STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOCIAL SENTINEL, INC.,

Petitioner,

vs.

STATE OF FLORIDA, DEPARTMENT OF EDUCATION, Case No. 19-0754BID

Respondent,

and

ABACODE, LLC; and ZEROFOX, INC.,

Intervenors.
_____/

RECOMMENDED ORDER

On March 7, 2019, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing in Tallahassee, Florida.

APPEARANCES

For Petitioner: Thomas P. Crapps, Esquire
Kirsten H. Mathis, Esquire
Joy Ryan, Esquire
Meenan, P.A.
300 South Duval, Suite 410
Tallahassee, Florida 32301

For Respondent: Jason D. Borntreger, Esquire
James L. Richmond, Esquire
Department of Education
325 West Gaines Street, Suite 1244
Tallahassee, Florida 32399-0400

For Intervenors: J. Riley Davis, Esquire
Akerman, LLP
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Respondent's decision to reject all replies to Invitation to Negotiate 2019-44, Social Media Monitoring (ITN), is arbitrary or illegal, within the meaning of section 120.57(3)(f), Florida Statutes.

PRELIMINARY STATEMENT

By ITN issued on August 3, 2018, Respondent solicited replies to negotiate the procurement of a web-based social media monitoring tool (Monitoring Tool) to examine social media posts to enhance school safety. On December 10, 2018, Respondent issued an Intent to Award to Intervenor Abacode, LLC (Abacode).

On December 13, 2018, Petitioner filed a Notice of Protest, and, on December 21, 2018, Petitioner filed a Formal Written Protest and Petition for Administrative Hearing, as well as a bond. On January 3, 2019, Respondent issued an Amended Agency Decision to reject all replies.

On January 7, 2019, Petitioner issued a Second Notice of Protest, and, on January 16, 2019, Petitioner filed a Formal Written Protest and a Petition for Administrative Hearing (Petition).

The Petition alleges that Respondent's rejection of all replies is contrary to a statutory deadline of December 1, 2018, for making the Monitoring Tool available for use by school districts, and Respondent should instead award the contract to Petitioner. The Petition alleges that Respondent's rejection of Petitioner's reply is arbitrary due to the absence of a stated logical reason for the rejection and illegal because it is contrary to the purpose of a competitive procurement. As to the latter point, the Petition alleges that, by proposing an award and then rejecting all replies, Respondent allowed the replies to become public record, so that other vendors could examine the previously confidential replies of their competitors. The Petition requests a recommended order directing Respondent to award the contract to Petitioner.

In the Pre-hearing Stipulation filed on March 5, 2019, Petitioner clarified the Petition. First, Petitioner sought alternative relief to an award of the contract to Petitioner: a reopening of the procurement to allow the eight vendors to submit replies to the ITN, as revised by Respondent in the manner set forth below, and a rescoring of the new replies.

Second, although Petitioner continued to allege that Respondent's reject-all decision is arbitrary and illegal, Petitioner revised its bases for these grounds. Petitioner claimed that the reject-all decision is arbitrary because

Respondent failed to meet the December 1 statutory deadline; Respondent failed to state a reason for the reject-all decision; and Respondent tardily made the reject-all decision following an award decision, so that the replies of Petitioner and other vendors became nonexempt public records, thus undermining the integrity of the competitive procurement. Petitioner claimed that the reject-all decision is illegal because Respondent failed to meet the December 1 statutory deadline and Respondent tardily made the reject-all decision following an award decision, so that the replies of Petitioner and other vendors became nonexempt public records, thus undermining the integrity of the competitive procurement.

Respondent transmitted the file to DOAH on February 14, 2019. A Motion to Intervene was filed February 25, 2019, by Abacode and its partner, ZeroFox, Inc.[1/] By response filed February 28, 2019, Petitioner objected to the motion. The administrative law judge granted the Motion to Intervene by Order entered on March 1, 2019.

At the hearing, Petitioner called one witness and offered into evidence 14 exhibits: Petitioner Exhibits 1 through 14. Respondent called two witnesses and offered into evidence two exhibits: Respondent Exhibits 1 and 2. Intervenors called no witnesses and offered into evidence no exhibits. The parties

jointly offered 19 exhibits: Joint Exhibits 1 through 19. All exhibits were admitted.

The court reporter filed the transcript on April 4, 2019. Each party filed a proposed recommended order on April 15, 2019. Petitioner's proposed recommended order does not contend that Respondent's reject-all decision is illegal, but does not withdraw this claim, so it is addressed below.

FINDINGS OF FACT

1. In response to the tragic shootings at Marjorie Stoneman Douglas High School in February 2018, the legislature enacted, effective March 9, 2018, the Marjorie Stoneman Douglas High School Public Safety Act (the Act). Among other things, the Act authorizes Respondent to spend $3 million for the 2018-19 fiscal year "to competitively procure . . . [a] centralized data repository and analytics resources pursuant to s. 1001.212, Florida Statutes[,]" and provides that Respondent "shall make such resources available to the school districts no later than December 1, 2018." Ch. 2018-3, §§ 50 and 52, Laws of Fla.

2. Within one month after the passage of the Act, Respondent confirmed that the above-quoted language mandated the procurement of two systems and that "analytics resources" refers to the Monitoring Tool. Respondent researched the relevant technology and drafted an ITN, which it issued on August 3, 2018.

3. In general, the ITN requires each vendor to submit, by September 6, 2018, a reply consisting of a technical reply and a price reply and provides that Respondent will evaluate the replies by September 10, 2018. ITN section 3.4 states that the Negotiation Committee will commence negotiations on or about September 24, 2018, and the winning vendor or vendors will commence work on October 19, 2018.

4. ITN section 8.1.2, which contains the "Criteria for Evaluation," states that Respondent will score each reply based on a maximum of 70 points for the technical reply and 30 points for the price reply. Section 8.1.2 states that, after negotiations, Respondent anticipates awarding the contract, if any, to not more than three vendors that Respondent has determined provide the best value to the state. ITN section 8.3 provides that, after Respondent awards a contract to each of up to three vendors, "[s]chool districts will then choose from these approved vendors to determine which [Monitoring Tool] is used in their district."

5. ITN section 8.1.3, which contains the "Criteria for Negotiations," broadly authorizes Respondent to negotiate revisions to each vendor's technical reply, as required to serve the best interest of the state. Section 8.1.3.E. also authorizes Respondent to revisit each vendor's price reply: "[Respondent] reserves the right to negotiate different terms and related price

adjustments if [Respondent] determines that it is in the state's best interest to do so."

6. ITN Attachment B is the "Price Reply." The first paragraph of Attachment B states: "There shall be no additional costs charged for work performed under this ITN. The [school] district price on this page will be used for evaluation and scoring purposes." The second paragraph, which is titled, "Assessment Instrument," adds: "Respondent shall provide a cost for the Social Media Monitoring instrument and services in subsequent contract." Immediately below this statement is the following price form:

Description			Cost	
Social Media Monitoring instrument and services	Contract Period 2018-2021	10/19/18-6/30/19	$____	
		7/1/19-6/30/20	$____	
		7/1/20-6/30/21	$____	
Social Media Monitoring instrument and services	Optional Renewal Years	7/1/21-6/30/22	$____	
		7/1/22-6/30/23	$____	
		7/1/23-6/30/24	$____	
Grand Total Cost*			$____	$____

7. The price form fails to reveal if the "Grand Total Cost" and annual costs are per-district prices or gross prices, regardless of the number of school districts choosing to use the Monitoring Tool. The asterisk is meaningless because the ITN contains no explanation as to its meaning. The second blank line to the right of "Grand Total Cost" is consistent with an extension of a per-district price, but the document does not

direct the vendor to perform such an extension, which would be impossible because, as noted above, the multiplier is unknown until districts contract to use a specific Monitoring Tool.

8. On August 22, 2018, Respondent issued ITN Addendum #1, which answers questions posed by vendors. Through this means, Respondent informed vendors that school districts are not required to use the Monitoring Tool, Addendum #1, p. 3; it is impossible to determine the volume of usage of the Monitoring Tool among over 4000 schools serving about 3 million students, Addendum #1, p. 3; replies may include more detailed pricing schedules, such as "pricing based on differing user counts and/or number of schools or districts," Addendum #1, p. 4; and the Monitoring Tool may be used by as many as 67 school districts plus six university-affiliated lab or charter schools, Addendum #1, p. 6.

9. On August 30, 2018, Respondent issued ITN Addendum #2, which makes two changes to Attachment B. Addendum #2 deletes the second blank line to the right of "Grand Total Cost" and explains the asterisk by stating, "Points awarded will be based on this price." Neither change resolves the ambiguity as to whether the quoted prices are per-district or gross prices.

10. Eight vendors, including Petitioner, timely submitted replies. Petitioner is a responsible vendor and its reply is responsive.

11. It appears that Respondent completed scoring of all of the technical and price replies of the eight vendors in substantial conformity with the September 10 deadline stated in the ITN. As provided by the ITN, five of Respondent's employees scored the technical replies, staff scored the price replies, and the five employees who scored the technical replies formed the negotiating team.

12. One of the technical evaluators failed to discharge his responsibilities. Appearing not to have read or understood the basics of Petitioner's reply, which describes a Monitoring Tool already in use by several Florida school districts, the evaluator wrongly concluded that Petitioner's reply did not offer a Monitoring Tool and improperly assigned a low score to its reply. This evaluator abruptly quit the day after turning in his evaluations, and Respondent's negotiating team was reduced to the four remaining evaluators.

13. Based on the scoring of the replies, Respondent selected three vendors with which to negotiate: Abacode, Veratics, Inc. (Veratics), and NTT Data Inc. (NTT Data).

14. Abacode resolved the ambiguity of the price form in Attachment B by adding to the price form language stating that its price is a per-district price. For the three years of the base contract and three optional renewal years, Abacode's

"Per-District Grand Total Cost" was $68,350, meaning that, even ignoring the lab schools, the gross price would slightly exceed $4.5 million, if all 67 school districts chose Abacode's Monitoring Tool for six years. Abacode offered a 15% discount in the unlikely event that all 73 school districts and lab schools chose to use its Monitoring Tool.

15. Veratics did not alter the price form and offered a "Grand Total Cost" of $143,325.18 for the three years of the base contract and three optional renewal years. This appears to be a per-district price, so the gross price would slightly exceed $9.6 million, if all 67 school districts chose Veratics' Monitoring Tool for six years.

16. NTT Data likewise completed the price form without alterations, showing a "Grand Total Cost" of $88,454 for the three years of the base contract and three optional renewal years. An additional page entitled, "Additional Pricing Detail" confirms that the "Grand Total Cost" is a per-district price, so the gross price would slightly exceed $5.9 million, if all 67 school districts chose NTT Data's Monitoring Tool for six years.

17. Negotiations with the three vendors commenced in late October 2018. During negotiations, Respondent's negotiating team realized that the ITN failed to convey adequately Respondent's requirement to receive the notifications that the Monitoring Tool

transmits to the contracting school district, as vendors had not included this service in their price replies.

18. At some point, the negotiating team also realized that the price form was ambiguous as to per-district or gross pricing. On November 13, 2018, Respondent's procurement officer sent to a member of the negotiating team a draft revised price form that specified per-district pricing for the base years, but not for the optional renewal years. After further revisions by the recipient of the email, Respondent distributed a revised price form to the three vendors, but not the five vendors that it had not selected for negotiations.

19. As applicable to both the base and optional renewal periods, the revised price form requires an annual price for notifications to Respondent; a one-time price for the "Initial Districts [sic] first six (6) months"; and "Costs per additional district," which are classified by "Small," "Medium," and "Large." The revised price form also includes a list of all 67 districts with their 2017-18 enrollments and classifies each district as "Small," "Medium," or "Large."

20. The three vendors timely submitted revised price replies with the following "Grand Total Costs": Abacode--$4.6 million, Veratics--$34.4 million, and NTT Data--$6.0 million. The price replies of Abacode and NTT Data increased by relatively modest amounts, but the price reply of Veratics, which

increased by nearly $25 million over the six years of the procured service, itemized about $5.5 million for the first year. Hurdling past the $3 million authorized for the procurements of the Monitoring Tool and a centralized data repository, Veratics implicitly eliminated itself as a vendor.

21. On December 10, 2018--nine days after the statutory deadline for making the Monitoring Tool(s) available to school districts--Respondent issued a Notice of Intent to Award the contract to Abacode. Petitioner timely filed a Notice of Protest and Formal Written Protest, which includes a Petition for Administrative Hearing. The petition details, among other things, the ambiguity in the original price form as to per-district or gross pricing and alleges that Respondent failed to perform the necessary conversions to compare price replies accurately. Addressing the negotiations, the petition notes, among other things, that the three selected vendors were allowed to change their price replies and submitted what the petition describes only as "higher" pricing--certainly, a charitable understatement as applied to Veratics. For relief, Petitioner requested recommended and final orders directing that Respondent award the contract to Petitioner, "or, alternatively, that [Respondent] reject all Replies and conduct a new procurement."

22. On January 3, 2019, Respondent did just that: Respondent issued an Amended Agency Decision rejecting all

replies and advising that it would reissue the ITN in a second attempt to procure the Monitoring Tool. However, Petitioner timely filed a Second Notice of Intent to Protest and Formal Written Protest, as well as the Petition, which, as noted above, requests a recommended order awarding the contract to Petitioner.

23. Due to the school-safety issues involved in the subject procurement, Commissioner of Education Richard Corcoran issued a memorandum on February 13, 2019, authorizing Respondent to proceed with the second procurement "to avoid an immediate and serious danger to the public health, safety or welfare," as provided by section 120.57(3)(c). On the same date, Governor Ron DeSantis issued Executive Order 19-45, which, among other things, characterizes as "unacceptable" Respondent's failure to meet the December 1 statutory deadline and orders Respondent to "immediately take any and all steps necessary to implement [the Act] to provide . . . [the Monitoring Tool] . . . by August 1, 2019."

24. The new invitation to negotiate is similar to the ITN, except that its definition of "Notifications" in the scope of services clearly defines the need to transmit notifications to Respondent, as well as to the contracting school district, and the price form in Attachment B bases the evaluation on gross prices.

25. Respondent's decision to reject all replies is supported by five facts: 1) the irrational scoring of Petitioner's reply by one evaluator; 2) the potential confusion caused among potential vendors, including the eight vendors that submitted replies, by the ambiguity contained in the price form in Attachment B; 3) the revision of the price form for the three selected vendors to clarify that the pricing was on a per-district basis; 4) the effective loss of one of the three selected vendors upon receipt of pricing replies to the revised price form; and 5) the capacity to resolve the then-pending protest by acceding to Petitioner's demand for a reject-all decision.

26. As for the first reason, Petitioner objected at hearing to testimony from one of Respondent's witnesses pertaining to this matter because, on deposition, Respondent's agency representative failed to identify the irrational scoring as a factor in the reject-all decision. As discussed in the Conclusions of Law, section 120.57(3)(f) requires a determination of whether an agency's reject-all decision "is," not "was," arbitrary. Thus, all facts may be considered, regardless of whether an agency witness cited them in a deposition or, more broadly, whether an agency cited them at the time of making the reject-all decision. Additionally, despite the failure of the deposition witness to identify this factor, Petitioner mentioned

in the Pre-hearing Stipulation "incorrect evaluations" by at least one evaluator, so Petitioner was aware of this basis for the reject-all decision, even though Petitioner may not have been aware that Respondent relied on this factor in making the reject-all decision.

27. As for the third reason, as noted above, the ITN permits Respondent to negotiate new items and, if so, obtain revised price replies from the vendors with which it is negotiating. These provisions cover the addition of the notification to Respondent, which Respondent substantially omitted from the ITN. However, resolution of a basic element of any bid[2/] solicitation--here, whether the price form calls for per-district or gross pricing--does not fall within these provisions, so Respondent's decision to provide this revision only to the three selected vendors raises competitive concerns.

28. As for the fourth reason, the ITN permits Respondent to have selected two vendors for negotiations in the first place. But this does not mean that the effective loss of a selected vendor is not available as a legitimate reason to reject all replies. Also, Veratics' jarring price increase indicates either that one of the successful vendors failed to appreciate the scope of the procurement or did not wish to participate in the procurement any further--either reason signaling a potential

problem with the procurement, so that Respondent rationally may have decided to reject all replies.

29. As for the fifth reason, Respondent had already missed the December 1 statutory deadline, and a reject-all decision represented the quicker route to completing this procurement because of the above-cited flaws in the initial procurement; the school-safety issue, which authorizes the immediate commencement of a second procurement for the Monitoring Tool; and, as discussed in the Conclusions of Law, a reject-all decision is easier to defend than an award decision.

30. In the Pre-hearing Stipulation, Petitioner requested relief in the form of a reopening of the procurement process following a clarification from Respondent--presumably, as to the pricing ambiguity in the original price form and the need to provide notifications to Respondent; an opportunity for all eight vendors to submit new replies; and the scoring of the new replies.

31. First, Petitioner did not seek this relief in its initial petition protesting the award decision or even in the Petition protesting the reject-all decision. So, when making the reject-all decision, Respondent was acceding to the only alternative posed by Petitioner that did not result in an award to Petitioner. By doing so, as explained above, Respondent rationally pursued an expeditious resolution of the then-pending

protest and, thus, the procurement of the Monitoring Tool. Had Respondent chosen an option not presented by Petitioner, Respondent had no assurance that its choice would have induced Petitioner to dismiss its first protest.

32. Second, even if Respondent should have assumed that a restart of the first procurement would have resolved Petitioner's then-pending protest, as it accomplishes the same thing as a reject-all decision followed by a rebid, the focus is on whether Respondent made a rational choice, not whether it made the best choice. By this point, at least, Respondent was trying to hurry along the procurement, and a reject-all decision would achieve this end, even if a restart of the first procurement might have been resulted in an earlier award.

33. Under the circumstances, Respondent's decision in January 2019 to cut its losses and reject all replies, clean up the documents, and rebid the procurement is not arbitrary.

34. As discussed in the Conclusions of Law, no further analysis is required of Petitioner's claim that the reject-all decision is arbitrary for the additional reason that the sequence of events--an award decision, a reject-all decision, and a rebid--has resulted in the disclosure of each vendor's reply and undermined the integrity of the procurement process. The point is that the reject-all decision is rational--not, as discussed above, whether Respondent could have made a better decision or,

in connection with a claim of arbitrariness, whether the effect of the agency's decisionmaking sequence may also have undermined the integrity of the procurement process.

CONCLUSIONS OF LAW

35. DOAH has jurisdiction. §§ 120.569 and 120.57(1) and (3), Fla. Stat. Petitioner and Abacode are "adversely affected" by the reject-all decision. § 120.57(3)(b).

36. The burden of proof is on Petitioner. § 120.57(3)(f). Section 120.57(3)(f) identifies what Petitioner must prove in order to prevail in a bid case based on an award decision or a reject-all decision:

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

37. Section 120.57(3)(f) requires deference to an agency's decision in any bid case and greater deference to an agency's decision in a reject-all case than an award case.[3/] In an award

case, the role of the administrative law judge is to conduct a de novo hearing and apply a standard of proof, but the standards of proof and criteria for overturning the proposed award decision are deferential. In a reject-all case, the role of the administrative law judge is to conduct a hearing, impliedly not entirely de novo, and apply a standard of review, not proof, and the criteria for overturning the proposed reject-all decision are even more deferential. In both cases, the deferential criteria--and, in the award case, the deferential standards of proof--apply only to the agency's intended[4/] action.[5/]

38. A close reading of section 120.57(3)(f) is unnecessary to reject Petitioner's claim that Respondent's intended agency action to reject all replies is arbitrary. In general, an "arbitrary" decision is a decision unsupported by logic or the necessary facts. See § 120.52(8)(e) (defining "arbitrary" as criterion for invalidating a rule); Agrico Chem. Co. v. Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978) (arbitrary means "despotic" or not supported by facts or logic). As an appellate standard of review, the "arbitrary and capricious" standard subjects an agency's decisionmaking "only to the most rudimentary command of rationality[, requiring] an inquiry into the basic orderliness of the [decisionmaking] process, and authoriz[ing] the courts to scrutinize the actual [decision] for signs of blind prejudice or inattention to crucial facts." Adam

Smith Enters. v. State Dep't of Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989) (construing former statute governing direct appeals of legislative rulemaking by agencies).

39. The language of section 120.57(3)(f) requires a determination of whether the intended agency action to reject all replies "is" arbitrary. This implies that the determination is based on the facts available at the time of the hearing, regardless of whether the agency relied on them when making its reject-all decision. Regardless of whether Respondent rejected all replies, in part, due to the irrational scoring of one evaluator, ample additional reasons support Respondent's reject-all decision, as set forth in the Findings of Fact. Petitioner thus has failed to prove that Respondent's reject-all decision is arbitrary.

40. A close reading of section 120.57(3)(f) is not necessary to reject one of Respondent's claims that the intended agency action to reject all replies is illegal. Section 120.57(3) does not define "illegal," but a common definition of the term is "not according to or authorized by law." Merriam Webster online dictionary.[6/] Justice Canady has cited a similar definition, which states that "illegal means 'contrary to, or forbidden by, law.' 7 The Oxford English Dictionary 652 (2d ed. 1989)." State v. McMahon, 94 So. 3d 468, 479 (Fla. 2012) (Canady, J., dissenting).

41. There is nothing even literally illegal in the sequence of the procurement, which consists of an award decision, a disclosure of the replies of all of the vendors, a reject-all decision, and a reissuance of substantially the same ITN. As Petitioner contends, by law, the subject procurement required a competitive sealed reply, § 287.057, and the replies remained exempt public records under certain conditions. § 119.071(1)(b). The effect of entire sequence of events resulted in the loss of the public-records exemption prior to the issuance of the new invitation to negotiate, but this represents nothing more than the interplay of the laws governing competitive procurement and the laws governing public records, including replies to an invitation to negotiate.[7/] Petitioner thus has failed to prove that Respondent's reject-all decision is illegal due to the disclosure of the contents of Petitioner's reply.

42. However, a close reading of section 120.57(3)(f) is necessary to address the other illegality claim, which is predicated on Respondent's failure to complete the procurement by the statutory deadline of December 1, 2018. The facts support this claim. It is undisputed that the procurement has missed the statutory deadline--as of this date, by over four months on a procurement that, from start to finish, was allotted nine months. It is undisputed that time is of the essence in this procurement,

which, by legislative mandate, was to enhance school safety on a schedule enacted by the legislature.

43. It is necessary to distinguish between the claim and the relief sought by Petitioner. Claiming that the failure to meet the statutory deadline satisfies the criterion of illegality, so as to necessitate the setting aside of the reject-all decision, Petitioner variably has requested an award of the contract, a restart of the procurement, or, at least implicitly, a remand of the matter for Respondent to reconsider its reject-all decision, freed of whatever illegality attached to its January 3 reject-all decision.

44. It is irrelevant that Petitioner has failed to recognize the power of its claim. If the failure to meet the statutory deadline satisfies the meaning of illegality in section 120.57(3)(f), this is a condition that cannot be cured. In other words, if Respondent's failure to make available a Monitoring Tool to the school districts by December 1 is illegal, all acts after December 1, 2018, to procure the Monitoring Tool may be set aside, if challenged by an adversely affected person,[8/] unless the legislature reinstates the procurement.

45. The question is whether this claim is supported by the law. Between the utter irrationality of arbitrariness and the deception or corruption associated with dishonesty or fraud lie bidding mishaps arising from an agency's inattention to detail:

within this spacious middle ground, an agency's intended action may give rise to claims of illegality.

46. A literal definition of illegal contradicts the structure of section 120.57(3)(f). A violation of law, at least as applicable to bidding, is well described by the three criteria for setting aside an award decision: a violation of statute, rule or policy, or, treating the invitation to bid as a contract binding on the agency, the specification document. If "illegal" covers substantially the same ground, then a reject-all case may be easier to win for a protestor, which, if unable to prove illegality, may show one of the other criteria; of course, such a situation would undermine section 120.57(3)(f), which secures greater deference to an agency decision not to do business with any vendor than an agency decision to do business with a vendor.

47. The source of the legislative enactment of illegality as a criterion for setting aside a reject-all decision was a then-recent Florida Supreme Court case, which, in turn, relied on other decisions. But none of these cases sets aside an agency bid decision based on a literal definition of illegality.

48. Enacted in 1996,[9/] the reject-all provisions of section 120.57(3)(f) codified Department of Transportation v. Groves-Watkins Constructors,[10/] which held that an agency's reject-all decision may not be overturned absent a finding of "'illegality,

fraud, oppression, or misconduct,'"[11/] as the Court had earlier held in Liberty County v. Baxter's Asphalt & Concrete, Inc.[12/]

49. Groves-Watkins was an illegality case that, unfortunately, was treated as an arbitrariness case by the Court, the lower court, and the hearing officer. In Groves-Watkins, the agency rejected all bids to construct a complex highway interchange and immediately reissued the same invitation to bid. The agency based its reject-all decision on the fact that the lowest bid exceeded the agency's projected costs by 29%. However, the large discrepancy was due to the agency's miscalculation of projected costs, which, when corrected, substantially eliminated any difference between the projected costs and the bid amount. Because the agency's policy was automatically to award a bid if the lowest bid was less than 7% more than projected costs, the hearing officer concluded that the reject-all decision was arbitrary and capricious and recommended that the agency issue a final order setting aside the reject-all decision and awarding the bid to the lowest bidder.

50. The agency issued a final order rejecting the recommended order and affirming its reject-all decision. Reversing, the First District Court of Appeal concluded that the agency's reject-all decision was arbitrary and capricious.[13/] In dissent, Judge Ervin stated that there was no finding of "'illegality, fraud, oppression or misconduct'" and, if there

were one, it would have lacked a sufficient evidentiary basis, implying that he was not equating "illegality" with literal illegality. Judge Ervin reviewed case law from other jurisdictions that, notwithstanding some conflicting decisions, provided that an agency enjoys "unbridled discretion" to reject all bids, so as always to reserve for the agency the right to redesign its procurement to reduce costs. Ultimately retreating from this position, Judge Erving concluded that a reject-all decision must be sustained, as long as it is free from "the Liberty County standard of . . . fraud, oppression, or misconduct,"[14/] this time omitting from his restatement of the Liberty County criteria the troublesome criterion of illegality.

51. Reversing the First District, the Florida Supreme Court held that the Liberty County criteria conform to "the majority view that . . . judicial intervention to prevent the rejection of a bid should occur only when the purpose or effect of the rejection is to defeat the object and integrity of competitive bidding." Ignoring the Liberty County criterion of illegality, the Court understandably found that budgetary concerns arising from an "honest mistake" by the agency in projecting costs insulated the reject-all decision from a claim of arbitrariness.

52. In support of its holding, the Court cited, among other sources, a Third Circuit Court of Appeals decision, Sea-Land Service, Inc. v. Brown,[15/] for the principle that "only [a]

showing of clear illegality will entitle an aggrieved bidder to judicial relief."[16/] The Court did not explain how a violation of the 7% policy did not constitute "clear illegality" or explain the meaning of "clear illegality."

53. The Sea-Land Service decision equates a "showing of clear illegality" with "no rational basis" for the decision,[17/] so as to treat illegality and arbitrariness synonymously. But, as Groves-Watkins itself illustrates, a reject-all decision may be illegal without being arbitrary. In any case, neither Groves-Watkins nor Sea-Land Services offers any support for a literal interpretation of illegality, and their common use of "clear illegality" suggests a judicial intent to require illegality plus something unspecified by the courts.

54. More recent federal procurement cases have identified a factor to be added to literal illegality: prejudice to the protestor. In Caddell Construction Co. v. United States,[18/] the court summarized the applicable law for setting aside an agency's decision in a bid case:

> As the [federal Administrative Procedure Act (APA)] instructs, in determining whether to set aside agency action, the Court shall take "due account . . . of the rule of prejudicial error." 5 U.S.C. § 706. In the seminal case of Kentron Hawaii, Ltd. v. Warner,[19/] . . . the United States Court of Appeals for the District of Columbia Circuit emphasized that to be remediable, a procedural procurement error had to result in a "prejudicial violation of applicable

> statute or regulations," or an irrational award decision. 480 F.2d 1166, 1169, . . . (D.C. Cir. 1973). Thus, when an irrational or arbitrary and capricious agency action has occurred, prejudice is presumed, but when a violation of statute or regulation has occurred, there must be a separate showing of prejudice. See generally Centech Grp., Inc. v. United States, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (recognizing that "a reviewing court may set aside a procurement action if the procurement official's decision lacked a rational basis or for a challenge involving "a violation of regulation or procedure . . . the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations.") (emphasis added) (internal citations omitted); Banknote Corp. of Am. Inc. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (recognizing that under the APA standard applied in [Administrative Dispute Resolution Act of 1996] cases "a bid award may be set aside if either (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure . . . . When a challenge is brought on the second ground, the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations.") (emphasis added) (internal citation and quotation marks omitted).[20/]

Other federal decisions require a showing of prejudice, without regard to the federal APA, evidently based on the application of common law to federal procurements. See, e.g., TRW Envtl. Safety Sys., Inc. v. U.S.;[21/] Data Gen. Corp. v. Johnson.[22/]

55. None of these definitions works. The literal definition destroys the structure of section 120.57(3)(f) and its establishment of different levels of deference. Examined from

the perspectives of Respondent's failure to comply with the statutory deadline, a hypothetical failure to coordinate the procurement of the Monitoring Tool with the Florida Department of Law Enforcement and school districts, and the Groves-Watkins facts, proposed agency action in each of these cases would be illegal, and each of these procurements could not proceed.

56. The "clearly illegal" definition lacks meaning, although the Court's reference to the object of competitive bidding implies the exclusion of literal illegality. It would make little sense if the Court were referring to the probability of illegality. Factfinding is by degree, but judicial conclusions of law are not. Once the facts are found by the agreed-upon evidentiary standard, an act or omission is legal or it is not, and labeling the act or omission as "clearly illegal" adds nothing. For example, treating the standard of illegality as "certainly illegal," the proposed agency action would be illegal in this case, the coordination hypothetical, and Groves-Watkins, just as the proposed agency action would be using a literal definition of illegal.

57. Literal illegality plus prejudice achieves greater deference because the proposed agency action in the three scenarios would be illegal only in Groves-Watkins. In the present case, Petitioner's claims arising out of the disclosure of its reply involve prejudice, but not prejudice arising from

Respondent's failure to comply with the statutory deadline. However, prejudice is extrinsic to illegality, not part of illegality, so as likely to require legislation to be added to section 120.57(3)(f).

58. Another definition preserves the structure of section 120.57(3)(f) and, if not precisely co-extensive with literal illegality, introduces no extrinsic elements, while achieving at least the deference of literal illegality plus prejudice.[23/] The definition is a departure from the essential requirements of law, which is the primary criterion used by courts to review, by certiorari, quasi-judicial actions of agencies that are not subject to chapter 120 when no other method of review is available. Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995). Although more frequently applied to certiorari review of local land use decisions, this deferential criterion has been applied to a bid decision of an agency not covered by chapter 120. Biscayne Marine Partners, LLC v. City of Miami, 2019 Fla. App. LEXIS 2122, pp. 7-8 (Fla. 3d DCA 2019) (discussion of the four Liberty County criteria in analysis of whether a proposed bid award constituted a departure from the essential requirements of law).

59. Specifically, a departure from the essential requirements of law is:

> an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

Heggs, 658 So. 2d at 527-28 (citing Jones v. State, 477 So. 2d 566, 569 (Fla. 1985) (Boyd, C.J., concurring specially)). Consistent with the reference to the object of competitive bidding in Groves-Watkins, this is the meaning of illegality in section 120.57(3)(f).

60. Assessed by this definition, Respondent's failure to meet the statutory deadline is not an inherent or essential illegality, and proceeding with the procurement after December 1, 2018, is not an abuse of administrative power of any sort, nor a miscarriage of justice. Thus, the failure to meet the statutory deadline is not a departure from the essential requirements of law, so it does not constitute illegality within the meaning of section 120.57(3)(f).

61. Respondent's violation of the statutory deadline is not a departure from the essential requirements of law, in part, because the legislature imposed no penalty on Respondent's violation of the statutory deadline, notwithstanding its materiality.[24/] As noted above, the Governor and Commissioner of Education have inferred that the procurement may continue--implicitly recognizing that it is illogical, when a statutory

deadline is violated, to impose draconian consequences, not specified by statute, so as to defeat the objective of the statutory deadline in the first place--here, to secure the Monitoring Tool, sooner rather than later.[25/] A literal definition of illegality in section 120.57(3)(f) would write into the Act a draconian penalty for Respondent's violation of the statutory deadline in defiance of common sense.

62. Petitioner thus has failed to prove that Respondent's reject-all decision is illegal because Respondent violated the statutory deadline.

RECOMMENDATION

It is

RECOMMENDED that the Department of Education enter a final order dismissing the Petition.

DONE AND ENTERED this 17th day of April, 2019, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of April, 2019.

ENDNOTES

[1/] All references to "Abacode" include ZeroFox, Inc.

[2/] All references to "bid" are to all types of procurements, including an invitation to negotiate.

[3/] The statutory analysis in this recommended order does not rely on legislative intent, except where explicitly so stated. Instead, the statutory analysis defines the key word, "illegality," based, not on its literal meaning in isolation, but on:

> the entire text of a statute, including its structure and the physical and logical relation of its many parts, when applying the language of the statute to a set of facts. See Scalia & Garner, Reading the Law: The Interpretation of Legal Texts, p. 167 (2012) ("Perhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

Hous. Opportunities Project v. SPV Realty, LC, 212 So. 3d 419, 421 (Fla. 3d DCA 2016).

Adherence to the whole-text canon avoids any conflict between the legislative intent and the statutory language, although some decisions hold that legislative intent may override the "strict letter of the statute." See, e.g., Vildibill v. Johnson, 492 So. 2d 1047, 1048 (Fla. 1986); State v. Webb, 398 So. 2d 820 (Fla. 1981). The First District Court of Appeal has limited these Florida Supreme Court holdings to cases in which a literal construction would lead to "absurd or unreasonable unconstitutional results" or "ambiguity, absurdity, or unreasonableness on the face of the statute." Kuria v. BMLRW, LLLP, 101 So. 3d 425, 426-27 (Fla. 1st DCA 2012). However, this may be a misreading of Vildibill, which consists of two

independent parts: first, the crediting of legislative intent, even when it may contradict the strict letter of the statute, and, second, the reading of a statute to harmonize it with the constitution. See also Byrd v. Richardson-Greenshields Secur., Inc., 552 So. 2d 1099 (Fla. 1989); State v. Webb, 392 So. 2d 820 (Fla. 1981); Dep't of Prof'l Reg. v. Fla. Dental Hygienist Ass'n, 612 So. 2d 646 (Fla. 1st DCA 1993).

[4/] Section 120.57(3)(f) addresses "proposed" agency action in the award case and "intended" agency action in the reject-all case. The administrative law judge is unaware of any difference in meaning between "proposed" and "intended" agency action. Perhaps the statute uses the two terms to emphasize the distinction between the award case and the reject-all case. This recommended order uses the terms interchangeably.

[5/] Because the deferential standards and criteria apply to the proposed agency action, the administrative law judge may find direct evidentiary facts based on the preponderance standard. § 120.57(1)(j). Such facts would include what was said at a bidders' conference, when a bidder submitted a bid, or an evaluator's explanation for a score. The agency may make some intermediate-level determinations, such as whether a variance is a minor irregularity and, if so, whether to waive it, that may also be addressed under the deferential standards and criteria because they are not direct evidentiary facts.

[6/] "Illegal," merriam-webster.com, https://www.merriam-webster.com/dictionary/illegal (last visited April 15, 2019).

[7/] As an aside, it does not appear that any vendor availed itself of the opportunity to protect the confidentiality of any trade secrets, as provided by section 815.045. See Managed Care of N. Am., Inc. v. Fla. Healthy Kids Corp., 2019 Fla. App. LEXIS 4039 (Fla. 1st DCA 2019) (not yet final).

[8/] The inclusion of a statutory deadline for a procurement may not be common, so the inability to cure a violation may be an unusual situation. The Act also requires Respondent, in preparing the ITN, to coordinate with the Florida Department of Law Enforcement and the school districts. If a protestor proved a claim that Respondent failed to do so and a literal definition of illegality applied, Respondent's failure to coordinate would constitute a literal illegality, but presumably could be remedied by later coordination with these entities and making revisions to the ITN, as necessary or advisable.

[9/] Ch. 1996-159, § 19, Laws of Fla.

[10/] 530 So. 2d 912 (Fla. 1988). Donna E. Blanton, Florida's Revised Administrative Procedure Act, 70 Fla. B.J., July/Aug. 1996, at 30, 35.

[11/] Groves-Watkins, 530 So. 2d at 914 (citing Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982)). As to the addition of the criterion of illegality, see preceding endnote.

[12/] 421 So. 2d 505, 507 (Fla. 1982).

[13/] Some of the above-cited facts are found only in the intermediate appellate decision, Groves-Watkins Constructors v. Dep't of Transp., 511 So. 2d 323 (Fla. 1st DCA), reh. denied with opinion, 511 So. 2d 323 (Fla. 1st DCA 1987) (discussions of, among other things, the effect of agency's proceeding with second procurement during a pending bid protest and the power of court to direct agency to award contract to a vendor).

[14/] Groves-Watkins, 511 So. 2d at 330, 332 (Ervin, J., dissenting).

[15/] 600 F.2d 429 (3d Cir. 1979).

[16/] Groves-Watkins, 530 So. 2d at 913.

[17/] Sea-Land Service, 600 F.2d at 434.

[18/] 125 Fed. Cl. 30 (2016).

[19/] 480 F.2d 1166 (D.C. Cir. 1973). This case is cited by Sea-Land Services.

[20/] Caddell Constr., 125 Fed. Cl. at 50.

[21/] 18 Cl. Ct. 33, 65 (1989).

[22/] 78 F.3d 1556 (Fed. Cir. 1996).

[23/] Defining illegality as a departure from the essential requirements of law may even preserve the agency's reject-all decision on the Groves-Watkins facts, although it is a close call. If not, the only standard that would preserve the reject-all decision would be Judge Ervin's "unfettered

discretion" standard, which reads out of the law all four Liberty County criteria.

[24/] Using similar reasoning, Florida courts traditionally have examined the history and subject matter of a statutory deadline and, if the statute did not explicitly restrain the performance of the act after the deadline and the statute was not jurisdictional, declined to enforce a statutory deadline because the statute was directory rather than mandatory. See, e.g., Schneider v. Gustafson Indus., Inc., 139 So. 2d 423, 425 (Fla. 1962); First Providian, L.L.C. v. Evans, 852 So. 2d 908 (Fla. 4th DCA 2003).

[25/] In the unlikely event that the legislature were to take a different view, it could easily terminate the procurement by not authorizing or appropriating funding for years after the 2018-19 fiscal year.

COPIES FURNISHED:

Jason D. Borntreger, Esquire
James L. Richmond, Esquire
Department of Education
325 West Gaines Street, Suite 1244
Tallahassee, Florida 32399-0400
(eServed)

Thomas P. Crapps, Esquire
Joy Ryan, Esquire
Meenan P.A.
300 South Duval Street, Suite 410
Tallahassee, Florida 32301
(eServed)

Kirsten H. Mathis, Esquire
Meenan, P.A.
300 South Duval Street, Suite 410
Tallahassee, Florida 32301

J. Riley Davis, Esquire
Akerman, LLP
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
(eServed)

Chris Emerson, Agency Clerk
Department of Education
Turlington Building, Suite 1520
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within ten 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.