

STATE OF FLORIDA  
DEPARTMENT OF EDUCATION

FILED AGENCY CLERK  
2019 SEP 27 AM 8:38

ABACODE, LLC and ZEROFOX, INC.,

PETITIONERS,

vs.

STATE OF FLORIDA, DEPARTMENT OF  
EDUCATION,

RESPONDENTS,

and

NTT DATA, INC.,

INTERVENOR.

DEPT OF EDUCATION  
TALLAHASSEE FLA  
DOE Case No. 19-2741BID  
DOAH Case No.: 19-2741BID

2019 SEP 30 PM 1:33  
DIVISION OF  
ADMINISTRATIVE HEARINGS

**FINAL ORDER**

This matter comes before the Department of Education (“Department”) for consideration and final agency action on the Recommended Order in the above-styled case, entered by Administrative Law Judge Mary Li Creasy (hereinafter “ALJ”) of the Division of Administrative Hearings (“DOAH”) and herein incorporated by reference. Having considered the entirety of the record, the Department makes its findings as follows.

**PRELIMINARY STATEMENT**

This matter arises from the Petitioners’ protest of the Agency Award issued by the Department to Intervenor. The Department issued Invitation to Negotiate 2019-44 Re-Bid, Social Media Monitoring, and Petitioner Abacode and Intervenor provided replies. The Department’s negotiation committee recommended Petitioner Abacode; however, the Department ultimately awarded the contract to Intervenor. Thereafter, Petitioners submitted their written protest, and the Department referred the protest to DOAH. At issue in the proceeding was whether, in making a

recommendation to award the contract to Intervenor, the Department acted contrary to governing statutes, rules, policies, or procurement specifications, and if so, whether the award was clearly erroneous, arbitrary, capricious, or contrary to competition. A hearing was held before the ALJ on June 25, 2019, and the ALJ issued her Recommended Order on August 26, 2019, recommending that the Department issue a final order dismissing Petitioners' protest. On September 5, 2019, Intervenor submitted exceptions to the Recommended Order. No additional exceptions or responses were provided.

#### STANDARD OF REVIEW

The Administrative Procedure Act contemplates that an agency will adopt an administrative law judge's recommended order as the agency's final order in most proceedings. To this end, the Department has been granted only limited authority to reject or modify findings of fact in the ALJ's Recommended Order.

In particular, an agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record 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. § 120.57(1)(1), Fla. Stat.

Absent a demonstration that the underlying administrative proceeding departed from essential requirements of law, "[a]n ALJ's findings cannot be rejected unless there is no competent, substantial evidence from which the findings could reasonably be inferred." *Prysi v. Dept. of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002) (citations omitted). In determining whether challenged findings are supported by the record in accord with this standard, the Commissioner may not reweigh the evidence or judge the credibility of witnesses, both tasks being within the

sole province of the ALJ as the finder of fact. *See Heifetz v. Dept. of Bus. Reg.*, 475 So. 2d 1277, 1281-83 (Fla. 1st DCA 1985).

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

#### RULINGS ON EXCEPTIONS

Parties to a dispute before an ALJ are afforded an opportunity by statute to file exceptions to the recommended order. Section 120.57(1)(k), Florida Statutes, requires the Department to include in its Final Order an explicit ruling on each exception, except for those exceptions that do not clearly identify the disputed portion of the Recommended Order, that do not identify the legal basis for the exception, or that do that include appropriate citations to the record. The Department will address Intervenor's exceptions as follows:

#### **Exceptions 1 and 5**

Intervenor challenges paragraphs 7 and 34 of the Recommended Order to the extent that the paragraphs do not state that no party challenged Commissioner Corcoran's decision to proceed with the solicitation process despite the pending protest. Intervenor essentially objects to factual findings not made and proposes additions to the factual findings. Intervenor makes no assertion that the proceedings failed to comply with essential requirements of law or that the ALJ's findings of fact are not based on competent, substantial evidence. By failing to provide argument to either effect, Intervenor has not met the high burden required for the Commissioner to overturn a finding

of fact. *See, e.g., Bay Cnty. Sch. Bd. v. Bryan*, 679 So. 2d 1246 (Fla. 1st DCA 1996); *Dunham v. Highland Cnty. Sch. Bd.*, 652 So. 2d 894 (Fla. 2nd DCA 1995). Further, the factual findings made by the ALJ are supported by competent, substantial evidence in the record, and the Department is precluded from re-weighing the evidence and testimony presented to the ALJ. *See Heifetz v. Dept. of Bus. Reg.*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). Exceptions 1 and 5 are denied.

### **Exception 2**

Intervenor takes issue with the ALJ's finding in paragraph 13 that "[i]t is based in the United Kingdom," and seeks to clarify that Bandwatch (and not Intervenor) is based in the United Kingdom. There is not competent, substantial evidence to conclude that Intervenor is based in the U.K. Instead, the record evidence, particularly the deposition testimony of Rick Johnson, confirms that Bandwatch, and not Intervenor, is based out of the United Kingdom. *See* Intervenor's Exhibit 4 at 16:3-16. Accordingly, Exception 2 is accepted, and paragraph 13 should read as follows:

In contrast, NTT is a global information technology company, the fifth largest in the world, and employs more than 250,000 people, with 55 subsidiary companies. One of these subsidiaries, NTT Security, employs approximately 1,200 people and competes with Abacode in the MSSP market. ~~It is based in the United Kingdom.~~ In 2018, an independent analyst firm ranked NTT Security 10th among MSSPs, while ranking Abacode at 71st. Unlike Abacode's experience with the ZeroFOX tool, NTT has previously implemented the Bandwatch tool on behalf of public education customers. Bandwatch is based in the United Kingdom.

### **Exception 3**

Intervenor challenges the ALJ's findings in paragraph 23 to the extent that it "implies that NTT DATA's initial reply did not explicitly address the issue of staffing and user-level support." In paragraph 23, the ALJ found that (1) the Department inquired as to how Intervenor would address staffing and user-level support; (2) Intervenor had not explicitly addressed that issue in its proposal; (3) Intervenor did respond by identifying the individuals that would be participating in the project and potential expansion areas; and (4) Intervenor detailed its intentions in its best and

final offer. While Intervenor points to its reply as contradicting the ALJ's finding that it did not address staffing and user-level support, review of the citations provided by Intervenor reveals that the reply provided only cursory and generic information on staffing and user-level support. Accordingly, the ALJ had competent, substantial evidence to support her findings, and Exception 3 is rejected.

#### **Exception 4**

Exception 4 challenges the findings within paragraph 26 of the ALJ's Recommended Order to the extent that it implies that Intervenor did not have a valid business reason to reduce its price. Paragraph 26 finds that the Intervenor's proposed price was effectively halved from the previous 2018 ITN. Again, Intervenor essentially objects to factual findings not made, as the ALJ made no finding as to the intent or validity behind the price reduction. Intervenor makes no assertion that the proceedings failed to comply with essential requirements of law or that the ALJ's findings of fact are not based on competent, substantial evidence. By failing to provide argument to either effect, Intervenor has not met the high burden required for the Commissioner to overturn a finding of fact. *See, e.g., Bay Cnty. Sch. Bd. v. Bryan*, 679 So. 2d 1246 (Fla. 1st DCA 1996); *Dunham v. Highland Cnty. Sch. Bd.*, 652 So. 2d 894 (Fla. 2nd DCA 1995). Further, the factual findings made by the ALJ are supported by competent, substantial evidence in the record, and the Department is precluded from re-weighing the evidence and testimony presented to the ALJ. *See Heifetz v. Dept. of Bus. Reg.*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). Exception 4 is hereby denied.

#### **Exceptions 6, 10, 12, 13**

Intervenor contests the legal conclusions (1) that the matter is not moot and (2) that DOAH has subject matter jurisdiction over the same. In sum, Intervenor argues that when Petitioners failed to challenge Commissioner Corcoran's decision to continue with the contracting process pursuant

to section 120.57(3)(c), Florida Statutes, the protest became moot and DOAH was no longer the forum to contest the contract award.

When rejecting or modifying a conclusion of law or interpretation of an administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion or interpretation, and must make a finding that its substituted conclusion of law or interpretation or administrative rule is as or more reasonable than that which was rejected or modified. § 120.57(1)(1), Fla. Stat. Here, the ALJ's conclusions of law present a cohesive, comprehensive, and cogent explanation of the law. Although Intervenor provides an alternative conclusion, it has failed to demonstrate that its position is as or more reasonable than that of the ALJ. Accordingly, these exceptions are denied.

#### **Exception 7**

Intervenor contests the findings within paragraph 36 and note 2, arguing that it presented ample evidence that it is a responsible vendor. Although Intervenor points to evidence in the record related to its capabilities, the ALJ limited the presentation of evidence on the issue of "responsibility" by her ruling on the Second Motion in Limine and, ultimately, found that Petitioners did not raise the issue of responsibility in the Proposed Recommended Order. Based on the foregoing and the fact that the ALJ did not appear to make any explicit ruling as to either party's responsibility, Exception 7 is denied.

#### **Exception 8**

Intervenor takes exception to the factual findings in paragraph 45 in so far as it implies that "the ITN failed to indicate the criteria for award." Intervenor essentially objects to factual findings not made, as the paragraph made no mention of the ITN's legality or sufficiency. Intervenor makes no assertion that the proceedings failed to comply with essential requirements of law or that the

ALJ's findings of fact are not based on competent, substantial evidence. By failing to provide argument to either effect, Intervenor has not met the high burden required for the Commissioner to overturn a finding of fact. *See, e.g., Bay Cnty. Sch. Bd. v. Bryan*, 679 So. 2d 1246 (Fla. 1st DCA 1996); *Dunham v. Highland Cnty. Sch. Bd.*, 652 So. 2d 894 (Fla. 2nd DCA 1995). Further, the factual findings made by the ALJ are supported by competent, substantial evidence in the record, and the Department is precluded from re-weighing the evidence and testimony presented to the ALJ. *See Heifetz v. Dept. of Bus. Reg.*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). Exception 8 is denied.

#### **Exception 9**

Intervenor challenges the factual finding in paragraph 53 to the extent that it indicates that Intervenor did not provide an educational institution as a verifiable reference. Notably, the finding states:

NTT's proposal provided noneducational references which dealt with social media **monitoring** for threats of violence. NTT has relevant experience in **monitoring** in the educational setting but due to the nondisclosure provisions of the contracts with those education institutions, they could not be used as verifiable references.

(Emphasis supplied.) The record evidence identified by Intervenor supports the ALJ's finding, as it notes the University of California – Davis reference is limited to marketing—not monitoring. The findings made by the ALJ are supported by competent, substantial evidence in the record. *See* Joint Exhibit 7 at 181 and 190. Exception 9 is rejected.

#### **Exception 11**

Intervenor challenges the legal conclusion in paragraph 56 “insofar as [the paragraph] suggests that “Team Abacode,” including ZeroFOX, Inc., has standing.” While it is not clear whether paragraph 56 makes the conclusion that ZeroFOX, Inc. or “Team Abacode” have standing, Exception 11 is accepted. *See Fort Howard Co. v. Dep't of Mgmt. Servs.*, 624 So. 2d 783 (Fla. 1st

DCA 1993); *Westinghouse Electric Corp. v. Jacksonville Transp. Auth.*, 491 So. 2d 1238, 1240 (Fla. 1st DCA 1986); *see also Rubber Millers, Inc. v. U.S.*, 596 F. Supp. 210 (D.C. 1984).

Accordingly, paragraph 56 is modified as follows:

Abacode, LLC, has standing to bring this procurement protest and NTT has standing to participate as an intervenor because their substantial interests are at stake.

DISPOSITION

WHEREFORE, after a review of the record in its entirety, it is ORDERED and ADJUDGED as follows:

1. Intervenor's exceptions 1, 3-10, 12-13 are DENIED;
2. Intervenor's exceptions 2 and 11 are ACCEPTED, and the findings are modified as noted;
3. The findings and conclusions in the Recommended Order are otherwise ADOPTED;
4. The Administrative Law Judge's recommendation is ADOPTED.

DONE AND ORDERED this 26<sup>th</sup> day of September, 2019, in Tallahassee, Florida.



RICHARD CORCORAN  
Commissioner of Education

NOTICE OF APPEAL RIGHTS

Unless waived, any party substantially affected by this Final Order may seek judicial review by filing an original Notice of Appeal with the Clerk of the Department of Education, and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the



appropriate District Court of Appeal within thirty (30) days of rendition of this order, in accordance with Rule 9.110, Florida Rules of Appellate Procedure, and section 120.68, Florida Statutes.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the above FINAL ORDER has been filed with the Agency Clerk of the Department of Education on this 27 day of September, 2019, and that a true and correct copy has been furnished to:

Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060

Jason Douglas Borntreger, Esq.  
Florida Department of Education  
325 West Gaines Street, Suite 1544  
Tallahassee, Florida 32399-0400  
[Jason.Borntreger@fldoe.org](mailto:Jason.Borntreger@fldoe.org)

J. Riley Davis, Esq.  
Thomas A. Range, Esq.  
Akerman LLP  
Suite 1200  
106 East College Avenue  
Tallahassee, Florida 32301  
[riley.davis@akerman.com](mailto:riley.davis@akerman.com)  
[tom.range@akerman.com](mailto:tom.range@akerman.com)

Frederick John Springer, Esq.  
Bryant Miller Olive P.A.  
Suite 900  
101 North Monroe Street  
Tallahassee, Florida 32301  
[fspringer@bmlaw.com](mailto:fspringer@bmlaw.com)

  
\_\_\_\_\_  
AGENCY CLERK