STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES,

GATEWAY RETAIL CENTER,

Petitioner,

v.

CASE NO. 20-2660BID
RENDITION NO. DCF-20-189-FO

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent,

and

MIDTOWN CENTRE OFFICE, LLC,

Intervenor.
_____/

FINAL ORDER

THIS CAUSE is before me for entry of a final order concerning a bid protest on the Department's intent to award the contract associated with Invitation to Negotiate No. 590:361 ("the ITN"). The Recommended Order, dated August 31, 2020, concluded the Department's intent to award the contract associated with the ITN to Midtown Centre Office, LLC ("Midtown") was not arbitrary or capricious, irrational, or otherwise contrary to the law. It further recommended that the Department enter a final order affirming the Notice of Intent to award the contract to Midtown. Petitioner filed exceptions to the Recommended Order and the Respondent filed a response to the exceptions.

Exceptions

Petitioner takes exception to the Statement of the Issue and accompanying footnote.

> 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. Footnote 1. (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.").

Petitioner argues in this exception that the administrative law judge ("ALJ") improperly limited the scope of the Statement of the Issue when it found that Petitioner never asserted in the Joint Pre-trial Stipulation ("Stipulation") that the Department's intended award was clearly erroneous or contrary to competition. In support of its argument, Petitioner points to its Petition and Amended Petition for Hearing and to the Stipulation. In this exception, Petitioner is asking the Department to find that it did sufficiently plead that the award was clearly erroneous or contrary to competition. This exception is denied as follows.

First, as Respondent correctly points out in its response to this exception, preservation of arguments is not an area of law over which the Department has substantive jurisdiction, thereby prohibiting the Department from granting the exception. Section 120.57(1)(l), Florida Statutes.

Second, if Petitioner is treating the Statement of the Issue as a finding of fact, this exception must be denied as it is supported by competent substantial evidence. See section 120.57(1)(l), Florida Statutes (stating that an agency may not reject or modify a finding of fact that is supported by competent substantial evidence). After a careful review of the Stipulation, the Department finds that Petitioner did not assert in its

issues to be tried whether the Department's actions were clearly erroneous or contrary to competition. Because pre-hearing stipulations limit the issues to be tried and must be strictly enforced, this exception is denied. See Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc., 174 So. 3d 1037, 1038-1039 (Fla. 4th DCA 2015).

Petitioner takes exception to paragraph 40 of the Findings of Fact.

> 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.

Petitioner argues that this finding of fact is not supported by competent substantial evidence because the March 3, 2020, email to Mr. Hulsey does not name the Brownett Building. This email was submitted into evidence as Joint Exhibit 40 and Petitioner is correct that it does not name the Brownett Building, but it does state, "Here are the rates we'd like to propose for the *space that you viewed today*." (emphasis added). Mr. Mehaffie, the author of the email, testified the "space that you viewed today" referred to the Brownett Building. Tr. at 348:18-25. He also testified that Midtown's final proposal was on the Brownett Building. Tr. at 347:19-25. As this finding of fact is supported by competent substantial evidence this exception is denied.

Petitioner also argues in its exception that because the offer was not made in writing it does not constitute an offer at all. As pointed out in Respondent's response to this exception, the ALJ concluded in footnote 16 that he "disregarded any argument that the details of Midtown's BAFO were not sufficiently memorialized in a written document submitted to the Department" because the argument was not mentioned by Petitioner in

the Stipulation. The Department does not have substantive jurisdiction over the preservation of arguments, and therefore does not have authority to grant this exception.

Petitioner takes exception to footnote 11 found in paragraph 44 of the Findings of Fact.

> Footnote 11. 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. Husley'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 Brownett Building.

Petitioner again argues in this exception that Midtown's final offer was not submitted in writing. For the reasons stated in the prior exception to paragraph 40, the Department does not have substantive jurisdiction over the preservation of arguments and therefore does not have authority to grant this exception.

If Petitioner is additionally arguing that footnote 11 is not supported by competent substantial evidence, a review of the record shows this argument is without merit. As stated in Respondent's response to this exception, the finding that Mr. Husley's assistant erred by not updating the addresses to reflect the new buildings being offered by Gateway and Midtown is supported by testimony in the record. Tr. at 60:22-61:6; 148:3-8; 174:14-21. The ALJ found this testimony to be credible. In ruling on an exception, the Department must remain mindful that it is the ALJ's function to consider all evidence, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the evidence, reach ultimate findings of fact, and draw conclusions of

law based on those findings.[1] An agency may not reweigh the evidence.[2] Accordingly, this exception is denied.

Petitioner takes exception to paragraphs 46 and 47 of the findings of fact.

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

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[1] See Belleua v. Dep't of Environmental Regulation, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997). The weighing of evidence and judging of the credibility of witnesses by the Administrate Law Judge are solely the prerogative of the Administrative Law Judge as finder of fact. See Strickland v. Fla. A & M Univ., 799 So.2d 276 (Fla. 1st DCA 2001).

[2] When determining whether to reject or modify findings of fact in a recommended order, the agency is not permitted to weigh the evidence, judge the credibility of the witnesses, or interpret the evidence to fit its ultimate conclusions. See N.W. v. Dep't of Children & Family Servs., 981 So.2d 599 (Fla 3d DCA 2008); Rogers v. Dep't of Health, 920 So.2d 27, 30 (Fla. 1st DCA 2005); Aldrete v. Dep't of Health, Board of Medicine, 879 So.2d 1244, 1246 (Fla. 1st DCA 2004); Gross v. Dep't of Health, 819 So.2d 997, 1001 (Fla. 5th DCA 2002).

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.

Petitioner takes exception to the ALJ finding that the Department was familiar with the Brownett Building and that other matters beyond just price were considered in making the intended award. Petitioner points to testimony and evidence in the record that it believes contradicts the above findings of fact, but as stated previously, the Department must remain mindful in ruling on an exception; it may not reweigh the evidence as that is in the discretion of the ALJ. The findings of fact in paragraphs 46 and 47 are supported by competent substantial evidence in the record. Tr at 183:16-184:1; 207:8-208:18. Because the Department may not reject or modify a finding of fact that is supported by competent substantial evidence, this exception is denied. See section 120.57(1)(l), Florida Statutes.

Petitioner takes exception to paragraph 54 of the Conclusions of Law.

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 "[such] 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."] Footnote 16 (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.

Petitioner states in this exception that it "reasserts the points raised in its Basis for Exception No. 1 as to Exception No. 5, as the points contained therein mirror footnote 2." As ruled on in Petitioner's first exception to the Statement of the Issue, this exception is denied; preservation of argument is not an area over which the Department has substantive jurisdiction.

Petitioner takes exception to paragraph 56 of the Conclusion of Law.

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

Petitioner again argues in this exception that portions of Midtown's best and final offer were not made in writing, thereby rendering it incomplete. Consistent with the ruling on Petitioner's prior exceptions, this exception is denied; preservation of argument is not an area over which the Department has substantive jurisdiction.

Petitioner take exception to paragraph 60 of the Conclusions of Law.

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. White 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 vendor 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.

Petitioner "reasserts the points raised in its Basis for Exception as to Exception No. 7." As Respondent states in its response to this exception, granting Petitioner's exception to this conclusion of law would require reversing the findings of fact in those previous paragraphs, which the Department is not permitted to do. *See* section 120.57(1)(l), Florida Statutes (Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of facts). For the reasons articulated above with respect to the filed exceptions to paragraphs 46 and 47 of the findings of fact, this exception is denied.

Petitioner takes exception to paragraph 61 of the Conclusions of Law and Recommendation.

> 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.
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> 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.

Petitioner reiterates its argument in this exception that the intended award to Midtown would be arbitrary and capricious as it did not place its proposal in writing. As previously ruled on in prior exceptions, preservation of arguments is not an area of which the Department has substantive jurisdiction. This exception is denied.

Accordingly, the Recommended Order is approved and adopted and the Notice of Intent to award the contract associated with Invitation to Negotiate No. 590:3161 to Midtown Centre Office is **AFFIRMED**.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 29 day of September, 2020.

Chad Poppell, Secretary

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY A PARTY PUSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE. SUCH APPEAL IS INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF CHILDREN AND FAMILIES AT 1317 WINEWOOD BOULEVARD, BUILDING 2, ROOM 204, TALLAHASSEE, FLORIDA 32399-0700, AND A SECOND COPY ALONG WITH THE FILING FEE AS PRESCRIBED BY LAW, IN THE DISTRICT COURT OF APPEAL WHERE THE PARTY RESIDES OR IN THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED (RECEIVED) WITHIN 30 DAYS OF RENDITION OF THIS ORDER.[3]

Copies furnished to the following via U.S. Mail on date of Rendition of this Order.[1]

Robert A. Sweetapple, Esq.
Cynthia J. Miller, Esq.
Sweetapple, Broekeer & Varkas, PL
4800 North Federal Highway, Suite D306
Boca Raton, FL 33431
pleadings@sweetapplelaw.com
cmiller@sweetapplelaw.com
Counsel for Gateway Retail Center, LLC

Cindy Laquidara, Esq.
Akerman, LLP
50 North Laura Street, Suite 3100
Jacksonville, FL 32202
cindy.laquidara@akerman.com
Counsel for Gateway Retail Center, LLC

William D. Hall, Esq.
John L. Wharton, Esq.
Dean Mead & Dunbar
215 South Monroe Street, Suite 815
Tallahassee, FL 32301
whall@deanmead.com
jwharton@deanmead.com
Counsel for Department of Children and Families

Robert H. Hosay, Esq.
Benjamin J. Grossman, Esq.
Mallory A. Neumann, Esq.
Foley & Lardner, LLP
196 East College Avenue, Suite 900
Tallahassee, FL 32301
rhosay@foley.com
bjgrossman@foley.com
mneumann@foley.com
cforjet@foley.com
mlong@foley.com
Counsel for Intervenor

Claudio Llado, Clerk
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399

Lacey Kantor, Agency Clerk

[3] The date of the "rendition" of this Order is the date that is stamped on its first page.