812 So. 2d 572, 574 (Fla. 2d DCA 2002) (The Department of Health's "voluntary use of a competitive selection format bound it to abide by statutory competitive procurement procedures and subjected the Department's decision to challenge under the bid protest provisions of section 120.57(3).").

Further, the School Board correctly asserts that Cady Studios waived its right to argue that the School Board should have used a different type of competitive solicitation format. After the School Board issued the RFP on July 18, 2017, Cady Studios did not file a notice of protest to the RFP's specifications within 72 hours of the RFP being posted. As also discussed in paragraphs 67-78, section 120.57(3)(b) states, in pertinent part:

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. . . . Failure to file a notice of protest . . . shall constitute a waiver of proceedings under this chapter.

As stated in section 120.57(3)(b), a vendor may challenge the "method" used to rank proposals or award contracts by "a protest of the terms, conditions, and specifications contained in the [RFP]." Any such protest must be raised "within 72 hours after the posting of the solicitation," or it is waived. See Consultech of Jacksonville, Inc. v. Dep't of Health, 876 So. 2d 731, 734 (Fla. 1st DCA 2004) (rejecting the protestor's challenge to the Department of Health's scoring of the element of costs because the petitioner "failed to file a protest to the terms and conditions of the RFP as required by section 120.57(3)."; and Capeletti Bros., Inc. v. Dep't of Transp., 499 So. 2d 855, 857 (Fla. 1st DCA 1986) ("The purpose of the bid solicitation protest provision is to allow an agency, in order to save expense to the bidders and to assure fair competition among

them, to correct or clarify plans and specifications prior to accepting bids. A failure to file a timely protest constitutes a waiver of chapter 120 proceedings.”).

Accordingly, to the extent that Cady Studios desires to contest the “method” the School Board chose to conduct its solicitation for the Photography Services, Cady Studios was required to raise such a challenge within 72 hours after the School Board issued the RFP on July 18, 2017. Because Cady Studios failed to file a notice of protest to the terms, conditions, or specifications of the RFP, Cady Studios has waived its opportunity to dispute the same. See Optiplan Inc. v. Sch. Bd. of Broward Cnty., 710 So. 2d 569, 572-73 (Fla. 4th DCA 1998) (“Having failed to file a bid specification protest, and having submitted a proposal based on the published criteria, [the vendor] has waived its right to challenge the criteria.”).

<sup>11/</sup> Even if Cady Studios could not have reasonably known about the basis for a protest until the debriefing meeting on October 5, 2017, it delayed an additional 25 business days to file a written notice of protest - even after the additional explicit warning of a 72-hour deadline imparted by both Ms. Lowder at the debriefing meeting and Ms. Olsen in her October 16, 2017, letter. With no explanation as to why Cady Studios waited until November 9, 2017, to formally file its notice of protest, such circumstances do not support the defense of equitable tolling.

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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.