

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GATEWAY RETAIL CENTER,

Petitioner,

vs.

Case No. 20-2660BID

DEPARTMENT OF CHILDREN AND  
FAMILIES,

Respondent,

and

MIDTOWN CENTRE OFFICE, LLC

Intervenor.

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RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted via Zoom video teleconferencing on July 9 and 10, 2020, before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: Cynthia J. Miller, Esquire  
Sweetapple, Broecker & Varkas, PL  
4800 North Federal Highway, Suite D306  
Boca Raton, Florida 33431

Cindy A Laquidara, Esquire  
Akerman, LLP  
50 North Laura Street, Suite 3100  
Jacksonville, Florida 32202

For Respondent: William D. Hall, Esquire  
John L. Wharton, Esquire  
Dean, Mead and Dunbar  
215 South Monroe Street, Suite 815  
Tallahassee, Florida 32301

For Intervenor: Robert H. Hosay, Esquire  
Benjamin J. Grossman, Esquire  
Mallory Neumann, Esquire  
Foley & Lardner, LLP  
106 East College Avenue, Suite 900  
Tallahassee, Florida 32301

John A. Tucker, Esquire  
Foley & Lardner, LLP  
One Independent Drive, Suite 1300  
Jacksonville, Florida 32202

#### STATEMENT OF THE ISSUE

Whether the Department of Children and Families’ (“the Department”) intent to award the contract associated with Invitation to Negotiate No. 590:3161 (“the ITN”) to Midtown Centre Office, LLC (“Midtown”) was arbitrary or capricious, irrational, or otherwise contrary to the law.<sup>1</sup>

#### PRELIMINARY STATEMENT

Gateway Retail Center, LLC (“Gateway”) filed an “Amended Petition and Request for Formal Hearing” (“the Amended Petition”) on June 8, 2020, challenging the Department’s intent to award the contract at issue to

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<sup>1</sup> Midtown argued on page 2 of its Proposed Recommended Order that Gateway Retail Center, LLC never asserted that the Department’s intended award was clearly erroneous or contrary to competition and that the analysis should thus be limited to whether the intended award was arbitrary or capricious. Because the undersigned agrees with Midtown’s argument, the “Statement of the Issue” is a slightly revised version of the “Concise Statement of the Nature of the Controversy” as set forth in the parties’ Joint Pre-Hearing Stipulation. *See Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.*, 174 So. 3d 1037, 1038-39 (Fla. 4th DCA 2015)(stating that “[p]retrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced.”).

Midtown. The Department referred this matter to DOAH on June 10, 2020, and the undersigned scheduled a final hearing for July 9 and 10, 2020.

Midtown filed a “Notice of Intervention and Appearance” on June 11, 2020, based on the fact that it was specifically identified in the Amended Petition and that its substantial interests were at stake. The undersigned issued an Order on June 12, 2020, amending the case style and formally recognizing Midtown as an intervenor.

The Department filed a “Motion for Summary Recommended Order or, in the Alternative, Motion to Strike Irrelevant Portions of the Amended Petition, and Motion in Limine” (“the Motion for Summary Recommended Order”) on July 1, 2020. In support thereof, the Department argued that all of the arguments raised in the Amended Petition were contrary to the plain language of the ITN or some other undisputed fact. At the outset of the final hearing, the undersigned denied the Motion for Summary Recommended Order without prejudice to the arguments therein being raised again.

On July 8, 2020, Midtown filed a “Motion in Limine to Exclude Argument Related to Gateway’s Offer Submitted After the Notice of Intent to Award” and a “Motion in Limine.” Both of the aforementioned Motions were denied at the outset of the hearing with the caveat that the objections therein could be reasserted if the arguments at issue were raised during the final hearing.

The undersigned accepted Gateway Exhibits 1 through 25 into evidence but deferred ruling on relevancy objections to Gateway Exhibits 10, 11, and 23 through 25.<sup>2</sup> Those objections are overruled. The Department’s

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<sup>2</sup> There is an error in the Pre-hearing Stipulation regarding the numbering of Gateway’s exhibits. All of Gateway’s exhibits after No. 4 are off by one numerical position. For example, the document listed by the Pre-hearing Stipulation as Gateway Exhibit No. 5 should actually be listed as Gateway Exhibit No. 6, and so forth through the end of Gateway’s exhibits.

Exhibits 1 through 16 were accepted into evidence, and rulings on Midtown's relevancy objections to Exhibits 1 and 6 were deferred. Those objections are overruled. Midtown Exhibits 1 through 22 were accepted into evidence without objection. Joint Exhibits 1 through 52 were accepted into evidence.

Gateway presented testimony from David Hulsey, Jim Goldsmith, Charles Johnson, and Daniel Mehaffie. The Department and Midtown did not call any witnesses. Midtown offered portions of depositions from Adam Landa (Midtown Exhibit 16) and David Berger (Midtown Exhibit 17) in lieu of live testimony, and the undersigned accepted those designations.

Near the conclusion of the final hearing, Gateway orally moved to amend the Amended Petition in order to raise a new issue pertaining to parking at Midtown's office park. The undersigned denied that motion without prejudice to Gateway arguing in its proposed recommended order why that particular issue should be considered.

The three-volume final hearing Transcript was filed on July 28, 2020, and the parties filed timely proposed recommended orders that were considered in the preparation of this Recommended Order.

The Department and Midtown filed a "Joint Motion to Strike Portions of Petitioner's Proposed Recommended Order" ("the Joint Motion") on August 13, 2020. In support thereof, the Department and Midtown noted that Gateway's Proposed Recommended Order raised an argument that had not been previously identified by Gateway in the Amended Petition or the Pre-hearing Stipulation, i.e. that Midtown's Best and Final Offer ("BAFO") was not submitted in writing, and was therefore non-responsive. As discussed in the Conclusions of Law below, the undersigned grants the Joint Motion and

has disregarded any argument pertaining to Midtown’s BAFO not being in writing.

### FINDINGS OF FACT

Based on the evidence adduced at the final hearing, the record as a whole, and matters subject to official recognition, the following Findings of Fact are made:

#### The Parties

1. The Department is the state agency charged with working “in partnership with local communities to protect the vulnerable, promote strong and economically self-sufficient families, and advance personal and family recovery and resiliency.” § 20.19(1)(a), Fla. Stat. (2019).<sup>3</sup>

2. Gateway owns a shopping center in Jacksonville, and Midtown has owned the Midtown Office Park in Jacksonville since September of 2019.

#### The ITN

3. The Department posted the ITN on October 9, 2019, in order to obtain leased space in Jacksonville for its ACCESS Storefront (“the Storefront”) and North Florida Customer Call Center (“the Call Center”) beginning March 1, 2021. The Storefront is expected to serve 350 to 400 clients a day and is currently located in Building D of Gateway’s Jacksonville shopping center. The Call Center is currently located in Midtown Office Park’s Brownnett Building.

4. The ITN set forth two options for prospective bidders. Option 1 sought a location of approximately 26,585 square feet to house the Storefront and the Call Center for 5, 7, or 10-year lease terms. Option 2 sought one location of approximately 11,091 square feet for the Call Center and a separate location of approximately 15,494 square feet for the Storefront. Option 2 also called for 5, 7, or 10-year leases.

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<sup>3</sup> Unless stated otherwise, all statutory references shall be to the 2019 version of the Florida Statutes.

5. The ITN specified that the Department would evaluate and rank all submissions deemed responsive to the ITN. Those rankings would serve as the basis for one or more bidders advancing to “the short list” and being entitled to conduct negotiations with the Department. Section V of the ITN indicates that negotiations were to begin after the Department evaluated the initial replies to the ITN.

6. The ITN’s stated goal was to “award a lease that best meets the needs of the State using a flexible, iterative process.” Therefore, the ITN established a process in which the Department had a great deal of flexibility in how it conducted negotiations with the short-listed bidders. For example, the ITN states that the Department “reserves the right to negotiate with all, one or none of the respondents in its sole discretion.” The ITN also states that the Department “has the right, at any time during the process, to reject any and all proposals that are not, in [the Department’s] sole discretion, in the best interests of the State.”

7. The Department reserved “the right to seek clarifications, to request Reply revisions, and to request any information deemed necessary for proper evaluation of Replies.” The Department afforded itself “the right to negotiate different terms and related price adjustments if [the Department] determines that it is in the State’s best interest to do so.” While the ITN provided that “negotiations may be conducted serially by order of ranking or concurrently with all short listed [bidders],” the Department reserved the right to “expand the short list to include additional responsive Offerors for negotiation or change the method of negotiation . . . if it determined that to do either would be in the best interest of the State.” Also, the Department could “[s]chedule additional negotiating sessions with any or all responsive [bidders].”

8. The ITN specified that, after the Department completed the initial negotiation session with the selected short-listed bidders, the Department, “in its sole discretion,” would “determine whether to hold additional negotiation sessions and with which [bidders] it [would] negotiate.” The ITN

empowered the Department to “[t]ake any additional administrative steps deemed necessary in determining the final award, including additional fact-finding, evaluation, or negotiation where necessary and consistent with the terms of this solicitation.” Furthermore, any time after the initial negotiating session, the Department could require all responsive bidders to provide additional or revised written proposals addressing specific topics and “[d]ecline to conduct further negotiations with any [bidder].”

9. The Department reserved the right to schedule additional negotiation sessions in order to finalize contractual terms with bidders identified in a Notice of Award. In addition, the Department could reopen negotiations with any bidder at any time prior to executing a contract or terminate negotiations with any or all bidders, regardless of the status of negotiations with those bidders.

10. The Department could “waive minor irregularities when to do so would be in the best interest of the State of Florida.” The ITN defined a “minor irregularity” as a “variation from the terms and conditions of this ITN which does not affect the price of the Offer or give the [bidder] a substantial advantage over other [bidders] and thereby restrict or stifle competition and does not adversely impact the interest of the Department.”

11. The ITN also contained a broad provision providing that:

The Department reserves all rights described elsewhere in this ITN. The Department has sole discretion in deciding whether and when to take any of the foregoing actions, the scope and manner of such actions, the responsive [bidder] or [bidders] affected and whether to provide concurrent public notice of such decision.

12. The end of the negotiation process could lead to the Department selecting one or more bidders “to submit a written best and final offer, to memorialize all agreements reached during negotiations and to extend additional benefits to the State.”

13. As for the final selection, the ITN specified that:

The [Regional Director] or her/his designee will approve an award that will provide the best leasing value to the State, based on the criteria in Section V.B.2, taking into consideration the recommended award by the negotiating team. In so doing, the [Regional Director] or his/her designee is not required to score the Offerors, but will base his or her recommendation on the criteria set forth above. If the [Regional Director] or his or her designee determines that two or more Replies most advantageous to the State are equal with respect to all relevant considerations, including price, quality, and service, the award will be made in accordance with Rule 60A-1.011, Florida Administrative Code and Section 295.187, Florida Statutes.

14. The ITN set out a “general schedule” detailing key dates in the solicitation process and estimated time periods for when certain events would occur. For example, the initial schedule established December 9, 2019, as the deadline for bidders to submit their replies to the Department. The Department’s evaluators were scheduled to meet on December 16, 2019, and complete their evaluation of the replies. It was “anticipated” that the “short list” of bidders would be announced on December 19, 2019. Then, the “estimated time period for negotiation” would begin on December 20, 2019, and conclude on January 23, 2020. Finally, February 14, 2020, was the Department’s “estimated date for posting” its Notice of Intent to Award.

15. During the course of this solicitation, the Department revised its general schedule multiple times via the issuance of addenda. For example, Addendum 3 was issued on December 6, 2019, and delayed by approximately one month all of the events following the opening of the initial replies to the ITN. Addendum 6 was issued on February 7, 2020, and extended the negotiation period with short listed bidders to February 21, 2020.



Addendum 7 was issued on February 19, 2020, extending the aforementioned negotiation period to February 28, 2020, and the estimated award date to March 16, 2020.

16. The Department authorized CBRE, Inc. (“CBRE”), the world’s largest real estate company, to act as its representative during the solicitation and negotiations. CBRE helps agencies structure bids so they draw as much interest as possible from prospective bidders. CBRE also assists with assembling the bid documents that agencies post to the State of Florida’s Vendor Bid System (“the VBS”). In addition to ensuring that offers are technically compliant with the terms of an ITN, CBRE handles negotiations with short-listed bidders and facilitates the receipt of the bidders’ BAFOs.

17. CBRE assigned David Hulsey to be its lead person for the ITN, and Charles Johnson of the Department was his designated contact.<sup>4</sup>

18. The ITN was posted on the VBS on October 9, 2019. Any bidder objecting to any of the ITN’s terms, conditions, or specifications had 72 hours to file a protest, but no protest was filed.

19. Five prospective bidders replied to the ITN. Gateway submitted two replies, each offering to lease space in Building A of Gateway’s Jacksonville shopping center. As noted above, the Department currently leases space for the Storefront in Building D in the same shopping center. Midtown submitted one reply which proposed leasing space in the Dew Building of its Midtown office park. The Department currently leases space for the Call Center in the Brownnett Building of that office park.

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<sup>4</sup> Mr. Hulsey explained that CBRE does not recommend which bidder should receive the contract: “I don’t recommend anything. We don’t make any decisions. Once we finish with negotiations and test fits, we give that to the agency, and they make decisions and recommendations. We as tenant brokers don’t have the authority to make any decisions. We’re not on the evaluation teams, and we just, you know, that’s not part of the scope of our contract.” When asked if he made any recommendations in the instant case, Mr. Hulsey testified, “Absolutely not. I don’t have that authority, and quite frankly, we don’t care. We represent the state, so if bidder A, B, or C wins, we get paid. I have no inclination to – for one to win over the other. The only thing I care about is whoever wins can they get the funding through traditional lending or private equity, do they understand the scope of work and the cost associated with building out this space.”

20. After receiving replies to the ITN, Mr. Johnson ranked the replies from highest to lowest based on the criteria set forth in the ITN. He then transmitted those rankings and a recommendation about which bidders should make the short list to the Regional Director overseeing the Jacksonville area. The Regional Director or his/her designee then selected the bidders with whom the Department (via CBRE) would commence negotiations.

21. Gateway, Midtown<sup>5</sup>, and Timuquana Marketplace, LLC (“Timuquana”) advanced to the short list on January 13, 2020.<sup>6</sup>

Getting BAFOs from Gateway and Midtown

22. The ITN specified that “[p]rior to final negotiation and selection of an Offer or Offers, a ‘test fit’ of the Proposed Space relative to the need may be required, the expense of which shall be borne by [the bidder].” The ITN defined a “test fit” as:

the first attempt to show the proposed office space criteria on paper in the form of a preliminary space plan. The test fit determines if you can “fit” into a specific space or how much space you will actually need to build out the space.

A test fit ensures that a prospective bidder understands the Department’s needs and will provide exactly what the Department is seeking.<sup>7</sup>

23. Even though the ITN stated that a test fit “may be required,” Mr. Hulseby considers test fits to be an essential part of the negotiation process: “I was trying to facilitate test fits, which are the basis for

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<sup>5</sup> Midtown earned the highest overall score.

<sup>6</sup> The subsequent negotiations with Timuquana were not extensive because its proposed lease rates were substantially higher than those proposed by Gateway and Midtown.

<sup>7</sup> Charles Johnson, the Department’s contact person for the ITN, testified that a test fit shows “where the seats are, and where the people are going to be sitting. Where . . . rooms are located, restrooms, [and whether the contemplated arrangement is] conducive to fire codes.”

negotiations, so that we could get to a final best and final number and feel confident that they could build it out.”

24. Adam Landa, Gateway’s point-of-contact for this bid, contacted Mr. Hulsey about revising Gateway’s offer so that it would be based on Building D rather than Building A. Mr. Hulsey responded via a February 6, 2020, email stating that the Department was receptive to keeping the Storefront in Building D, but Mr. Hulsey still wanted Gateway to submit a test fit:

Adam,

Per our conversation yesterday afternoon, [the Department] is open to the idea of keeping the store front in their current location at Gateway, with some modifications to the lobby and an expanded area of approximately 3,000sf. [The Department] is requesting that you hire an architect/space planner to complete a “high level” test-fit to show how the storefront and call center fits into the available vacant space adjacent to the service center. If your architect/space planner needs to meet with [the Department], I can set that up. The time period for negotiations ends tomorrow according to the schedule in the ITN; however, we are going to extend that timeframe for a couple of weeks to allow time for the test-fit process. If you have any questions, please contact me.

Mr. Hulsey provided Gateway with the names of three architects who could perform the test fit.<sup>8</sup>

25. Mr. Hulsey contacted Gateway and Midtown on February 18, 2020, in order to determine when he could expect the first drafts of the test fits that

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<sup>8</sup> Mr. Hulsey wrote an email to Mr. Landa on February 10, 2020, relaying an architect’s contact information and stating he was “working to find you a couple more to reach out to.” Mr. Landa replied 10 minutes later thanking Mr. Hulsey and saying “[w]e will get right on it.”

had been requested. Mr. Hulsey's February 18, 2020, email to Mr. Landa asked:

Any idea when we will see the first draft of a "high level" test fit? No one from [the Department] has been contacted by a space planner or ownership to give their input. We will be reaching the end of the period for negotiations this Friday and then the agency will make their decision. I would assume that you would like for [the Department] to see past the existing conditions before they make their decision.

26. In lieu of a test fit, Mr. Landa submitted via email a "revised site plan" and what he referred to as "attached test fits" on February 18, 2020. Via the same email, Mr. Landa asked Mr. Hulsey to "please confirm if we can extend the negotiations by an additional week." On February 22, 2020, Mr. Hulsey's assistant notified Mr. Landa via email that "[t]he addendum to extend the deadline for negotiations on the Jacksonville ITN has been posted to VBS, please find a copy attached. The new deadline date is 2/28/2020."

27. Mr. Landa then transmitted the following email to Mr. Hulsey and his assistant on February 26, 2020:

Per our conversation today, please see attached a revised site plan and proposed rental structure for the two proposed spaces in Building D at Gateway Town Center. Please note that we provided your client an approximate 1,000 square feet of additional space for non-rentable items such as bathrooms, etc.

The proposed rentable square feet will be based on your client's required 26,585 total square feet plus approximately 3%, which comes to approximately 27,382 total square feet. To clarify, [the Department] will be paying gross rent on the basis

of its required 27,382 square feet, as seen on the proposed rental structure attached.<sup>9]</sup>

28. The documents transmitted by Mr. Landa did not amount to an actual test fit because they did not show how the interior of the spaces would be arranged or anything else contemplated by the ITN's definition of "test fit."

29. Mr. Hulseley was frustrated with Gateway's failure to provide him with a test fit, testifying that:

Q: Gateway never provided you with a test fit, did they?

A: No. We tried – we tried. I was so frustrated with Mr. Landa that I called David Berger and expressed my frustration. And said, David, I don't think that Mr. Landa understands what a test fit is, because I asked for a test fit and he sends me a site plan with the vacant space that they have in the center. And I was just pulling my hair out trying to communicate.

Q: Okay. And I guess, based on what you just said, would it be fair to say that you really bent over backwards trying to get a test fit from Gateway?

A: I went beyond. Above and beyond. If the tables were turned and Gateway was awarded this, Midtown would probably be protesting saying that

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<sup>9</sup> Mr. Landa also transmitted the substance of this email to Mr. Hulseley via a text message sent on February 26, 2020.

I showed favoritism to Gateway, because I helped them get in touch with some architects.<sup>[10]</sup>

30. In response to an inquiry from Mr. Landa asking if he needed anything else, Mr. Hulseley emailed the following to Mr. Landa on March 6, 2020, well after the February 28, 2020, negotiation deadline:

We have everything we need at this point. [The Department] is reviewing all of their options and hope to make an award according to the revised schedule of events in the ITN. If they request additional information, I will reach out to you.

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<sup>10</sup> Mr. Hulseley had relayed his frustration to David Berger, one of Gateway's partners:

Q: And did David Berger call you during this procurement at all, to your recollection?

A: Yeah. If David needed something, you know, he would call; and if I didn't answer, he would text and say, "Call me," and I'd text and say, you know, "I'm tied up," "I can't," "I will," but I would rather have reached out. In fact, when I was not getting the responsiveness that I needed from this Adam Landa, I would call David and say, "David, I don't know if this Adam guy understands what a test fit is." I said, "I've given him three names of three architects and their phone numbers, which is not my responsibility, but Adam told me 'We don't have an architect in Jacksonville.'" So I did his work for him and we still never got a call or meeting setup with the architects.

Well, I called David and expressed my frustration that we weren't getting what we needed because I knew David knew the process because I just finished – he was just finishing up \$250,000 in work for DOC.

Q: Do you recall when in time approximately those conversations were? Were they before or after the BAFO?

A: Oh, before. There's probably -- I don't even know how many calls, you know. You – I'd need something, I'd ask for it and ask for it. Finally, I wasn't getting it, I put it in writing in an email towards the end of February, I guess, you know, "When are we going to get this?" so at least I was on record as asking for it for both properties. I was like, you know, "Come on, Guys, I can't keep pushing this out more and more. We're trying to help you both and at some point we've got time restraints."

In light of Gateway's inability to provide the test fit requested by Mr. Hulsey, his decision to effectively cease negotiations with Gateway was justified.

31. Mr. Hulsey had a different experience obtaining a test fit from Midtown. His February 18, 2018, email to Daniel Mehaffie, Midtown's lead negotiator for this bid, stated the following:

Any idea when we will see the first draft of a "high level" test fit? We will be reaching the end of the period for negotiations this Friday and then the agency will make [its] decision. I would assume that you would like for [the Department] to see past the existing conditions before they make their decision.

32. Mr. Mehaffie responded to Mr. Hulsey's email on February 18, 2020, by reporting that the test fit had revealed a problem with the available space in the Dew Building. Mr. Mehaffie proposed that the problem could be substantially alleviated by reducing the size of the Department's cubicles:

Thanks for speaking with me today. As we discussed, I'd like to extend the deadline 1 week so we should hopefully be able to wrap everything up with the test fit. I'd like to confirm that we are ok to reduce the cubicle size to 6x6 as opposed to 6x8 to save [approximately] 2,000 sf on the 1st floor. Based on John's visit to the storefront operation, their cubicles are 6x6 so they wouldn't actually be losing space from their current outfit. Please confirm this will be okay so I can inform our architect who is working on the test fit for us.

33. Mr. Hulsey responded on February 19, 2020, by stating he did not anticipate that a one week extension of the February 21, 2020, negotiation deadline would be problematic. Mr. Hulsey copied Mr. Johnson on the email and asked if he consented to Midway basing its test fit on the Department using 6x6 cubicles.

34. The Department issued Addendum 7 on February 19, 2020, extending the negotiations deadline to February 28, 2020, and the estimated contract award date to March 16, 2020.

35. The terms of the ITN and the greater weight of the evidence demonstrate that the “the initial negotiation session” referred to in the ITN concluded on February 28, 2020.

36. After transmitting a revised test fit for the Dew Building to Mr. Hulseley on February 27, 2020, Mr. Mehaffie emailed Mr. Hulseley on February 28, 2020, stating that “[a]fter deliberating and taking all things into consideration with the owners, we’d like to propose the Dew Building for a 5 yr lease with 3% annual escalations, with a 5 yr option to renew (also with 3% escalations) and a base year price of \$20.44.”

37. Midtown’s revised offer presented two issues. The test fit submitted on February 27, 2020, indicated there was still some uncertainty about the Dew Building having enough space to accommodate the Storefront and the Call Center. Also, Mr. Mehaffie’s February 28, 2020, email only offered a 5-year lease option while the ITN requested leases of 5, 7, or 10-year durations.

38. Even though the ITN indicated the Department would be willing to accept a 5-year lease option, Mr. Hulseley encouraged Midtown to offer 7 and 10-year lease options as well. He did so because:

[m]y role is, whether or not his initial offer of a 5-year with a 5-year option, if you read the negotiation section in the ITN, yeah, probably would be accepted. But I had been directed to get a 5-,7- and 10-year option. So whether or not the agency accepted this one, I was going to provide for the agency what was requested in the ITN. What they did with it, that’s out of my hand. We don’t make decisions.



39. Mr. Hulsey also felt the Midtown offer was incomplete:

I felt like it was incomplete. So, you know, we reach out. People that have not been involved in the ITN process, we are there to assist and facilitate getting the best deal for the State of Florida. And I took as many liberties with Gateway as I did with Midtown to help out.

40. Midtown ultimately realized that leasing the Dew Building to the Department was not going to be sufficiently profitable. Therefore, Midtown transmitted a revised proposal via email to Mr. Hulsey on March 3, 2020, proposing to house the Storefront on the first floor of the Brownett Building while keeping the Department's Call Center on the Brownett Building's second floor. The revised proposal included leasing options of 5, 7, and 10 years and the rate per square foot for each year.

41. When accounting for the charges associated with the option years, Midtown's revised offer made it the lower cost venter for each time period.

42. Even though the Department was already in the Brownett Building and there were no concerns about space given the Brownett Building's size, Mr. Hulsey still required Midtown to submit a new test fit based on the Brownett Building:

With Midtown, I'd never worked with this ownership group, and when they submitted their initial offer they estimated – if you look at their Attachment I where we have the rental rates broken down – they estimated the cost for their construction would be \$250,000. We have a half million square feet. I know what it costs, and I didn't feel comfortable that they had a clear understanding of what this cost was going to be, so I raised the bar for Midtown very high to ensure that they understood the scope of work and that they were going to be required to build it out according to the agency specification.

And, you know, the worst thing you can do in the world is get four months down the road with construction documents, lease documents. Time is clicking away, and somebody all of a sudden says, oh, wait a minute, we didn't realize what this was going to cost, we're going to have to come back and retrace the deal. We don't do that. So the more clarity that we can get at the front end, the fewer problems we have at the tail end.

43. A test fit based on the Brownnett Building was emailed to Mr. Hulseley and the Department on March 25, 2020.

The Department Intends to Award the Contract to Midtown

44. Mr. Hulseley's assistant transmitted spreadsheets on March 9, 2020, to Mr. Johnson listing the BAFOs for Gateway, Midtown, and Timuquana.<sup>11</sup> Mr. Hulseley called him later that day and expressed no preference for any of the BAFOs.<sup>12</sup>

45. On March 29, 2020, Mr. Johnson wrote the Notice of Intent to Award the contract to Midtown "in order to establish final contract terms and conditions, to become the lessor of office space for the Economic Self Sufficiency Program."<sup>13</sup> The Department's Notice of Intent to Award was posted on the Vendor Bid System at approximately 3:30 p.m., on March 30, 2020.

46. Mr. Johnson was very familiar with Gateway's Building D and Midtown's Brownnett Building because the Department was already leasing

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<sup>11</sup> The spreadsheets referred to the addresses of the buildings that Gateway and Midtown had originally proposed, Building A for Gateway and the Dew Building for Midtown. However, the greater weight of the evidence established that Mr. Hulseley's assistant erred by not updating the addresses to reflect the new buildings being offered by Gateway and Midtown. The Department was well aware that Gateway's final offer was based on Building D and Midtown's final offer was based on the Brownnett Building.

<sup>12</sup> Timuquana's bid was far less desirable than the ones submitted by Gateway and Midtown. As a result, Mr. Hulseley did not request a test fit from Timuquana because he did not want to require Timuquana to needlessly spend money.

<sup>13</sup> Mr. Johnson made the decision for the Department to post the Notice of Intent to Award the contract to Midtown. Gateway's protest brought a halt to the contract award process.

those buildings. In light of that unique situation, the non-price evaluation criteria in V.B.2 of the ITN (such as location and parking) were not at issue, and price properly became the key factor in deciding between Gateway and Midtown's offers:

Q: When did you – did you ever make a recommendation to select the Brownett Building?

A: Actually, no. This [bid protest] stopped me from it.

Q: Do you provide any information on the criteria other than cost to the people in the chain of command who are making the decision?

A: No. Not really. I have a contact, a person that I work really closely with in Tallahassee. He's been around for quite a while. He knows these areas. We were in a unique situation here. We had two top contenders, and we were in both of them.

47. While Mr. Johnson's decision was largely based on price, he did not ignore the other criteria set forth in the ITN:

Q: And when you made your recommendation, you were familiar with both the Gateway shopping center and Midtown, because [the Department] had been renting from them for a number of years, right?

A: Both of them, yes.

Q: And you had been there, you had done visits. I mean, what might be described as intimately familiar with these locations?

A: Yes, sir.

Q: And so things such as when you made your recommendation, you were aware of things such as the location, the parking, the facility's present

condition, those sorts of things, you were aware of those when you were making your award decision, weren't you, sir?

A: Yes, sir . . .

Q: My point is, rate was very important to you in your award decision, wasn't it sir?

A: Oh, yes.

Q: But it wasn't blind to all of these other factors or criteria, right? You were aware of those?

A: Oh, no. If I had not – if I had not been paying one or the other for many years of rent, I would have been looking at it a little differently. You know, if I had no history with them.

Q: Okay. And your history gave you knowledge with regard to all of these other factors that you were aware of when you were making your award decision; is that correct?

A: Yes, sir.

#### Gateway's "Hail Mary"

48. Over a month after the deadline for transmitting BAFOs and approximately 15 minutes after the Department posted the Notice of Intent to Award on the VBS, Gateway transmitted an offer to build out Building D and other unused space for \$16.00 per square foot on a 5-year lease term. That represented an \$8.00 per square foot drop from the lowest rental price proposed in its preceding offer. The March 30, 2020, email from Mr. Landa to Mr. Hulsey stated the following:

We have been trying to contact you and [the Department] to review and negotiate our response to ITN 590:3161. Unfortunately, we have been unable to connect, perhaps due to the situation at hand with the coronavirus. Our model has changed

due to lowering costs and interest rates, and we have greater flexibility to modify the proposed gross rents and agree to a 5 year lease. We have been trying to meet with you and [the Department] to negotiate gross rental rates in good faith, and we have not received a date/time to do so. We understand that negotiations with us as an offeror [are] contemplated by the Bid Documents. Also, we have not gotten any feedback from [the Department] on our response to the ITN. We are anxious to do so, and we hope [the Department] finds the attached and below revisions to be compelling.

I refer you to the attachments to this email. In summary, we propose that the Landlord will be responsible to build out the expansion to [the Department]'s current space and propose that [the Department] pay a gross initial rent of \$16.00/square foot on approximately 11,814 square feet. Additionally, we propose that the Landlord will be responsible to build out the approximate 17,793 square feet and that [the Department] shall pay \$16.00/square foot gross rent only on the basis of approximately 15,568 square feet. Therefore, the Tenant will have an approximate 2,225 square feet of additional space for free (which would cover non-rentable items such as bathrooms, etc.). So, the Tenant will pay a gross rent on the basis of approximately 27,382 total square feet, which is based on your required 26,585 total square feet plus 3%.

As you can see, under our revised proposal, the Landlord will build out both of the Tenant's spaces, and the Tenant will save in gross rent approximately \$1,368,873.86 for the total initial lease term, \$4,539,233.58 for the total option term and \$5,908,107.44 for the total initial lease term and total option term combined.

49. Testimony from James Goldsmith, a partner and president of Gateway, indicated this offer was an attempt to persuade the Department to reopen negotiations:

Q: And how did Gateway's offer of the D building in this email come about?

A: We were – after submitting our Building A, we were expecting to get some negotiation from [the Department]. Not having heard anything, having got an email that they were delayed for COVID, we were concerned that something was going on. We just had an inkling that things were not going right, or our bid was not received well, because we had no negotiation. When someone says they're going to negotiate with you, you expect them to get back to you.

So in an effort to prod the process, I suggested a week or so before, two weeks before, we start working on some numbers and see maybe we can – I don't know if it was legal or not, or proper, but I would say let's get to Building A, but if Building A is not going to work for you, here's what we can do in Building D. And it was just a Hail Mary trying to get him to come to the table, but we didn't know whether it would be effective or not.<sup>[14]</sup>

50. As explained in the Conclusions of Law below, Gateway has not carried its burden of demonstrating that the Department's intended award to Midtown is arbitrary or capricious, irrational, or otherwise contrary to the law.

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<sup>14</sup> Section 120.57(3)(f), Florida Statutes, barred the Department from considering this final offer from Gateway. The statute provides, in relevant part, that “[i]n a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered.”

## CONCLUSIONS OF LAW

51. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes (2017).

52. Section 120.57(3)(f) provides, in relevant part:

Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. 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.

53. Gateway, as the party challenging the proposed agency action, has the burden of proof in this proceeding and must show that the Department's proposed action is arbitrary or capricious. § 120.57(3)(f), Fla. Stat.; *State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). "A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or [one that is] despotic." *Agrico Chem. Co. v. Dep't of Env'tl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978).<sup>15</sup>

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<sup>15</sup> As noted in footnote 1, Gateway never asserted that the Department's intended award was clearly erroneous or contrary to competition. Therefore, the analysis is limited to whether the intended award was arbitrary or capricious.

54. Gateway raised numerous arguments in its Amended Petition, the Pre-hearing Stipulation, its Proposed Recommended Order, and during the Final Hearing. However, only the four arguments discussed below will be addressed because they were the only ones set forth in the Pre-hearing Stipulation and Gateway's Proposed Recommended Order. Consideration of any arguments not identified in the Pre-hearing Stipulation would defeat the purpose of requiring one. *See Spitzer v. Bartlett Bros. Roofing*, 437 So. 2d 758, 760 (Fla. 1st DCA 1983)(noting that the law encourages and upholds stipulations "in order to minimize litigation and expedite the resolution of disputes," and "[s]uch an agreement should neither be ignored nor set aside in the absence of fraud, overreaching, misrepresentation or withholding facts by the adversary or some such element as would render the agreement void.")<sup>16</sup>

55. Gateway argues the Department erred by allowing Midtown to submit a revised offer on March 3, 2020, without notifying Gateway that such an opportunity was available. Gateway further argues that the Department showed favoritism by: contacting Midtown after February 28, 2020, to relay that Midtown's bid was incomplete; allowing Midtown to submit an amended bid; and failing to advise Gateway that it could have submitted a revised bid after February 28, 2020. Prior to this time, every change to the ITN schedule had been published via a publicly-issued addendum to the ITN.

56. Gateway's argument ignores the considerable discretion afforded to the Department via the ITN and the stage the negotiations had reached after

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<sup>16</sup> Gateway extensively argued in its Proposed Recommended Order that the complete details of Midtown's BAFO were not sufficiently memorialized in any written document transmitted to the Department. The Department and Midtown filed a "Joint Motion to Strike Portions of Petitioner's Proposed Recommended Order" ("the Joint Motion") asserting this argument should be disregarded because it was not mentioned by Gateway in the Pre-hearing Stipulation. The undersigned concludes that the Department and Midtown are correct. *See Palm Beach Polo Holdings*, 174 So. 3d at 1038-39 (stating that "[p]retrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced."). As a result, the Joint Motion is granted, and the undersigned has disregarded any argument that the details of Midtown's BAFO were not sufficiently memorialized in a written document submitted to the Department.



February 28, 2020. The terms of the ITN demonstrate that the “initial negotiating session” referenced in the ITN ended on February 28, 2020. Even though Addendum 7 established February 28, 2020, as the deadline for BAFOs, that date did not mark the end of the Department’s ability to negotiate with bidders. At that point in time, the aforementioned provisions of the ITN enabled the Department to decide with whom it would continue to negotiate. After the Department completed the initial negotiation session with the selected short-listed bidders, the ITN empowered the Department to “[t]ake any additional administrative steps deemed necessary in determining the final award, including additional fact-finding, evaluation, or negotiation where necessary and consistent with the terms of this solicitation.” Also, any time after the initial negotiating session, the Department could require all responsive bidders to provide additional or revised written proposals addressing specific topics and “[d]ecline to conduct further negotiations with any [bidder].” These provisions authorized the Department to communicate with Midtown after February 28, 2020, and encourage Midtown to submit a revised bid. These provisions also authorized the Department to cease negotiations with Gateway. That action was justified given Gateway’s failure to submit the test fit requested by Mr. Hulseley.

57. Gateway also argues that the Department failed to negotiate with Gateway after it made the shortlist. In making this argument, Gateway utilizes an overly restrictive definition of negotiation. That term means more than simply “haggling” about transactional terms such as price and/or quantity. The online edition of the Merriam-Webster Dictionary defines the term “negotiate” as “to confer with another so as to arrive at the settlement of some matter” or “to arrange for or bring about through conference, discussion, and compromise.” See “negotiate,” <https://meriam-webster.com> (last visited August 25, 2020). The extensive communications between Gateway and Mr. Hulseley about obtaining a test fit and revising Gateway’s

offer so that it would be based on Building D rather than Building A amount to negotiations within the foregoing definitions.

58. Gateway argues there is nothing proving that Midtown actually offered the Brownnett Building as part of its BAFO. Mr. Hulseley's assistant transmitted spreadsheets to Mr. Johnson on March 9, 2020, listing the BAFOs for Gateway, Midtown, and Timuquana. Those spreadsheets erroneously listed the addresses of the buildings that Gateway and Midtown had originally proposed. Mr. Hulseley's testimony established that his assistant simply neglected to update the addresses to reflect the buildings being offered by Gateway and Midtown. Mr. Johnson credibly testified that the Department was well aware that Gateway's final offer was based on Building D and Midtown's final offer was based on the Brownnett Building.

59. Gateway asserts that the Department erred by basing its intent to award the contract to Midtown exclusively on price. The pertinent portion of the ITN provided that:

The [Regional Director] or her/his designee will approve an award that will provide the best leasing value to the State, based on the criteria in Section V.B.2, taking into consideration the recommended award by the negotiating team. In so doing, the [Regional Director] or his/her designee is not required to score the Offerors, but will base his or her recommendation on the criteria set forth above. If the [Regional Director] or his or her designee determines that two or more Replies most advantageous to the State are equal with respect to all relevant considerations, including price, quality, and service, the award will be made in accordance with Rule 60A-1.011, Florida Administrative Code and Section 295.187, Florida Statutes.

60. The instant case amounts to a unique situation in that the Storefront and Call Center are already, respectively, located in Gateway and Midtown buildings. While criteria other than price were not ignored, the Department

and Mr. Johnson were well aware of the non-price attributes associated with each building. With there being no evidence that either building or lessor was deficient in any respect on non-price criteria, price appropriately became the primary factor in Mr. Johnson's decision. When Midtown's revised offer made it the lower cost vender for each lease term, Midtown became the low cost bidder, and there was no need for Mr. Johnson to consider Florida Administrative Code Rule 60A-1.011 and section 295.187, Florida Statutes.

61. Based on the Findings of Fact established herein, it is concluded that the Department's intent to award the contract associated with the ITN to Midtown was not arbitrary or capricious, irrational, or otherwise contrary to the law.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Children and Families enter a final order affirming the Notice of Intent to award the contract associated with Invitation to Negotiate No. 590:3161 to Midtown Centre Office, LLC.

DONE AND ENTERED this 31st day of August, 2020, in Tallahassee, Leon County, Florida.

*Garnett Chisenhall*

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G. W. CHISENHALL  
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 31st day of August, 2020.

COPIES FURNISHED:

Cynthia J. Miller, Esquire  
Sweetapple, Broecker & Varkas, P.L.  
Suite D306  
4800 North Federal Highway  
Boca Raton, Florida 33431  
(eServed)

Lacey Kantor, Esquire  
Department of Children and Families  
Building 2, Room 204Z  
1317 Winewood Boulevard  
Tallahassee, Florida 32399-0700  
(eServed)

Robert H. Hosay, Esquire  
Foley & Lardner LLP  
Suite 900  
106 East College Avenue  
Tallahassee, Florida 32311  
(eServed)

Benjamin J. Grossman, Esquire  
Foley & Lardner LLP  
Suite 900  
106 East College Avenue  
Tallahassee, Florida 32301  
(eServed)

Mallory Neumann, Esquire  
Foley & Lardner LLP  
106 East College Avenue  
Tallahassee, Florida 32301  
(eServed)

William D. Hall, Esquire  
Dean Mead  
Suite 815  
215 South Monroe Street  
Tallahassee, Florida 32301  
(eServed)

Daniel Ryan Russell, Esquire  
Dean, Mead & Dunbar  
Post Office Box 351  
Tallahassee, Florida 32302  
(eServed)

John L. Wharton, Esquire  
Dean, Mead & Dunbar  
Suite 815  
215 South Monroe Street  
Tallahassee, Florida 32301  
(eServed)

Cindy A. Laquidara, Esquire  
Akerman LLP  
Suite 3100  
50 North Laura Street  
Jacksonville, Florida 32202  
(eServed)

John A. Tucker, Esquire  
Foley & Lardner, LLP  
Suite 1300  
One Independent Drive  
Jacksonville, Florida 32202  
(eServed)

Lacey Kantor, Agency Clerk  
Department of Children and Families  
Building 2, Room 204Z  
1317 Winewood Boulevard  
Tallahassee, Florida 32399-0700  
(eServed)

Chad Poppell, Secretary  
Department of Children and Families  
Building 1, Room 202  
1317 Winewood Boulevard  
Tallahassee, Florida 32399-0700  
(eServed)

Javier Enriquez, General Counsel  
Department of Children and Families  
Building 2, Room 204F  
1317 Winewood Boulevard  
Tallahassee, Florida 32399-0700  
(eServed)

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.