STATE OF FLORIDA
DEPARTMENT OF HEALTH

TALLAHASSEE CORPORATE CENTER, LLC,

Petitioner,

v.

DOH Case No.: 2018-0067
DOAH Case No.: 18-1574BID

FLORIDA DEPARTMENT OF HEALTH,

Respondent,

and,

TALLAHASSEE RETAIL VENTURES, LLC,

Intervenor.
_____/

FINAL ORDER

A Recommended Order having been received, this matter is before the Department of Health (Department) for entry of a final order. Having reviewed the Recommended Order, and the exceptions filed by Petitioner Tallahassee Corporate Center, LLC, the Department finds:

STANDARD OF REVIEW FOR RULING ON EXCEPTIONS TO A RECOMMENDED ORDER

Section 120.57(1)(k), Florida Statutes, directs an agency to include in its final order an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

An agency may not reject or modify findings of fact in a recommended order unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. See § 120.57(1)(*l*), Fla. Stat.

An agency may reject or modify the conclusions of law over which the agency has substantive jurisdiction and interpretation of administrative rules over which the agency has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. See § 120.57(1)(*l*), Fla. Stat.

NOMENCLATURE OF EXCEPTIONS

For reasons of clarity, the Department will refer to each of Petitioner's numbered exceptions by Petitioner's original exception number and by Recommended Order paragraph number, e.g., Exception III.38, RO Paragraph 25. The Department neither accepts nor rejects Petitioner's general argumentation at 'exceptions' 1-37, because they do not comply with law; but will accept or deny only Petitioner's exceptions 38-62 which cite to numbered Recommended Order paragraphs as required by sec. 120.57(1)(k), Fla. Stat. To do otherwise quickly descends into confusion. There are no exceptions that identify a disputed point by Recommended Order page number.

RULINGS ON EXCEPTIONS

Exception III.38; RO Paragraph 25: This finding of fact is supported by competent substantial evidence, therefore this exception is **DENIED.**

Exception III.39; RO Paragraph 31: This finding of fact is supported by competent substantial evidence, therefore this exception is **DENIED.**

Exception III.40; RO Paragraph 43: This finding by the ALJ is supported by competent, substantial evidence of record; it is undisputed that Petitioner TCC failed to include an executed power of attorney with its reply, therefore the ALJ properly framed this issue. This exception is **DENIED.**

Exception III.41; RO Paragraph 44: This finding by the ALJ is supported by competent, substantial evidence, in that the ITN requires all proposers to document control and Petitioner TCC did not do so in its reply. The Department has no authority to enter additional or supplemental findings of fact in place of the ALJ's findings, therefore this exception is **DENIED.**

Exception III.42; RO Paragraphs 46, 47, 49, and 54 (composite): Petitioner TCC disagrees with the ALJ's findings in these paragraphs on evidentiary grounds. The Department has no authority to review the decisions of the ALJ to admit or deny evidence.

TCC requests that the final order include a finding that TCC's failure to document control of the property was waived by the Department at hearing, and invites the Department to substitute additional or supplemental findings of fact in place of the ALJ's findings. The Department has no authority to enter additional or supplemental findings of fact in place of the ALJ's findings, therefore this composite exception is **DENIED.**

Exception III.43; RO Paragraphs 51 and 53 (composite):

RO Paragraph 51 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

RO Paragraph 53 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

Exception III.44; RO Paragraph 56: TCC excepts to this finding based on argument regarding another proposer who is not a party to this case. This topic is beyond the scope of the proceeding before the ALJ. TCC invites the Department to make a supplemental finding of fact, not allowed under Florida law, therefore this exception is **DENIED.**

Exception IV.45; RO Paragraphs 7, 9, 13, 14, 20, 22-24, 26, 31-33, 41, 42, 68-70 & 80: Paragraphs 13, 24, 26, 31, 32 and 33 are fact findings, not dependent on any interpretation of documents.

RO Paragraph 13 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

RO Paragraph 24 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

RO Paragraph 26 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

RO Paragraph 31 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

RO Paragraph 32 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

RO Paragraph 33 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

Paragraphs 7, 9, 14, 20, 22, 23, 41, 42, 68, 69, 70, and 80 are conclusions of law.

RO Paragraph 7 is a correct interpretation of the ITN's terms, conditions and specifications, therefore this paragraph exception is **DENIED.**

RO Paragraph 9 and corresponding endnote 5 are correct interpretations of the ITN's terms, conditions and specifications, therefore this paragraph exception is **DENIED.**

RO Paragraph 14 is a correct interpretation of the ITN's terms, conditions and specifications, therefore this paragraph exception is **DENIED.**

RO Paragraph 20 is a correct interpretation of the ITN's terms, conditions and specifications, therefore this paragraph exception is **DENIED.**

RO Paragraph 22 is a correct interpretation of the ITN's terms, conditions and specifications, therefore this paragraph exception is **DENIED.**

RO Paragraph 23 is a correct interpretation of the TCC's reply documents, therefore this paragraph exception is **DENIED.**

RO Paragraph 41 is a correct interpretation of Florida law and the ITN's terms, conditions and specifications, therefore this paragraph exception is **DENIED.**

RO Paragraph 42 is a correct interpretation of TCC's reply to the ITN and the ITN's terms, conditions and specifications, therefore this paragraph exception is **DENIED.**

RO Paragraph 68 is a correct interpretation of the ITN, therefore this paragraph exception is **DENIED.**

RO Paragraph 69 is a correct interpretation of Florida law, therefore this paragraph exception is **DENIED.**

Exception IV.46; RO Paragraph 7 (reasserted): RO Paragraph 7 is a correct interpretation of the ITN's terms, conditions and specifications, therefore this paragraph exception is **DENIED.**

Exception IV.47; RO Paragraph 13 (reasserted): RO Paragraph 13 concludes the ITN turn-key requirement applies to existing facilities and new construction, which is a correct interpretation of the ITN, therefore this paragraph exception is **DENIED.**

Exception IV.48; RO Paragraph 14 (reasserted): RO Paragraph 14 concludes the ITN turn-key requirement applies to all proposers, which is a correct interpretation of the ITN, therefore this paragraph exception is **DENIED.**

Exception IV.49; RO Paragraphs 20 & 23 (reasserted):

RO Paragraph 20 conclusion is a correct statement regarding the goal of the Department in the ITN, therefore this paragraph exception is **DENIED.**

RO Paragraph 23 conclusion is a correct statement regarding TCC's reply, therefore this paragraph exception is **DENIED.**

Exception IV.50; RO Paragraph 22 (reasserted):

RO Paragraph 22 conclusion is a correct statement regarding space specifications, therefore this paragraph exception is **DENIED.**

Exception IV.51; RO Paragraph 24 (reasserted):

RO Paragraph 24 conclusion is a correct statement regarding TCC's reply, therefore this paragraph exception is **DENIED.**

Exception IV.52; RO Paragraph 26 (reasserted):

RO Paragraph 26 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

Exception IV.53; RO Paragraph 31 (reasserted):

RO paragraph 31 conclusion about what the Department was seeking in the ITN is correct, therefore this paragraph exception is **DENIED.**

Exception IV.54; RO Paragraphs 29 (new), 32 & 33 (reasserted):

RO Paragraph 29 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

RO Paragraph 32 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

RO Paragraph 33 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

Exception IV.55; RO Paragraphs 41 & 42 (reasserted):

RO Paragraph 41 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

RO Paragraph 42 findings of fact are supported by competent, substantial evidence, therefore this paragraph exception is **DENIED.**

Exception IV.56; RO Paragraphs 50, 55 & 56:

RO Paragraph 50 conclusion that facts asserted by TCC are distinguishable is correct, therefore this paragraph exception is **DENIED.**

RO Paragraph 55 conclusion that facts asserted by TCC are distinguishable is correct, therefore this paragraph exception is **DENIED.**

RO Paragraph 56 conclusion that facts asserted by TCC are distinguishable is correct, therefore this paragraph exception is **DENIED.**

Exception IV.57; RO Paragraph 52:

RO Paragraph 52 conclusion is correct, therefore this paragraph exception is **DENIED.**

Exception IV.58; RO Paragraph 57:

RO Paragraph 52 conclusion is correct, therefore this paragraph exception is **DENIED.**

RO Paragraph 57 conclusion that facts asserted by TCC are distinguishable is correct, therefore this paragraph exception is **DENIED.**

Exception IV.59; RO Paragraph 58:

RO Paragraph 58 conclusion is correct, therefore this paragraph exception is **DENIED.**

Exception IV.60; RO Paragraphs 72 & 73:

RO Paragraph 72 conclusion is correct, therefore this paragraph exception is **DENIED.**

RO Paragraph 73 conclusion is correct, therefore this paragraph exception is **DENIED.**

Exception IV.61; RO Paragraph 77:

RO Paragraph 77 conclusion is correct, therefore this paragraph exception is **DENIED.**

Exception IV.62; RO Paragraphs 68-70 & 80:

RO Paragraph 68 conclusion is correct, therefore this paragraph exception is **DENIED.**

RO Paragraph 69 conclusion is correct, therefore this paragraph exception is **DENIED.**

RO Paragraph 70 conclusion is correct, therefore this paragraph exception is **DENIED.**

RO Paragraph 80 is a summary conclusion based on all the foregoing RO paragraphs, and is correct, therefore this paragraph exception is **DENIED.**

WHEREFORE, the Recommended Order entered in this proceeding on May 31, 2018 is adopted and incorporated by reference.

Based on the foregoing, the petition of Tallahassee Corporate Center, LLC is **DISMISSED.**

DONE and **ENTERED** this 2 day of July, 2018 in Tallahassee, Leon County, Florida.

Alexis Lambert
Chief of Staff
Florida Department of Health

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY ADVERSELY AFFECTED BY THIS ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. A REVIEW PROCEEDING IS INITIATED BY FILING A NOTICE OF APPEAL WITH THE CLERK OF THE DEPARTMENT OF HEALTH AND A COPY ACCOMPANIED BY THE FILING FEE WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES OR IN THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE FILING DATE OF THIS ORDER.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been sent by electronic mail and regular U.S. mail and/or by inter-office mail to each of the above-named persons this 2nd day of July, 2018.

Shannon Revell
Agency Clerk
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TALLAHASSEE CORPORATE CENTER, LLC,

Petitioner,

vs. Case No. 18-1574BID

DEPARTMENT OF HEALTH,

Respondent,

and

TALLAHASSEE RETAIL VENTURES, LLC,

Intervenor.
_____/

RECOMMENDED ORDER

A final hearing was held in this case on April 16, 2018, in Tallahassee, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings ("Division").

APPEARANCES

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STATEMENT OF THE ISSUES

Whether the Florida Department of Health's ("Respondent" or "Department") determination that Tallahassee Corporate Center, LLC ("Petitioner" or "TCC") submitted a nonresponsive reply to the Department's Invitation to Negotiate ("ITN") No. 640:0040 is contrary to the Department's governing statutes, rules, policies, or the solicitation specifications; and, if so, whether the decision was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On September 19, 2017, the Department issued the ITN soliciting replies for leased office space in Tallahassee, Florida, with a lease term to begin September 1, 2019. Both Petitioner and Intervenor submitted a timely reply to the ITN.

On February 27, 2018, the Department posted its Notice of Intent to award the contract to Tallahassee Retail Ventures, LLC ("TRV"). Petitioner timely submitted its Notice of Intent to protest the award of the ITN. On March 12, 2018, TCC timely filed its Formal Protest and Petition for Formal Administrative Hearing ("Petition"), which was referred to the Division on March 23, 2018, and assigned to the undersigned for scheduling a

final hearing. TRV filed a Notice of Intervention on March 28, 2018.[1/]

The undersigned conducted a telephonic scheduling conference on March 26, 2018, and the final hearing was scheduled for April 16 and 17, 2018.

On April 2, 2018, the Department filed a Motion for Protective Order ("Motion") seeking to limit the matters to be explored during deposition of its representatives to the reasons the Department deemed TCC's reply nonresponsive, and prohibit questions relating to the merits of TRV's reply. The Motion was based on the matters noticed in Petitioner's Notice of Taking Deposition Duces Tecum of the Department's representatives: Contract Officer Kimberly Cowling, and an unnamed corporate representative. However, in response to the Motion, Petitioner filed a Response arguing the Motion was moot and filed a Notice of Taking Depositions of Kimberly Cowling and the Department of Health Representative Witness, in which Petitioner narrowed the topic to the Department's determination that TCC's reply was nonresponsive. At the telephonic hearing on the Motion, Petitioner also withdrew its request to depose the Department's Broker, Jerry Thornbury. The undersigned denied the Motion as moot, refusing to speculate that Petitioner would inquire beyond the stated relevant issues during Ms. Cowling's deposition. The undersigned's Order Denying Respondent's Motion for Protective

Order specifically stated, "In the event Petitioner seeks the deposition of Mr. Thornbury, and the parties cannot agree on the issues to be covered in Mr. Thornbury's deposition, the undersigned will entertain reinstatement of Respondent's Motion for Protective Order, which may be disposed of without a hearing." Petitioner did not subsequently depose Mr. Thornbury.

On April 11, 2018, TRV filed a Motion to Dismiss Petition and Alternative Motion for a More Definite Statement, to which TCC filed a response on April 12, 2018. In the Motion to Dismiss, TRV argued Petitioner had admitted through discovery that its reply to the ITN was nonresponsive, thus no disputed issue of fact remained to be litigated. The Motion to Dismiss was denied. TRV's Motion for a More Definite Statement had some merit. The issues raised by TCC in the Petition were not fully fleshed out given the abbreviated timeframe for filing a Notice of Intent to Protest the award. As Petitioner acknowledged in the Petition, discovery was necessary to flesh out the reasons its reply had been deemed nonresponsive. Given that the parties' pre-hearing stipulation was due the following day, the undersigned denied the Motion for More Definite Statement to allow the parties to work on the stipulation, which would bind the parties to the disputed issues contained therein. See Gunn Plumbing, Inc. v. Dania, 252 So. 2d 1, 4 (Fla. 1971); Delgado v. Ag. for Health Care Admin., 2018 Fla. App. LEXIS 1012 at *9

(Fla. 1st DCA 2018) (holding that a stipulation that limits the issues to be tried amounts to a binding waiver and elimination of all issues not included); Heartland Envtl. Council, Inc. v. Dep't of Cmty. Aff., Case No. 94-2095 (Fla. DOAH Nov. 16, 1996; Fla. DCA Nov. 25, 1996).

Petitioner timely filed a Pre-hearing Statement which contains the following statement of factual issues to be decided by the undersigned:

> Whether Respondent's failure to evaluate the space proposed by TCC (that Respondent occupies), for consistency with its space occupancy needs, and failure to permit TCC to proceed to negotiation and make a best and final offer was contrary to governing statutes, rules or policies, or the solicitation specifications (mixed question of law and fact).

In its statement of position, Petitioner argued that its response to Item IV.G. of the ITN did not properly disqualify TCC's reply. Petitioner stated that, during its deposition of Ms. Cowling, she identified TCC's reply to Item IV.G. as the only reason TCC's reply was deemed nonresponsive. Petitioner raised two additional issues, alleging as follows: "DOH may now claim that TCC's reply should be [found] nonresponsive," including failure to demonstrate control of the property and pay the required Tenant Broker commission. With regard to the property control issue, Petitioner stated, "Any omitted information in TCC's ownership disclosure is a minor

irregularity that was not material, and did not afford TCC a competitive advantage, and should be corrected by allowing TCC to clarify or supply any missing information, not by disqualifying TCC's reply."

The final hearing commenced as scheduled on Monday, April 16, 2018. At the outset, the undersigned heard argument on three Motions in Limine filed by the Department on Friday, April 13, 2018, to which TCC filed responses on the morning of April 16, 2018. The motions sought to prohibit testimony and documentary evidence regarding TCC's attempts to change or supplement its original ITN reply; TCC's argument that its reply was "functionally equivalent" to the proposed office space sought in the ITN; and the Department's scoring of other replies to the ITN and negotiations with entities who submitted responsive replies. The undersigned granted each of the three Motions in Limine.

Petitioner presented the testimony of Todd Hakimi, TCC co-owner, and Jerry Thornbury, the Department's Broker Dealer. Petitioner introduced Exhibits P2, P8, and P23, which were admitted in evidence. Petitioner's Exhibits P4 through P7, P9 through P12, and P15 were ruled inadmissible, but are traveling with the record on Petitioner's proffer of same.

The Department presented the testimony of Mr. Thornbury and introduced Exhibits R1 through R6, R8, R12, and R13, which were admitted in evidence.

Intervenor offered no witnesses and introduced Exhibits I1 and I2, which were admitted in evidence.

During examination of Mr. Thornbury, Petitioner sought to elicit testimony regarding the responsiveness of other applicants' replies on the issue of control of the property, as well as introduce excerpts from those ITN replies as exhibits. The undersigned declined to allow the proffered testimony and exhibits, which were beyond the scope of disputed issues of fact for the final hearing.[2/]

However, the undersigned granted, in part, Petitioner's Motion for Reconsideration of that ruling and admitted in evidence Petitioner's Exhibits P20 through P22 to rebut Respondent's assertion that Petitioner's ITN reply was nonresponsive on the issue of control of the property. In the Order granting Petitioner's Motion for Reconsideration, the undersigned gave the parties five days from the date of the Order to request a hearing to take testimony regarding whether Exhibits P20 through P22 support a finding that Petitioner's ITN reply was responsive on the issue of control of the property. No party requested a hearing. Respondent did file Respondent's Exhibits R17 through R19, complete copies of

Petitioner's Exhibits P20 through P22, which are hereby admitted in evidence.

The one-volume Transcript of the final hearing was filed on May 1, 2018.[3/] Petitioner filed a timely Proposed Recommended Order. Respondent filed a timely Proposed Recommended Order in which Intervenor joined. Intervenor timely filed Supplemental Proposed Findings of Fact and Conclusions of Law in which Respondent joined. The parties' post-hearing filings have been considered in the preparation of this Recommended Order.

All references herein to the Florida Statutes are to the 2017 version.

FINDINGS OF FACT

The ITN

1. The Department is a state agency that seeks space for administrative offices, a call-center facility, and claimant hearings. The Department currently leases office space from TCC, which lease expires on October 31, 2019.

2. On July 19, 2017, the Department issued the ITN seeking vendors that could provide 135,815 square feet of office space for lease. The Department issued one addendum to the ITN on September 1, 2017, deleting a requirement that the space be contiguous within a single building.

3. There were no challenges to the terms, conditions, or specifications contained in either the ITN or the amendment thereto.[4/]

4. Both TCC and TRV are potential lessors which submitted replies to the ITN.

5. The ITN includes a provision expressly reserving the Department's "right to negotiate with all responsive and responsible Proposers, serially or concurrently, to determine the best-suited solution." (emphasis added). The term "Proposer" is defined in the ITN to mean "the individual submitting a Reply to this [ITN], such person being the owner of the proposed facility or an individual duly authorized to bind the owner of the facility." This reservation of rights placed interested lessors on notice that only responsive proposers could be invited to negotiations.

6. The Department seeks to lease space in either an existing building or a building to be constructed in the future. In the Introduction, the ITN describes the proposals requested as follows:

> The [Department] is seeking detailed and competitive replies to provide built-out office facilities and related infrastructure for occupancy by the [Department]. As relates to any space that is required to be built-out pursuant to this [ITN], see Attachment "A" which includes the [Department] Specifications detailing the build-out requirements. The proposed

> facility may be within an existing building or a non-existing building designed as a Build-to-Suit to meet the [Department] Specifications.

7. The specifications in Attachment A provide the basic requirements for the potential leased space, including the required type, number, and square feet of each space (i.e., office, workstation, conference room, storage), as well as the voice and data requirements for each space.

8. The ITN provides that Attachment A "is an integral part of this ITN."

9. Section III.A. of the ITN details the requirements for responsive replies, including documentation demonstrating control of the property, a floor plan to scale, and return of each ITN page with the proposer's initials. In addition, for Build-to-Suit proposals, responsive replies must include the proposed site plan, and may include building renderings.[5/]

10. Section IV. provides the Lease Terms and Conditions, and requires replies to indicate whether the proposer will meet each term and condition by marking either a "Yes" or "No" option with an "X."

11. Section IV.B. provides that the space must be made available for occupancy on September 1, 2019. This section emphasizes the importance of timely occupancy, requiring submission from the Lessor to the Tenant Broker of items to

assure same, such as the sample construction project schedule, documentation of construction inspections, a performance bond, and proposed and final floor plans. Section IV.B. is not limited in applicability to Build-to-Suit leases. In fact, Section IV.B. provides that, for build-to-suit leases, the lessor must also provide architectural design and construction plans to the Department of Management Services for prior approval.

12. Section IV.G. is titled "Space Availability - Turn-Key Build Out," and requires as follows:

> The State requires a "turn-key" build-out by the Lessor. Therefore, Proposer shall assume all cost risks associated with delivery in accordance with the required space program specifications detailed in **Attachment A.**
>
> **Proposer agrees to provide a "turn-key" build-out in accordance with the space program specifications detailed in Attachment "A" following the [Department]'s approval of an architectural layout provided by the Proposer:**
>
> YES _____ or NO_____

13. "Turn-key" is a term of art in the commercial leasing industry meaning to deliver a space to the lessee which can be occupied immediately. The turn-key requirement is applicable to both build-out of an existing facility and build-to-suit new construction.

14. By the terms of the ITN, the requirement for a turn-key build-out applies to all proposers, and is not restricted to proposers offering a build-to-suit option.

TCC's Reply

15. TCC submitted a proposal for an existing building, the very building in which the Department currently leases space for the functions described in the ITN.

Item IV.G

16. In its reply, TCC responded "NO" to the statement "Proposer agrees to provide a 'turn-key' build-out in accordance with the space program specifications detailed in this Attachment A following the [Department]'s approval of an architectural layout provided by the Proposer."

17. In the space between Items IV.G. and IV.H., TCC added the following typewritten language:

> 10 Year Term - TI Allowance capped at $7 psf ($3.50 psf beginning year 1/$3.50 psf after year 5) 15 Year Term - TI Allowance capped at $10 psf ($5 psf beginning year 1/ $5 psf after yr. 5).

18. In an apparent effort to explain the interlineated text in its reply, TCC also submitted an "Additional Response" sheet with its ITN reply, which reads as follows:

ITN:640:0400
Additional Response
Attachment A/[Department] Specification

> As the current Landlord for the [Department], our response proposes a "Stay In Place" option. Under this option, we propose a Tenant Improvement Allowance in order for the [Department] to address any Tenant Improvements necessary. With [Department] currently occupying the space, it would be impossible to ask them to move out of its existing office space in order to meet the requested [Department] Specifications in Attachment A.

19. A "stay-in-place" offer is also a term of art in the commercial leasing industry which references negotiations between an existing lessee and lessor for a new lease of the space currently occupied by the lessee.

20. The terms of the ITN are clear: the Department is seeking to negotiate with all proposers which agree to meet its space program specifications.

21. TCC's representative, Todd Hakimi, testified (both in his deposition and at final hearing), that TCC's reply offered a stay-in-place option, rather than a turn-key or build-to-suit lease. Mr. Hakimi further testified that he formulated the response to the ITN on his understanding that the space currently leased to the Department by TCC was satisfactory to the Department, thus no buildout of the space was necessary to comply with the ITN.

22. Mr. Hakimi's testimony is belied by TCC's supplemental response explaining that it would be impossible to ask the Department to "move out of its existing office space to meet the requested Agency Specifications in Attachment A." In the supplemental response, TCC admits that the Department is seeking space which meets specifications not met by the existing office space.

23. TCC's reply was nonresponsive. By responding "No" to Item IV.G., TCC indicated it would not comply with the Department's space program specifications in Attachment A, which is an integral and material component of the ITN.

Tenant Improvement Allowance

24. Instead, TCC's reply offered a Tenant Improvement Allowance ("TIA"), shifting the burden to the Department to meet its space program requirements, rather than providing a "turn-key" space on September 1, 2019.

25. Moreover, TCC's reply "capped" the TIA at a per-square-foot amount, essentially limiting the amount TCC would pay toward the space program requirements set forth in Attachment A. In doing so, TCC refused to "assume all cost risk associated with delivery in accordance with the space program specifications" as required by Item IV.G.[6/]

26. If accepted, Petitioner's response would give TCC a competitive advantage over other responders who agreed to

"assume all cost risk associated with delivery in accordance with the space program requirements."

Broker Commission

27. Item IV.J., another mandatory lease condition, requires lessors to agree to execute a Commission Agreement, which was attached to the ITN as Attachment G, another integral and material component of the ITN:

> Proposer acknowledges review of the Commission Agreement (Attachment G). Proposer agrees to execute and be bound by the Agreement should the Proposed Space be selected by the [Department].
>
> YES _____ or NO_____

28. The Commission Agreement includes a schedule for the commission rate based on the total aggregate gross base rent that could be paid ranging from 3.50 percent on the first $500,000 of base rent to 2.50 percent on the base amount of $8.5 million and over.

29. TCC checked "YES" in response to Item IV.J., but contradicted that reply by adding "Agree to 2% commission."

30. Mr. Hakimi testified that he offered a two-percent commission because he viewed his reply to the ITN as a renewal of the current lease, and it is customary to give a lower broker commission for renewal than for a new lease.

31. The Department was not seeking a renewal lease. The ITN sought proposals to meet the agency space program

specifications either within an existing building or at a build-to-suit location.

32. TCC refused to be bound by this material term of the ITN, thus TCC's reply was nonresponsive.

33. If accepted by Respondent, TCC's lower broker commission rate would have given TCC a competitive advantage over other proposers.

Control of Property

34. The ITN also provided that to be responsive, each lessor was required to submit documentation demonstrating the lessor's control of the property proposed for the leased space:

> 1. Replies must completely and accurately respond to all requested information, including the following:
>
> (A) Control of Property (Applicable for Replies for Existing and/or Non-Existing Buildings).
>
> For a Reply to be responsive, it must be submitted by one of the entities listed below, and the proposal must include supporting documentation proving control of the property proposed.
>
> * * *
>
> • **The owner of record of the facility(s) and parking area(s)** - Submit a copy of the deed(s) evidencing clear title to the property proposed.
>
> * * *
>
> • **The authorized agent, broker or legal representative of the owner(s)** - Submit a

copy of the Special Power of Attorney authorizing submission of the proposal.

35. The Special Power of Attorney form was attached to the ITN as Attachment H, another integral part of the ITN. Section K of the ITN clearly states, "Attachment H . . . is required if submitting on behalf of owners."

36. Attachment D to the ITN was a Disclosure Statement which solicited from proposers information about the ownership of the property, including the name of the titleholder, as well as the titleholder's social security number or federal employer identification number, as applicable.

37. TCC's reply contained a blank Attachment D.

38. TCC's reply included a deed identifying DRA CRT Tallahassee Center, LLC ("DRA CRT"), as the owner of the property offered for lease.

39. TCC's reply was executed by TCC President, Lyda Hakimi.

40. TCC did not execute Attachment K or include an executed power of attorney to demonstrate that TCC has control of the property on behalf of DRA CRT.

41. TCC owns DRA CRT, but the two are different legal entities. In order to demonstrate control of the property owned by DRA CRT, TCC was required to execute Attachment K or

otherwise provide a power of attorney to demonstrate authority to bind the owner to TCC's proposal.

42. TCC's reply did not demonstrate control of the property as required by the ITN. TCC's reply was not responsive on this issue.

Waivable Minor Irregularity

43. TCC contends that its failure to include an executed power of attorney was a minor irregularity which should have been waived by the Department.

44. TCC's argument is twofold. First, TCC maintains that the Department had actual knowledge that TCC was DRA CRT's agent because the Department was currently leasing the property from TCC.

45. Second, TCC maintains that proposals by other responders failed to establish control of the property, but were nevertheless deemed responsive by the Department.[7/]

46. TCC's first argument is not persuasive. As discussed in the Conclusions of Law, the undersigned's role is not to make independent findings based on the evidence of record, but to determine whether the Department's failure to waive the minor irregularity was arbitrary, capricious, or clearly erroneous.

47. In support of its argument that the Department acted arbitrarily in its determination that TCC was nonresponsive on the issue of control of the property, TCC introduced, over

strenuous objection, the ITN response from TRV and two separate responses from OAG Investment 3, LLC ("OAG").

48. TRV's reply reveals TRV is the owner of the property. TRV's proposal is executed by John McNeill as "Advisor" to TRV, and includes an executed Attachment H, Special Power of Attorney, from John Abernathy granting power of attorney to Mr. McNeill to act on his behalf regarding the ITN.

49. TCC complains that TRV's proposal does not demonstrate the relationship between TRV and Mr. Abernathy or establish Mr. Abernathy's authority to grant a power of attorney on behalf of TRV. Thus, TCC argues, TRV's reply suffers from the same defect as its own--failure to demonstrate control of the property--so the Department acted arbitrarily in failing to waive that nonconformity for TCC.

50. Petitioner's argument is not well-taken because the facts are distinguishable.

51. First, as to TRV's response, TRV is both the owner of the property and the proposer for the ITN. In contrast, TCC is the proposer, but not the owner of the property.

52. Second, TRV's reply documents, on Attachment D, establishes Mr. Abernathy's authority "to conduct business as a representative of" TRV.

53. TRV's reply included the required deed evidencing ownership, as well as a completed Attachment D Disclosure, and

Attachment H Special Power of Attorney. By contrast, in TCC's reply, it neglected to complete either Attachment D or Attachment H. TCC made no effort to document the proposer's authority to bind the property owner to the terms of the ITN.

54. The facts relating to TRV's reply are not sufficiently similar to TCC's for the undersigned to conclude that the Department acted arbitrarily in failing to waive TCC's nonconformity relating to control of the property.

55. The same applies to the proposals from OAG. OAG's reply for property on Barcelona Lane shows ownership of the property by the Townsend Mary D. Trust ("Trust") and a purchase and sale agreement between the Trust and OAG executed by Mary Townsend on behalf of the Trust. TCC first complains that the Trust holds the property by a Quit Claim Deed, which "does not prove title or control." Second TCC alleges that the reply does not establish Mary Townsend's authority to execute the purchase and sale agreement on behalf of the Trust.

56. As to OAG's reply for the Mahan Drive property, TCC complains that the warranty deed identifies ownership of only a 30-percent interest in the property, and the purchase and sale agreement to OAG is from six named individuals, one of whom is noted as a trustee of an unidentified trust, and only three of whom have an ownership interest in the property based on the deed submitted.

57. It is beyond the undersigned's authority to determine whether OAG's replies establish control of the property per the ITN specifications. The only purpose for which the TRV and OAG replies were admitted was to rebut the Department's assertion that TCC's reply was nonresponsive on the issue of control of the property.

58. The factual differences between TCC's documentation of ownership and control and those of the OAG proposals, do not support a finding that the Department acted arbitrarily in failing to waive the nonconformity.

CONCLUSIONS OF LAW

59. The Division has jurisdiction over the subject matter and the parties to this action. §§ 120.569 and 120.57(3), Fla. Stat.

60. Petitioner has the burden to prove, by a preponderance of the evidence, that the Department's determination that TCC's reply to the ITN was nonresponsive is contrary to the agency's governing statutes, rules or policies, or the ITN specifications. § 120.57(3)(f), Fla. Stat.

61. Although section 120.57(3) provides that this is a de novo proceeding, it is not a "de novo" proceeding in the traditional sense. See State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). That is, this is not a forward-looking proceeding to formulate agency

action, and the Division may not substitute its judgment for that of the Department. See Intercont'l Props., Inc. v. State Dep't of HRS, 606 So. 2d 380, 386 (Fla. 3d DCA 1992); R.N. Expertise, Inc. v. Miami-Dade Cnty. Sch. Bd., Case No. 01-2663BID (Fla. DOAH Feb. 4, 2002; MDCSB Mar. 13, 2002) (explaining the Division's role in procurement-protest proceedings). Instead, the Division engages in a form of "inter-agency review" in which the ALJ makes findings of fact about the action already taken by the Department. See State Contracting, 709 So. 2d at 609. The Division does not evaluate the Department's decision anew; instead the Division looks to see if the Department followed its governing statutes, its rules, and the ITN specifications during the procurement process. See R.N. Expertise, DOAH Case No. 01-2663BID.

62. Agencies enjoy wide discretion when it comes to soliciting and accepting proposals, and an agency's decision, when based upon an honest exercise of such discretion, will not be set aside even where it may appear erroneous or if reasonable persons may disagree. Baxter's Asphalt & Concrete, Inc. v. Dep't of Transp., 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985); Capeletti Bros., Inc. v. State Dep't of Gen. Servs., 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). Section 120.57(3)(f) establishes the standard of proof: whether the proposed action

is clearly erroneous, contrary to competition, arbitrary or capricious.

63. A decision is considered to be clearly erroneous when, although there is evidence to support it, after review of the entire record, the tribunal is left with the definite and firm conviction that a mistake has been committed. U.S. v. U.S. Gypsum Co., 333 U.S. 354, 395 (1948). An agency action is capricious if the agency takes the action without thought or reason, or irrationally. Agency action is arbitrary if it is not supported by facts or logic. See Agrico Chem. Co. v. State Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978). An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding. See Wester v. Belote, 138 So. 721, 723-24 (1931).

64. The ITN was issued pursuant to section 255.25, Florida Statutes, which applies to state agencies' procurement of leased building space.

65. Section 255.25(3)(a)3. provides, in pertinent part:

> a. If the agency determines in writing that the use of an invitation to bid or a request for proposals will not result in the best leasing value to the state, the agency may procure leased space by competitive sealed replies . . . .
>
> b. The agency shall evaluate and rank responsive replies against all evaluation criteria set forth in the invitation to negotiate and select, based on the ranking,

> one or more lessors with which to commence negotiations. After negotiations are conducted, the agency shall award the contract to the responsible and responsive lessor that the agency determines will provide the best leasing value to the state.

66. Section 255.248 defines "responsive reply," as used in 255.25, as a reply "submitted by a responsive and responsible lessor, which conforms in all material respects to the solicitation." § 225.248(7), Fla. Stat. "Responsive lessor" is defined as "a lessor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation." § 225.248(8), Fla. Stat.

67. A lessor whose reply conforms in all material respects to the ITN may be invited to negotiate.

68. TCC's reply was nonresponsive because it did not conform with material portions of the ITN, namely the Department's required space program specifications, turn-key delivery, broker commission agreement, and demonstration of control of the property.

69. TCC's failure to comply with the terms, conditions, and specifications renders the vendor nonresponsive and ineligible for negotiations. As a nonresponsive respondent, TCC was not eligible to participate in negotiations and was not eligible for the ultimate award under the ITN process.

70. The determination that TCC's bid was nonresponsive does not end this analysis. Not all irregularities in bid submissions or deviations from the terms of an invitation to bid are considered material enough to require rejection of a bid submittal. Tropabest Foods, Inc. v. Dep't of Gen. Servs., 493 So. 2d 50 (Fla. 1st DCA 1986); see also Fla. Admin. Code R. 60A-1.002(13). A deviation from the requirements of an invitation to bid "is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, 493 So. 2d at 52; see also Robinson Elec. Co. v. Dade Cnty., 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982).

71. In Florida, the following two criteria are applied to determine whether a deviation is material:

> [1] whether the effect of a waiver would be to deprive the [Department] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and [2] whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

Robinson Electric, 417 So. 2d at 1034.

72. The First District Court of Appeal has found that, by definition, anything affecting the price of a bid is not a minor irregularity and may not be waived by the agency. Rather, a

deviation affecting price is material and may not be waived by the agency. Mercedes Lighting & Elec. Supp., Inc. v. Fla. Dep't of Gen. Servs., 560 So. 2d 272, 278 (Fla. 1st DCA 1990).

73. As set forth in the Findings of Fact, TCC's deviations (offering a capped TIA, rather than complying with the Department's required space program specifications and providing the space "turn-key," as well as the two-percent broker commission rate) affect the price of the contract to be awarded. If accepted, TCC's reply would have given TCC a competitive advantage over other responders who agreed to "assume all cost risks associated with delivery in accordance with the space program specifications" of the ITN and to pay the specified broker commission. As such, they are material aspects of the ITN and may not be waived.

74. Whether TCC's failure to document control of the property is an immaterial waivable term depends on whether waiver would deprive the Department of assurance that the contract would be entered into and performed.

75. Where a state agency receives a bid from a person purportedly acting on behalf of the owner, when in fact the agent has no authority to submit the bid, the state may be unable to conclude the transaction because the property owner was not bound by the bid. See Intercont'l Properties, Inc. v. Dep't of HRS, supra. In the case at hand, Mr. Thornbury testified that it is

important for the Department to determine whether the individual proposers actually have authority to deliver the property prior to entering into negotiations with the proposers.

76. Petitioner is correct in citing Intercontinental Properties for the proposition that failure to attach proof of the agent's authority to act on behalf of the owner is "plainly the sort of deficiency which a public agency can, in its discretion, allow a bidder to cure after the fact." Intercontinental Properties, 606 So. 2d at 386-87 (emphasis added).

77. The question for the undersigned is whether the Department abused its discretion in failing to waive the irregularity. Petitioner argues the Department abused its discretion by acting arbitrarily--waiving the irregularity for other responders, but not TCC.

78. As discussed in the Findings of Fact, the replies introduced by Petitioner in support of its argument do not support a finding that the Department acted arbitrarily. The replies, assuming they were deficient, did not contain the identical deficiencies as noted by the Department in TCC's reply. The undersigned cannot conclude, based on that evidence, that the Department's failure to waive the deficiency was arbitrary or an abuse of the Department's discretion.

79. Assuming, arguendo, the Department erred in not waiving the irregularity in TCC's reply related to control of the property, that determination would not affect the outcome of the instant case. TCC's reply was nonresponsive in other aspects which were material and nonwaivable.

80. In summary, TCC did not prove that the Department's proposed action regarding ITN No. 640-0400 contravenes the Department's governing statutes, rules, policies, or the solicitation specifications, or is otherwise contrary to competition, arbitrary, or capricious.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health enter a final order dismissing Tallahassee Corporate Center, LLC's Petition.

DONE AND ENTERED this 31st day of May, 2018, in Tallahassee, Leon County, Florida.

Suzanne Van Wyk

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Filed with the Clerk of the
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this 31st day of May, 2018.

ENDNOTES

[1/] Petitioner argued at final hearing that TRV was not properly added as an Intervenor in these proceedings because TRV did not file a Motion to Intervene. The undersigned entered an ore tenus order at the final hearing, accepting TRV's Notice of Intervention as a Motion to Intervene, and granted the Motion.

[2/] In its pre-hearing statement, Petitioner argued only that, as it to its own reply, missing documentation on ownership and control was a minor irregularity that should have been waived. Petitioner did not allege that other replies were deficient in this respect.

[3/] In the Order on Petitioner's Motion for Reconsideration, the undersigned extended the deadline for filing proposed recommended orders to May 18, 2018.

[4/] With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for proposals. § 120.57(3)(b).

[5/] Section III.B. contains additional requirements specific to Build-to-Suit replies.

[6/] TCC's owner, Todd Hakimi, referred to the TIA as a "sweetener" to entice the Department to stay in its current location. The undersigned does not doubt that a TIA is used as an additional enticement in negotiation of a "stay-in-place" option. In the case at hand, the Department was not soliciting proposals for a "stay-in-place" lease.

[7/] TCC concludes the subject responses were deemed responsive because the Department proceeded to negotiation with those entities following bid opening.

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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.