


## **MEMORANDUM**

**TO:** Central Florida Expressway Authority Board; and  
Lauran Kelley, Executive Director

**FROM:**  Joseph L. Passiatore, General Counsel

**DATE:** August 4, 2015

**SUBJECT:** Adoption of Recommended Order in Bid Protest / Case No. BP15-01

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The attached Recommended Order represents the outcome of an evidentiary hearing held on July 22-23 to adjudicate the protest by FANEUIL, INC. regarding the Authority's Notice of Intent to Award Contract No. 001071, the Toll Operations and Management Services contract, to URS Energy and Construction, Inc. ("URS").

The primary bases for the protest was that URS did not comply with the material terms of the RFP, that the Evaluation Committee was misled as to the identity of the proposer and that URS received a competitive advantage during the process.

The Hearing Officer considered the oral testimony of four CFX witnesses as well as two URS employees to formulate the findings of material facts in the Recommended Order. Based on those findings and the applicable law, the Order recommends dismissal of the protest.

At the Board meeting the protestor, the Executive Director (or his/her designee), and any other proposer who appeared before the hearing officer shall be afforded an opportunity to comment on the hearing officer's recommendation and each may request the Authority Board to adopt alternative or modified findings.

CFX staff believes that the Recommended Order is well reasoned, consistent with the evidence and testimony and correctly applies the law. Accordingly, staff recommends adoption of the August 3, 2015 Recommended Order.

JLP/ml  
Enclosure – Recommended Order

# CENTRAL FLORIDA EXPRESSWAY AUTHORITY

FANEUIL, INC.,  
Petitioner,

Case No. BP 15-01

v.

Central Florida Expressway Authority,  
Respondent,

and

URS Energy & Construction, Inc.,  
Intervenor.

\_\_\_\_\_ /

## FINAL ORDER ADOPTING RECOMMENDED ORDER

This matter having come before the governing Board of the Central Florida Expressway Authority pursuant to Section 3-1.002.1(5) of the Authority's Procedure for Resolution of Protests, and the Board having reviewed the August 3, 2015 Recommended Order regarding the above styled bid protest, and being otherwise advised in the premises, it is hereby **ORDERED** as follows:

1. That the August 3, 2015 Recommended Order is hereby adopted by the Board in its entirety as the final agency action for all intents and purposes.

DONE and ORDERED this \_\_\_\_\_ day of August, 2015.

**ATTEST:**

CENTRAL FLORIDA  
EXPRESSWAY AUTHORITY, an agency  
of the State of Florida

\_\_\_\_\_  
Darleen Mazzillo  
Executive Assistant

By: \_\_\_\_\_  
Welton G. Cadwell  
CFX Board Chairman

Print Name: \_\_\_\_\_

### Certificate of Service

**I HEREBY CERTIFY** that a true copy of the foregoing has been furnished by electronic mail and/or U.S. Mail delivery to: Gregory S. Martin, Esquire, Gregory S. Martin & Associates, P.A., 555 Winderley Place, Suite 415, Maitland, Florida 32751, Denise Hammond, Esquire, Wright, Fulford, Moorhead & Brown, P.A., 505 Maitland Avenue, Suite 1000, Altamonte Springs, FL 32701 Michael E. Riley, Esquire, and Peter Antonacci, Esquire, Grey Robinson Attorneys at Law, Post Office Box 11189, Tallahassee, FL 32302-3189, Shelly L. Ewald, Esquire, Watt, Tieder, Hoffar & Fitzgerald LLP, 8405 Greensboro Drive, Suite 100, McLean, VA 22102, and Mariela Malfeld, Watt, Tieder, Hoffar & Fitzgerald, LLP, 1200 Brickell Drive, Suite 1800, Miami FL 33131 on this \_\_\_\_\_ day of August, 2015.

\_\_\_\_\_  
**Joseph L. Passiatore**  
General Counsel

CENTRAL FLORIDA EXPRESSWAY AUTHORITY

**FANEUIL, INC.,  
Petitioner,**

**Case No. BP 15-01  
Contract No. 001071**

**vs.**

**CENTRAL FLORIDA  
EXPRESSWAY AUTHORITY,  
Respondents,**

**and**

**URS ENERGY & CONSTRUCTION, INC.  
Intervenor.**

\_\_\_\_\_ /

**RECOMMENDED ORDER**

This matter came to be heard before the undersigned Hearing Officer on July 22 and 23, 2015, and having reviewed the file, considered the submissions of the Parties, heard testimony presented and considered evidence presented, heard argument of counsel and being otherwise advised in the premises, the following Recommended Order is made:

**I. THE PARTIES**

Faneuil, Inc. ("Petitioner" or "Faneuil") is the party protesting the recommended award of Contract No. 001071 to URS Energy & Construction, Inc. ("Intervenor" or "URS E&C").

URS E&C is the apparent successful responsible and responsive Proposer and is being recommended for the award of the Contract. URS E&C is entitled to participate in this proceeding pursuant to Rule 3-1.002.1 of Resolution 2003-017 of the Central Florida Expressway Authority (hereinafter "Rule \_\_").

The Central Florida Expressway Authority ("Authority" or "CFX") is the contracting entity and an Expressway Authority operating pursuant to Fla. Stat. Chapter 348 Part III.

**II. PRELIMINARY STATEMENT**

On April 27, 2015, the Authority issued its Notice of Intent to Award Contract No. 001071 Toll Facilities Operations and Management Services ("Contract") to Intervenor. On April 29,

2015, Petitioner timely filed its Notice of Protest of the Authority's Notice of Intent to Award the Contract. On May 11, 2015, Petitioner timely filed its Written Protest with the Authority.

On May 26, 2015, the undersigned was formally appointed as the Hearing Officer in this matter. Upon appointment, the Hearing Officer held a preliminary conference by telephone on May 28, 2015 with the Parties to schedule the Hearing. During the preliminary conference, URS E&C was permitted to participate in the Hearing and pre-Hearing process as an Intervenor. The Parties then waived the requirement to schedule the Hearing no more than ten (10) days following appointment of the Hearing Officer. Accordingly, the Hearing date was set for July 22 and 23, 2015 and a pre-Hearing schedule was developed for the exchange of documents and submissions to the Hearing Officer.

During the preliminary conference, Petitioner requested the opportunity to depose various witnesses. The Authority objected stating that the Rules do not provide for depositions and that in past Protests depositions were not permitted. Based upon the Rules and the Authority's objection, Petitioner's request was denied. Notwithstanding the lack of depositions, Petitioner received the entire Procurement file and secured documents from the Authority through a public records request. Further, the Authority agreed to make Authority employees available for the Hearing to be examined by the Petitioner.<sup>1</sup> Petitioner was also permitted to cross-examine the witnesses the Authority and Intervenor called during the Hearing. Thus, even though the Authority's Rules require an expedited process, Petitioner was able to fully develop its position in support of its Bid Protest. The Hearing Officer is left without any doubt that Petitioner was provided a full and fair opportunity to be heard and that a more formal pre-Hearing discovery process would not have further developed or supported Petitioner's position.<sup>2</sup>

Following the preliminary conference, the Hearing Officer was provided a binder of materials (including a compact disk) from the Authority with copies made available to Petitioner and Intervenor. The Index of Documents for the binder is attached as Exhibit A.

On June 10, 2015, the Hearing Officer conducted a telephone hearing to address concerns regarding the scope of Petitioner's public records request. Because the Hearing Officer has no jurisdiction to resolve disputes involving statutory public records requests, the Hearing Officer issued no orders related to Petitioner's public records request. However, through discussions the Petitioner and Authority were able to reach an agreement and the Hearing Officer adjusted some of the pre-Hearing submission dates.

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<sup>1</sup> Petitioner, though, did not call any Authority witnesses in its case-in-chief. Instead, Petitioner waited for the Authority to do so in its case-in-chief.

<sup>2</sup> However, it was only through the examination of three of the Evaluation Committee members and Mr. Robert Johnson did it become clear that the Authority was not misled by Intervenor's "branding" effort as more fully discussed below.

On June 26, 2015, the Parties submitted their Position Papers. Additionally, Petitioner submitted its Motion in Limine.

On June 29, 2015, the Hearing Officer conducted a pre-Hearing conference to address the Hearing format. The Hearing Officer also noted Petitioner's Motion in Limine during the pre-Hearing conference. A response date for Intervenor and the Authority to Petitioner's Motion was scheduled and a hearing on Petitioner's Motion was set for July 21, 2015.

On July 10, 2015, the Parties submitted their Response/Reply to the Position Papers previously submitted. Additionally, Intervenor (but not the Authority) submitted a response to Petitioner's Motion in Limine. Petitioner also submitted a second Motion in Limine for consideration.

On July 16, 2015, Petitioner submitted its Reply in support of its first Motion in Limine as well as the Parties' Joint Exhibits list. The Parties also submitted their additional exhibit lists. (For ease of reference, Joint Exhibits will be referred to as "J-"; Petitioner's Exhibits as "P-"; Authority's Exhibits as "A-"; and, Intervenor's Exhibits as "I-").

On July 21, 2015, the Hearing Officer heard Petitioner's first Motion in Limine. In sum, Petitioner sought to preclude evidence and testimony from the Intervenor that Petitioner's Proposal was deficient and thus Petitioner was without standing to pursue the Bid Protest. The Hearing Officer denied Petitioner's first Motion in Limine because the Petitioner had been apprised of the three bases upon which Intervenor asserted Petitioner's Proposal was deficient with sufficient time to develop a defense. While the Rules do not necessarily contemplate such motions, if the Hearing Officer believed that Petitioner was prejudiced by the alleged late position from the Intervenor, the Hearing would have been postponed. Petitioner's second Motion in Limine was resolved by agreement of the Parties.

On July 22, 2015, the scheduled Hearing commenced. The Authority provided a court reporter for the Hearing. All Parties attended with representatives and were identified on the records. During the Hearing, Petitioner called Andrew Clayton, Vice President of Operations for Faneuil, as well as published portions of exhibits to the Hearing Officer. The Petitioner then rested with the reservation that Mr. Robert Johnson would be called by the Authority and Petitioner would be able to examine him. The Authority called: (1) Mr. Robert Johnson, Manager of Procurement; (2) Mr. David Wynne, Director of Toll Operations; (3) Mr. Fred Nieves, Manager of E-Pass and Plaza Operations; and (4) Mr. Michael Carlisle – Assistant Finance & Accounting Manager. The Authority advised that Ms. Iranette Davis, Director of Business Development and the fourth Evaluation Committee member, was unavailable due to a scheduled leave of absence. The Intervenor called: (1) Mr. Norman Bradley "Brad" White, Vice President of Operations and Maintenance for URS E&C; and, (2) Mr. Daniel Goff, Program Manager for the FTS Joint Venture and an URS E&C employee. Following Intervenor's case-in-chief, the Hearing Officer heard closing arguments of counsel.

During the Hearing, the Hearing Officer requested the Parties to submit additional briefing concerning the RFP M/WBE requirements and Petitioner's compliance with those requirements. Following closing arguments of counsel, the Hearing Officer confirmed that there was no other testimony or evidence to be presented except for the additional briefing described. Therefore, the in-person portion of the Hearing was closed on July 23, 2015. The Hearing was fully closed on July 27, 2015 after receipt of Petitioner's and Intervenor's submissions as requested. The Authority made no additional submissions following closing arguments. Based upon the Hearing closing date of July 27, 2015, the Hearing Officer advised that this written recommended Order would be issued in ten (10) days from that date.

The Hearing Officer has reviewed the submissions (including Position Papers, Responses and Replies, the documents provided and case law cited), considered the testimony presented and reviewed the documents admitted as evidence, and the submissions made on July 27, 2015.<sup>3</sup> There being nothing further to consider, this Recommended Order follows.

### **III. STATEMENT OF THE ISSUES**

#### **A. Petitioner<sup>4</sup>**

1. Whether the Intervenor complied with the material terms of the RFP in submitting its Proposal.
2. Whether the Evaluation Committee was misled as to the identity of the Proposer and made its evaluation based upon flawed or inappropriate information.
3. Whether the Intervenor received a competitive advantage during the Proposal process.
4. Whether, as a result of the foregoing or any one of them, the Authority should reject the Intervenor's Proposal and the Petitioner be determined to be the only responsive/responsible Proposer.
5. Alternatively, whether the Authority should reject both Proposals and re-advertise the RFP.

#### **B. Intervenor**

1. Whether Petitioner improperly adopted the experience of its stated subcontractor as its own in its Proposal.
2. Whether Petitioner failed to properly comply with the RFP's M/WBE requirements.
3. Whether Petitioner failed to submit its Price Proposal timely.
4. Whether, as a result of the foregoing or any one of them, the Petitioner has no standing to bring its Bid Protest.

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<sup>3</sup> The list of Exhibits admitted during the Hearing is attached as Exhibit B to this Recommended Order.

<sup>4</sup> The Hearing Officer considered Petitioner's Notice of Protest, Written Protest, and Position Statement. Petitioner also presented the issues it believed required determination from the Hearing Officer during Opening Statements at the Hearing. The issues Petitioner presented have been summarized as the Hearing Officer came to understand them.

#### IV. SUMMARY RECOMMENDATION

The Intervenor, and more particularly its ultimate parent company, AECOM Technology Corporation (“AECOM”), invited this bid protest through its concerted effort to “brand” all affiliated, but separate companies as one. Petitioner contends that Intervenor and AECOM “conflate[d] the identity of the Proposer.” See Petitioner’s Position Statement, p.24. Petitioner’s point is well taken. Throughout its Proposal, its written communications (including emails), and oral presentation, Intervenor confused the distinction between the various AECOM and “URS” related entities. During the Hearing, Mr. White testified that the resources of AECOM were available to the Intervenor for purposes of fulfilling the Intervenor’s contractual obligations if awarded the Contract. The Hearing Officer suspects that Mr. White’s testimony on this point does not reflect the legal reality of the actual corporate structure – URS Energy and Construction, Inc., a distinct and separate entity from any other AECOM-related entity – with whom the Authority has stated its intention to award the Contract. Mr. White’s testimony also did not address whether the resources of AECOM will be available to Authority in the event the Intervenor fails to meet its contractual obligations. Based upon the nature of the various AECOM corporate structures as the Hearing Officer has come to understand them, the resources of “AECOM” will likely not be available to the Authority. Instead, the Authority will be left to look solely at the URS E&C entity and its resources, a point the Hearing Officer believes the Authority understands based upon the testimony and evidence received during the Hearing and argument of counsel for the Authority.

The Hearing Officer understands Petitioner’s concern that the Intervenor failed to be as candid in its Proposal and its communications with the Authority as it should have been as to the true nature of its corporate structure and relationship with AECOM. With a less sophisticated public owner, the Intervenor’s and AECOM’s branding effort may lead an owner to believe that AECOM is the contracting entity and all of AECOM’s experience and resources are available to that owner to secure the Intervenor’s performance. Here, though, the Authority recognized that a specific corporate entity – URS E&C – had submitted the Proposal. The Authority then determined that it would be in the Authority’s best interests to award the Contract at issue to URS E&C. Thus, while Intervenor and AECOM certainly appeared to have “conflated” their identity, the Authority saw through the haze purposefully created. Therefore, the Hearing Officer cannot say that the Authority acted arbitrarily or capriciously in reaching its decision to issue a Notice of Intent to Award the Contract to URS E&C. Further, the Hearing Officer finds no competitive advantage the Intervenor enjoyed over Petitioner as a result of the “branding” effort. For these reasons and as more fully set forth below, the Hearing Officer recommends that the **Petitioner’s Bid Protest be denied** and the instant matter be dismissed. However, the Hearing Officer also recommends that the Authority give consideration to return of Petitioner’s Protest Bond in full given that Petitioner’s concerns and questions raised, though not sufficient to overturn the intended award, were reasonable.

## V. FINDINGS OF MATERIAL FACTS

Based upon the submissions of the Parties, the Parties' Stipulated Facts, the testimony and evidence presented, and the Parties' respective oral arguments, the following material facts are determined:

1. On or about February 16, 2015, the Authority issued the Request for Proposals ("RFP"), Contract No. 001071, to contract for services for Toll Facilities Operations and Management of the Authority.
2. After release of the RFP, sealed Proposals were due to be submitted to the Authority by March 27, 2015.
3. Six Addenda to the RFP were issued with the last providing for Price Proposals to be submitted by 1:30 pm April 21, 2015.
4. The RFP included directions to prospective proposers for submissions of proposals and identified the scoring criteria upon which a submitted proposal would be evaluated by a committee established for that purpose.
5. The RFP included the following terms and conditions<sup>5</sup>:

### 1.1 INVITATION

...

For the purpose of this RFP, the term "Proposer" means the prime Proposer acting for itself. ...

### 1.7 QUALIFICATION FOR SERVICES

#### 1.7.1 GENERAL

**The Authority will determine whether the Proposer is qualified** to provide the services being contracted based on the Proposer demonstrating in its proposal satisfactory experience and capability in the work area. The Proposer shall include the necessary experienced personnel and facilities to support the activities required by the Contract. (Emphasis added).

#### 1.7.2 QUALIFICATION OF PERSONNEL

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<sup>5</sup> The Hearing Officer considered the RFP in its entirety. The specific provisions identified are not meant to be an exhaustive list. Rather, they represent those provisions the Hearing Officer considered most relevant to this Bid Protest and Recommendation.



Those key individuals who will be directly providing contract services shall have demonstrated specific experience as detailed in the Scope of Services. Individuals whose qualifications are presented shall be committed to the project for its duration.

### **1.8.2 RESPONSIVENESS OF PROPOSALS**

All proposals shall be in writing. **A responsive proposal is one which conforms in all[]material respects to the requirements contained herein.** Proposals may be rejected if found to be irregular or non-responsive by reasons including, but not limited to, failure to use or complete prescribed forms, conditional proposals, incomplete proposals, indefinite or ambiguous proposals, and improper or undated signatures.<sup>6</sup> (Emphasis added).

Other conditions which may cause rejection of proposals include: evidence of collusion among Proposers; lack of experience or expertise to perform the required work; failure to perform or meet financial obligations on previous contracts; an individual, firm, partnership or corporation is on the United States Comptroller General's List of Parties Excluded from Federal Procurement and Non-Procurement Programs.

### **1.8.4 WAIVERS**

The Authority may waive minor informalities or irregularities in proposals received where such is merely a matter of form and not substance, and **the correction or waiver of which is not prejudicial to other Proposers.** Minor irregularities are defined as those that **will not have an adverse effect on the Authority's interest and will not give a Proposer an advantage or benefit not enjoyed by other Proposers.** (Emphasis added).

### **1.12 SCOPE OF SERVICES MEETING AND SITE VISIT**

The Authority will convene a mandatory Scope of Services meeting on March 3, 2015. ... Attendance at the meeting is mandatory in order to propose on the project.

## **2.0 PROPOSAL SUBMISSION**

### **2.1 GENERAL**

By submitting a proposal, the Proposer represents that it understands and accepts the terms and conditions to be met and the character, quality, and scope of services to be

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<sup>6</sup> The RFP includes the term "all-material" which the Hearing Officer considers to be the result of scrivener error adding a hyphen where none was needed.

provided. **All proposals and associated forms shall be signed and dated in ink by a duly authorized representative for the Proposer.** (Emphasis added).

## 2.2 SUBMITTALS REQUIREMENTS

The original and six (6) copies of the Technical Proposal, and one (1) compact disk with an electronic version in pdf format with a resolution of 300 dots per inch (dpi), shall be submitted in a sealed envelope(s), identified as the Technical Proposal, and bearing on the outside the following:

Proposal For: TOLL FACILITIES OPERATION AND MAINTENANCE  
Contract No.: 001071  
Submitted To: CENTRAL FLORIDA EXPRESSWAY AUTHORITY  
Submitted By: **PROPOSER'S NAME**  
**PROPOSER'S ADDRESS**  
CITY, STATE, ZIP CODE  
**PROPOSER'S PHONE NUMBER**  
**PROPOSER'S CONTACT NUMBER AND E-MAIL ADDRESS**  
DATE SUBMITTED  
(Emphasis added).

## 2.5 PROPOSAL REVIEW PROCESS

An Evaluation Committee, hereinafter referred to as the Committee, will be established by the Authority to review and evaluate each Technical Proposal. The Committee will be comprised of at least four persons with background, experience, and/or professional credentials in the service area.

Each member of the Committee will receive a copy of each Technical Proposal and will base his/her evaluation of each proposal on the same criteria in order to assure that value is uniformly established. The Committee will assign rating factors based upon the evaluation criteria identified therein.

## 5.0 AWARD OF THE CONTRACT

The Authority intends to award the Contract to the responsible and responsive Proposer whose proposal **is determined to be the most advantageous to the Authority** taking into **consideration** the criteria stated herein.

6. On March 3, 2015, the Authority conducted a pre-proposal meeting at which attendance was mandatory. Petitioner notes that the sign in sheet for this meeting indicates that Mr. Daniel Goff signed in as "AECOM." Petitioner contends that the sign in sheet evidences that the Intervenor did not attend the mandatory meeting.

7. Mr. Goff testified during the Hearing that he was an employee of URS E&C and submitted redacted W-2s as Exhibit I-11. The Petitioner did not dispute this testimony and the Hearing Officer accepts that Mr. Goff is an employee of Intervenor. Thus, the Intervenor did attend the mandatory meeting.
8. Petitioner correctly notes that the sign in sheet does not accurately reflect Mr. Goff's employer or the entity which submitted the Proposal to the Authority. Nevertheless, the sign in sheet alone is not dispositive of whether the Intervenor attended the meeting. Instead, the testimony and evidence that Intervenor did attend through Mr. Goff is undisputed.
9. On March 23, 2015, Petitioner and Intervenor submitted Technical Proposals to the Authority for consideration and scoring.
10. Petitioner correctly notes that the envelope for the Intervenor's Technical Proposal failed to correctly identify the specific corporate entity submitting the Proposal.
11. Petitioner also correctly notes that the cover letter to Intervenor's Technical Proposal does not identify the Intervenor, but instead identifies "AECOM" and is signed by Mr. Brad White as Vice President of Operations and Maintenance without further specifying the specific corporate entity.
12. Petitioner further correctly notes that Intervenor's Technical Proposal focuses on "AECOM" to the near exclusion of the Intervenor. Throughout the Intervenor's Technical Proposal, "AECOM" addresses the scope and breadth of all affiliated AECOM entities without identifying which AECOM entity has what experience, staff, contracts and resources, among other things. In Section B.6 of its Technical Proposal, Intervenor does state, though:

AECOM acquired URS Corporation in October 2014. Since the legal entity for this opportunity is URS Energy & Construction, Inc. an AECOM Company, we are providing the URS Energy and Construction, Inc. audited financial statements for Fiscal Years 2011, 2012 and 2014 in Appendix A-24.

13. In the hands of a less sophisticated public owner, the comingling of the affiliated entities could lead that owner to conclude that it was actually receiving a proposal from the parent company and the entirety of its experiences, staff and resources were available to secure the proposer's performance under the contract. Intervenor's limited

reference to URS E&C could easily be overlooked or misunderstood without legal counsel and advice. However, the Authority was not misled. The Intervenor deftly completed the requisite forms to assure that “the correct legal entity was executing the contract.” See Exhibit I-2. The Authority carefully reviewed the completed forms and made note of the specific corporate entity submitting the Technical Proposal on multiple occasions before issuing the Notice of Intent to Award.

14. Specifically, Intervenor completed Forms D3 and D4 (See Exhibit J-13, Tabs D and E). Further, Intervenor specifically noted under Section B.6 of its Proposal that the Intervenor – URS E&C – and not its parent corporation, AECOM, was submitting the Proposal. See Exhibit J-13, p.B-6.
15. The Evaluation Committee members for this RFP and submitted Proposals were Mr. David Wynne, Mr. Fred Nieves, Mr. Michael Carlisle, and Ms. Iranetta Dennis.
16. Petitioner asserts that Mr. Robert Johnson’s April 3, 2015 Memorandum confirming the appointment of the Evaluation Committee evidences that the Authority thought AECOM submitted the Proposal. See Exhibit J-7. Petitioner further asserts that the Evaluation Committee did not know who they were scoring because Mr. Johnson’s Memorandum was in error.
17. Mr. Johnson, the Authority’s Manager of Procurement, testified that his Memorandum was initially completed based upon the Technical Proposal envelopes received. Mr. Johnson further testified, though, that after he sent the Memorandum to the Evaluation Committee he checked the D3/D4 Forms and confirmed the identity of the specific corporate entity submitting the Intervenor’s Technical Proposal – URS E&C.
18. Mr. Johnson testified that once he discovered the specific corporate entity, he did not tell the Evaluation Committee members of the “change” from AECOM to URS E&C. However, in setting the Oral Presentations date, Mr. Johnson did specifically identify the Intervenor along with Petitioner and did not reference AECOM. See Exhibit I-5. Mr. Johnson’s Notification of Oral Presentations was copied to the Evaluation Committee.
19. Nevertheless, following Mr. Johnson’s testimony a question remained as to what the Evaluation Committee members understood about which entity they were scoring – AECOM or the Intervenor.
20. The Intervenor challenged Petitioner’s standing to bring this Bid Protest alleging as one of its three challenges that Petitioner failed to timely submit its D3/D4 Forms along

with its Price Proposal.<sup>7</sup> However, based upon the testimony of Mr. Johnson and documentary evidence (e.g., Exhibit I-9), the Authority clearly waived the timing requirement for submission by inviting Petitioner to submit the completed forms beyond the deadline. Further, Intervenor has demonstrated no prejudice by Petitioner's alleged late submission of its Price Proposal. Therefore, the Hearing Officer determined that the Authority had waived any alleged late submission.

21. Petitioner has raised questions about whether the Evaluation Committee members properly completed the Disclosure Form for Evaluation Committee Members ("Disclosure Forms") if the members did not know who the actual entity was that submitted Intervenor's Proposal. See Exhibit J-8.
22. Though Petitioner did not raise clearly in its Protest a formal complaint of conflict of interest or bias, the Hearing Officer took seriously the question of whether the Evaluation Committee members properly and fully completed the Disclosure Forms. Ultimately three of the four Committee members testified during the Hearing. Each confirmed that even though their respective Disclosure Form was completed before they fully reviewed the Proposal,<sup>8</sup> each had no changes or further disclosures to make to their respective Disclosure Form once the identity of the Intervenor became known.<sup>9</sup> Thus, to the extent that the timing of completion of the Disclosure Form is at issue, it is a minor irregularity which amounts to nothing relevant to this Bid Protest.
23. Petitioner's primary contention related to the Disclosure Forms was that the Evaluation Committee could not have known to evaluate the Intervenor because the direction the Evaluation Committee received to complete the Disclosure Forms from Mr. Johnson's April 3, 2015 Memorandum (Exhibit J-7) specified AECOM and not the Intervenor. Further, the Disclosure Forms themselves did not specify the corporate entity being evaluated.
24. As addressed more fully below, Mr. Wynne and Mr. Nieves did not focus on the exact corporate entity submitting the Technical Proposal when performing their evaluation. Instead, they considered the specific key people being proposed, among other things.

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<sup>7</sup> Although the Authority's counsel stated that the Authority was adopting Intervenor's position that Petitioner lacked standing, the Authority did little to support that contention.

<sup>8</sup> Mr. Wynne's testimony was less than clear whether he reviewed the Intervenor's Technical Proposal before he completed the Disclosure Form or after. Nevertheless, he affirmatively testified that he had no changes or further disclosures to make based upon Intervenor being the specific corporate entity submitting the Technical Proposal.

<sup>9</sup> Evaluation Committee Member Ms. Dennis was unavailable for the Hearing and did not testify. The Authority's counsel advised that Petitioner was offered the opportunity to take Ms. Dennis' deposition given her unavailability for the Hearing and that Petitioner declined. Further, Petitioner has raised no specific allegations as to Ms. Dennis. Therefore, the Hearing Officer concludes that there is no reason to suspect that Ms. Dennis' ultimate testimony on the topic of her completion of the Disclosure Form would be any different than the testimony of her fellow Committee members.

Mr. Carlisle testified that he specifically considered the Intervenor's audited financial statements and was aware that Intervenor's Technical Proposal was specific to URS E&C. In short, while Petitioner's questioning whether the Evaluation Committee understood who was being evaluated was appropriate, the testimony and evidence received demonstrated that the Evaluation Committee was not confused or misled.

25. Mr. David Wynne testified during the Hearing. His pertinent testimony and related exhibits, which were unrefuted, may be summarized as follows:

- a. Mr. Wynne was aware of some corporate structure changes between the managing partner of the current toll services provider, Florida Toll Services, a Joint Venture ("FTS"), and an AECOM entity.
- b. Mr. Wynne testified he looked at Intervenor's D3/D4 Forms, but primarily to note that the forms had been completed.
- c. Mr. Wynne was not certain what the corporate structure changes related to the Intervenor and AECOM entailed. Instead, he left questions as to who the exact corporate entity would be entering the Contract with the Authority to the "Procurement Department" and "Legal."<sup>10</sup>
- d. Mr. Wynne evaluated both the Petitioner's and the Intervenor's Proposal based upon the specific key people proposed as well as the overall format, layout and plan set forth in the Technical Proposal.
- e. Mr. Wynne was familiar with the specific key people the Intervenor proposed based upon their work on behalf of FTS.
- f. Mr. Wynne did not credit the Intervenor with any additional abilities based upon AECOM's implied involvement in the pursuit.
- g. Mr. Wynne fairly and objectively evaluated both Technical Proposals and scored them accordingly.
- h. Mr. Wynne fairly and objectively evaluated both Oral Presentations and scored the Presentations accordingly.
- i. The contemporaneous corrections Mr. Wynne made to his Oral Presentation scoring was to correct a scrivener's error he made when recording the scores. His correction was made before he was aware of the other Evaluation Committee members' scores and before he was aware of the Proposers' Price Proposals.
- j. Mr. Wynne did not rely upon any substantive evaluation of Intervenor's audited financial statements. Instead, he relied upon Mr. Carlisle given Mr. Carlisle's accounting and financial background and experience.

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<sup>10</sup> Whether a proposal is responsive or a proposer is responsible is not left to the Evaluation Committee to determine. Instead, the Procurement Department for the Authority makes that determination. See Exhibit J-11, Section V. For example, identification of M/WBE participation or "good faith effort" is included in the Price Proposal which the Evaluation Committee members do not see until after their evaluations are completed and recorded.

26. As one of its challenges to Petitioner's standing, Intervenor asserts that Petitioner improperly included and incorrectly claimed credit for Parson Brinkerhoff's (PB) sole ownership of the Alltech, Inc. subsidiary ("Alltech") and Alltech's role in the FTS Joint Venture. While both Technical Proposals may suffer from "sales puffing," Petitioner's Technical Proposal clearly describes the relationship of PB and Alltech on pages 8 and 9 of its Proposal. See Exhibit I-10, p.9. Further, Petitioner clearly identified itself as the prime Proposer. From his testimony, Mr. Wynne understood the distinction between the Petitioner as prime Proposer and a PB entity acting as a subcontractor. Therefore, Intervenor's challenge fails and is rejected.
27. Based upon Mr. Wynne's unrefuted testimony, the Hearing Officer concludes that his scoring of both the firms Technical Proposals and Oral Presentations was reasoned and reasonable. Further, Mr. Wynne scored the Technical Proposals and Oral Presentations based upon an unbiased evaluation of the merits of Petitioner and Intervenor.
28. With respect to Mr. Wynne, Petitioner raised a concern about an email exchange between Mr. Wynne and Mr. Goff during the Proposal phase. Specifically, the email exchange took place on April 19, 2015. See Exhibit P-8.
29. The Hearing Officer heard testimony from Mr. Wynne and Mr. Goff on this subject as well as reviewed additional emails from Mr. Goff to Mr. Wynne. While Petitioner complains of a "cozy" relationship between Intervenor and the Authority, the Hearing Officer considers the email exchange between Mr. Wynne and Mr. Goff to be a matter of professional courtesy and it did not reflect an intent to influence the evaluation; nor was Mr. Wynne influenced in such regard. Therefore, even though Petitioner was entitled to question the motivation behind the email exchange, Petitioner's concern was shown to be unfounded.
30. During the examination of Mr. Wynne, additional emails were introduced to demonstrate that Mr. Wynne and the Authority were aware "of the acquisition of URS by AECOM." See Exhibits P-29, 40 and 41. To the Hearing Officer, the testimony elicited from Mr. Wynne together with the emails submitted do not support the view that Intervenor and its parent AECOM were candid about the exact corporate structure that was now the managing partner of FTS. To the contrary, the testimony and emails go more to Petitioner's point that the "branding" campaign AECOM required of its affiliated entities only "blurred the lines" between separate and distinct corporate entities. For example, in an October 22, 2015, Mr. Wynne was advised "I am pleased to inform you that URS, the managing partner of the Florida Toll Services joint venture, has officially combined with AECOM as of October 20, 2014." See Exhibit P-29. Based upon the evidence submitted, the statement is not accurate. AECOM did not acquire URS E&C. Instead, AECOM acquired the URS E&C's ultimate parent. AECOM did not become a member of the FTS Joint Venture; URS

E&C remained the member. These distinctions can have significant legal consequences which Petitioner highlighted.

31. Again, in the hands of a less sophisticated owner, a misunderstanding could arise regarding the exact corporate entity leading an owner to believe that resources and “backing” it thought was available was actually not because of a corporate veil. Here, though, the Authority was well aware that it issued its Notice of Intent to Award to Intervenor. If the Authority is comfortable with the financial resources and stability of the Intervenor without access to the parent corporation or other related affiliates, the Hearing Officer is not in a position to question that determination.
32. As part of its Protest, Petitioner complained that Intervenor failed to properly complete the Conflict/Nonconflict of Interest Statement (“Conflict of Interest”). Specifically, Petitioner alleges that Intervenor failed to identify litigation in Florida occurring within the last five (5) years. The Hearing Officer examined Mr. Wynne asking whether the Conflict of Interest form was something he considered in evaluating the Technical Proposals. Mr. Wynne testified that beyond noting that the form was completed, he did not consider the information contained therein one way or another. Instead, he left evaluation of the information included to the Authority’s legal department to evaluate.
33. More importantly, as explained further below, the Hearing Officer determined during the Hearing that both Intervenor and Petitioner properly completed their respective Conflict of Interest forms. Therefore, the competing challenges of both Petitioner and Intervenor that the Conflict of Interest forms were not properly completed were rejected during the Hearing.
34. Petitioner also complains that it was improperly scored by the Evaluation Committee, in particular Mr. Wynne. Petitioner goes as far as to suggest that if Mr. Wynne’s scoring was dropped, Petitioner would have been ranked higher than Intervenor after consideration of the Price Proposal. Notwithstanding these complaints, Petitioner developed no facts that Mr. Wynne improperly scored Petitioner. No evidence was presented that Mr. Wynne improperly skewed his scoring. No evidence was presented that Mr. Wynne purposefully ranked Intervenor higher based on bias or some inappropriate relationship. Further, all Parties agreed that it was not the Hearing Officer’s role to substitute his judgment for the reasoned judgment of the Evaluation Committee. Therefore, there is no basis to exclude consideration of Mr. Wynne’s scoring by the Authority and Petitioner’s Demonstrative Exhibit P-20 has no probative value.
35. Mr. Fred Nieves testified during the Hearing. His pertinent testimony and related exhibits, which were unrefuted, may be summarized as follows:



- a. Mr. Nieves was not fully aware of the corporate structure of the Intervenor.
  - b. Mr. Nieves did not consider the corporate structure in performing his evaluation.
  - c. Mr. Nieves did not credit Intervenor as being a part of AECOM to the detriment of Petitioner.
  - d. Instead, Mr. Nieves evaluated the key personnel, the format and plan included in the Technical Proposals.
  - e. Mr. Nieves fairly and objectively evaluated both Technical Proposals and scored them accordingly.
  - f. Mr. Nieves fairly and objectively evaluated both Oral Presentations and scored them accordingly.
36. Based upon Mr. Nieves' unrefuted testimony, the Hearing Officer concludes that his scoring of both Technical Proposals and Oral Presentations was reasoned and reasonable. Further, Mr. Nieves scored the Technical Proposals and Oral Presentations based upon his unbiased evaluation of the merits of Petitioner and Intervenor.
37. Mr. Michael Carlisle testified during the Hearing. His pertinent testimony and related exhibits, which were unrefuted, may be summarized as follows:
- a. Mr. Carlisle is the Authority's Assistant Finance & Accounting Manager and is familiar with reviewing and evaluating audited financial statements.
  - b. Mr. Carlisle reviewed the audited financial statements both Petitioner and Intervenor provided.
  - c. While Mr. Carlisle had some questions regarding Intervenor's valuation of certain items in its financial statements, Mr. Carlisle was satisfied after having reviewed the notes contained in the Intervenor's financial statements.<sup>11</sup>
  - d. Mr. Carlisle found nothing in either Intervenor's or Petitioner's financial statements that raised a concern that either one could not perform the Contract.
  - e. Mr. Carlisle fairly and objectively evaluated both Technical Proposals and scored them accordingly.
  - f. Mr. Carlisle fairly and objectively evaluated the Oral Presentations and scored them accordingly.
38. Based upon Mr. Carlisle's unrefuted testimony, the Hearing Officer concludes that his scoring of both Technical Proposals and Oral Presentations was reasoned and reasonable.

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<sup>11</sup> Petitioner introduced Exhibit P-27 which are Intervenor's audited financial statements. By agreement of the Parties and concurrence of the Hearing Officer, that exhibit was placed under seal and has been returned to the Authority's General Counsel. Further, any testimony elicited by the Parties and the Hearing Officer of any witness regarding Exhibit P-27 was noted as sealed in the record.

Further, Mr. Carlisle scored the Technical Proposals and Oral Presentations based upon his unbiased evaluation of the merits of Petitioner and Intervenor.

39. Petitioner contends the Intervenor misrepresented in its Technical Proposal the years for which audited financial statements were submitted. Specifically, Petitioner contends that Intervenor failed to submit an audited financial no older than twelve (12) months before the Proposal date. Petitioner contends that Intervenor's audited financial statement from 2013 does not satisfy this requirement of the RFP. In response, both the Authority and Intervenor note that based upon the requirement that the financial statement be audited, the date the audited financial statement was prepared should be considered.
40. The RFP provides: "Proposer shall provide its **most current audited financial statement (not more than 12 months old)** ..." (Emphasis added). Though this requirement is subject to some interpretation, the Authority is entitled to determine whether the Intervenor complied or not. If the Authority believes it has received the requisite financial information from which to evaluate Intervenor's financial stability, the Hearing Officer has no basis to question that determination. The Hearing Officer further notes that if awarded the Contract, Intervenor will be required to submit audited financial statements annually according to the RFP.
41. To Petitioner's assertion that Intervenor purposefully misled the Authority as to the extent of the audited financial statements, the only evidence on this point is that there was a minor, inconsequential misstatement in the Technical Proposal. Mr. Carlisle reviewed the actual financial statements as part of his role on the Evaluation Committee. The financial statements (Exhibit P-27) are plain on their face.<sup>12</sup> Mr. Carlisle could have addressed the purported discrepancy between what Intervenor actually submitted and what Intervenor represented to be submitted in his evaluation and/or during the Oral Presentations.
42. Intervenor called Mr. Brad White and Mr. Daniel Goff in its case-in-chief. The only relevant issue to which Mr. White testified concerned his interpretation of the Conflict of Interest form. The Hearing Officer agreed that the form includes a typographical error and should be read as follows: "The undersigned has had no litigation [on] any projects in the last five (5) years. The Hearing Officer agrees that the Intervenor properly completed the Conflict of Interest form.
43. With respect to Mr. Goff, his relevant testimony concerned confirming his employer and the circumstances under which he emailed Mr. Wynne on April 19, 2015. The Hearing

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<sup>12</sup> The Hearing Officer has reviewed Exhibit P-27 and has determined that no specific details of the contents are required for this Recommended Order except to note that it is for the years 2011, 2012 and 2013 (through January 3, 2014).

Officer finds Mr. Goff's testimony credible that the email was sent in the normal course of business under the FTS current contract with the Authority and was not sent to improperly influence or sway Mr. Wynne's evaluation of the Technical Proposals. The Hearing Officer further finds that Mr. Wynne was not influenced in any way by the email exchange with Mr. Goff and that Mr. Wynne's response was a mere expression of courtesy.

44. The balance of the testimony from Mr. White and Mr. Goff was not probative of the issues raised in Petitioner's Bid Protest or Intervenor's challenges to Petitioner's standing.
45. Intervenor's last challenge to Petitioner's standing is that Petitioner failed to satisfy the M/WBE requirement as set for in Section 3.2 of the RFP.<sup>13</sup>
46. During the pendency of the Hearing the Hearing Officer reviewed Petitioner's Price Proposal submission which includes the requisite M/WBE form. The Hearing Officer noted that Petitioner did not include all the requisite documentation to support its listing of Resource Management, Inc. ("RMI").
47. At the hearing on Petitioner's Motion in Limine, the Hearing Officer advised the Parties that he would receive evidence and testimony concerning Petitioner's satisfaction of the M/WBE RFP requirements. At the Hearing, Petitioner provided documentation supporting its contention that RMI was a certified M/WBE by the Florida Department of Management Services.
48. The RFP is specific as to what certifying entities the Authority will consider. However, the RFP also notes that the Authority will consider "good faith" efforts if a specific M/WBE participant is not identified.
49. The Hearing Officer has come to understand through this Hearing and others that the Authority takes seriously the goal of promoting minority and women owned businesses. It is for that reason, among others, that Ms. Dennis is a part of the Evaluation Committee. However, the Hearing Officer notes that the identification of the M/WBE participant comes **after** the Technical Proposals are evaluated and as part of the Price Proposal. Therefore, there is no specific scoring or weight given to this element by the Evaluation Committee. Instead, compliance appears to be a "pass/fail" grade with some flexibility afforded the Authority in that determination.

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<sup>13</sup> Intervenor raised a belated challenge to Petitioner's completion of Conflict of Interest form. While the Hearing Officer allowed Intervenor to pursue this argument briefly, the Hearing Officer concluded that Petitioner satisfied this requirement after a review of the form Petitioner completed. Therefore, Intervenor's challenge on this basis was rejected.

50. The Hearing Officer also noted that the Authority did not substantively challenge Petitioner's standing on this basis or any of the other bases Intervenor raised.
51. Given the Authority's stated willingness to waive irregularities in Intervenor's Proposal, the Hearing Officer believed it important to understand the substantive differences between the certification RMI has and the requirements of the certifying entities in the RFP, including the Florida Department of Transportation's Disadvantaged Business Enterprise designation.
52. Both Petitioner and Intervenor made additional submissions by the close of business on July 27, 2015. The Hearing Officer has considered those additional submissions as well as the requirements of the RFP and considers any deficiencies in Petitioner's submittal to be such that the Authority would waive them, if necessary. This does not mean that the Authority would turn a blind eye to the requirement that Petitioner achieve the goals the Authority established. To contrary, the Authority would work with the Petitioner to achieve those goals if Petitioner's Proposal was "determined to be in the best interest of the Authority." Therefore, the Hearing Officer rejects Intervenor's third and final basis challenging Petitioner's standing to bring this Bid Protest.
53. Notwithstanding Petitioner's standing to bring this Bid Protest and its legitimate questions concerning Intervenor's Proposal and the AECOM "branding" endeavor, the evidence – testimony and exhibits – taken as a whole demonstrates that the Evaluation Committee was not "confused" by Intervenor's lack of clarity. Further, the evidence demonstrates that the Authority's decision to issue a Notice of Intent to Award to Intervenor is not based upon whim or caprice or is somehow arbitrary and uninformed. Lastly, there is no evidence to indicate that Intervenor enjoyed an unfair competitive advantage over Petitioner as a result of Intervenor's lack of clarity.
54. While the Hearing Officer may consider Petitioner's questions and concerns to be well-founded based upon the Intervenor's statements in its Proposal, its emails and in its Oral Presentation, the Hearing Officer does not substitute his judgment for the informed judgment of the Evaluation Committee or the Authority. Simply because the Hearing Officer may reach a different conclusion as to who is the more capable Proposer is not enough to recommend an award different from what the Authority has already stated it intended to do – a point which even Petitioner admits.

## VI. CONCLUSIONS OF LAW

### A. Standard of Review and Burden of Proof

55. “Consideration of a Bid Protest is a stepped approach. Basic facts are determined based upon a preponderance of the evidence standard. However, once basic facts are determined, questions of ultimate fact or a mixture of law and fact are considered based upon a ‘clearly erroneous’ and ‘arbitrary or capricious’ standard. See e.g., *Emerald Correctional Mgt. v. Bay County Board of County Commissioners, et al.*, 955 So.2d 647 (Fla. 1<sup>st</sup> DCA 2007); *Knaus Systems, Inc. v. Dept. of Children and Family Services*, DOAH Case No. 99-1230BID (September 1999).” *Bright House Network, LLC v. Orlando-Orange County Expressway Authority et al.*, Case No. BO 2013-02 (Jan. 30, 2014).<sup>14</sup>

56. Petitioner cites *Verizon Business Network Services, Inc. v. Depart of Corrections, et al.*, DOAH Case No. 07-2468 (August 2007) to emphasize that the Hearing Officer is to consider the Authority’s actions *de novo*. Petitioner’s Position Statement, p. 4. Petitioner then states: “Faneuil will prove by a preponderance of the evidence that the Authority’s intended award of the contract to URS E&C is contrary to the RFP, clearly erroneous, contrary competition, and, without any doubt, arbitrary.” Petitioner’s Position Statement, p.5.

57. In *Verizon*, the Administrative Law Judge stated:

70. The underlying facts in this case are to be determined using the preponderance of the evidence standard. See § 120.57(1)(1), Fla. Stat.

73. A *de novo* proceeding in procurement cases means a proceeding in which evidence is received, factual disputes are settled, legal conclusions are made, and prior agency action is reviewed for correctness. The Administrative Law Judge **does not sit as a substitute for the Department in determining whether the right party prevailed in the proceeding.** “Instead, the hearing officer sits in a review capacity and must determine whether the bid criteria set ... have been satisfied.” *Intercontinental Properties, Inc. v. State Department of Health and Rehab. Serv.*, 606 So.2d 380, 382 (Fla. 1<sup>st</sup> DCA 1992). (Emphasis added).

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<sup>14</sup> The Central Florida Expressway Authority is a creature of statute, specifically Fla. Stat. § 348.751. The Administrative Procedures Act expressly excludes from the definition of “agency” “an expressway authority pursuant to pursuant to chapter 348[.]” Fla. Stat. § 120.52 (2015). Therefore, the case law and administrative decisions implementing the Administrative Procedures Act are persuasive only. However, the Hearing Officer accepts that the case law and administrative decisions related to Fla. Stat. Chapter 120 are reflective of the correct standard of review and burden of proof to be applied by a hearing officer in Authority.

74. The standard of proof used to make such a determination is “... whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.” § 120.57(3)(f), Fla. Stat.

76. Petitioners, in order to prevail, must identify and prove, by a greater weight of the evidence, a specific instance or instances where the agency’s conduct in taking its proposed action was either:

- (a) contrary to the Department’s statutes;
- (b) contrary to the Department’s rules or policies; or
- (c) contrary to the ITN specifications.

**It is not sufficient for Petitioners to prove merely that the agency violated the general standard of conduct.** By virtue of the applicable standards of review, **Petitioners must also establish that the Department’s misstep was:**

- (a) clearly erroneous;**
- (b) contrary to competition; or**
- (c) arbitrary or capricious.**

(Emphasis added). *Id.* at 54-56.

58. Thus, while the Hearing Officer is to consider the proposed agency action *de novo*, the Hearing Officer still considers the correctness of the Authority’s proposed course of action in context of whether it is clearly erroneous, arbitrary or capricious, or contrary to competition. See e.g., *Knaus Systems, Inc. v. Dept. of Children and Family Services*, DOAH Case No. 99-1230BID (September 1999). In *Knaus*, the Administrative Law Judge stated:

50. Section 120.57(3)(f) states that the standard of proof in this case is whether the proposed agency action is clearly erroneous, contrary to competition, arbitrary, or capricious (Clearly Erroneous Standard).

51. Typically, a standard of proof governs the determination of the basic facts that underlie the determination of the ultimate facts, and the determination of the ultimate facts underlie the determination of the legal issues. However, the language of Section 120.57(3)(f) applies the Clearly Erroneous Standard only to the proposed agency action. Requiring a protestor to prove by the Clearly Erroneous Standard the ultimate issue – i.e., that the proposed award is contrary to the statutes, rules, policies, or the RFP – may, with difficulty, be harmonized

with the notion of a *de novo* hearing. ... The law does not contemplate that the finding of basic facts will be governed by the review – like Clearly Erroneous Standard; instead, the law contemplates that the findings of basic facts will be governed by the residual administrative standard of proof, a preponderance of the evidence.

52. There are ultimate questions of fact to which the Clearly Erroneous Standard may be applied. Ultimate questions of fact – express and implied – link the basic facts to the final legal conclusion, which is whether the proposed decision to award is contrary to statute, rule, policy or the RFP. In some bid cases, the question arises whether a deviation in a bid is a material variance or a minor irregularity or whether a bid is responsive. These ultimate questions of fact, and the Clearly Erroneous Standard defers to the policy-influenced determinations. However, the underlying factual determinations, such as how the deviation may or may not yield a financial advantage or the interpretation of the contents of a bid, are governed by the less deferential preponderance standard of proof.

53. The Clearly Erroneous Standard also applies to subordinate questions of law and mixed questions of fact and law, such as interpretations of an agency rule or RFP, and questions of fact requiring the application of technical expertise, such as whether a specific product offered qualitatively complies with the specifications.

*Id.*

59. During the Hearing, the Hearing Officer asked the Parties to address whether it was the Hearing Officer's role to re-evaluate the Proposals and to substitute his judgment for that of the Authority or the Evaluation Committee. The Parties, including the Petitioner, agreed that it was not.
60. Petitioner acknowledges that it has the burden of proof, but incorrectly asserts that its burden is limited to that of a preponderance of evidence. Petitioner's Position Statement, p. 5. As set forth above, Petitioner proves "basic facts" by a preponderance of the evidence. The Petitioner must prove that the Authority's proposed course of action is "clearly erroneous," "contrary to competition," or "arbitrary and capricious."
61. Petitioner carries a weighty burden to succeed in this Bid Protest because even if the Hearing Officer were to agree that the Authority should have reached a different

determination, Petitioner's Protest fails if the Authority's determination is reasoned and reasonable.

62. Here, Petitioner has not met its initial burden of proving by a preponderance of the evidence that: (1) Intervenor failed to comply with the material terms of the RFP; (2) The Evaluation Committee was misled as to the identity of the Proposers; or (3) The Intervenor received a competitive advantage. By not carrying its initial burden of proof, Petitioner's Bid Protest fails.

#### **B. Petitioner has standing**

63. Intervenor alleged that Petitioner lacked standing for the reasons addressed above. While Petitioner has the burden of demonstrating standing (*See e.g., Dep't of Health and Rehabilitative Services v. Alice P.*, 367 So. 2d 1052 (Fla. 1<sup>st</sup> DCA 1979)), the Hearing Officer is satisfied Petitioner has standing to bring its Bid Protest.

#### **C. Intervenor complied with the material terms of the RFP**

64. Petitioner asserted that Intervenor failed to comply with the material terms of the RFP because: (1) it failed to note the correct corporate entity on the envelope in which it delivered the Technical Proposal; (2) it failed to properly identify the specific corporate structure in its Technical Proposal; and (3) it failed to submit an audited financial statement within 12 months of the submission of its Proposal.
65. The Authority, through its RFP and Procurement Rules, is entitled to waive what it believes to be minor irregularities which do not affect its interests or which do not create unfair competition or a competitive advantage in one proposer over another. *See also Knaus, supra.*
66. To evaluate Petitioner's challenges, what constitutes a "minor irregularity" which the Authority may waive must be evaluated based on what the Evaluation Committee and the Authority understood and how they reacted.
67. Having found that the Evaluation Committee and the Authority were not misled; that the Evaluation Committee evaluated the merits of the Proposals without bias or favoritism; and that the Evaluation Committee members' scoring was reasoned and reasonable, Petitioner's demand for exact technical compliance RFP gives way to the Authority's right to waive those minor irregularities.



68. Petitioner also contended that Intervenor failed to properly complete the Conflict of Interest form. However, based upon the facts presented and the Hearing Officer's interpretation of the form's requirements, Petitioner's assertion is incorrect.

69. Petitioner has failed to prove that Intervenor failed to comply with the material terms of the RFP.

**D. The Evaluation Committee was not misled as to the identity of the Proposers**

70. Petitioner contends that the Evaluation Committee must have been misled because Mr. Johnson's Memorandum appointing them as members referenced AECOM and not the Intervenor. Further, the Evaluation Committee members must have been misled because Intervenor and AECOM engaged in an effort to conflate, commingle and overstate the capabilities, experience, qualifications and resources of URS E&C, "the legal entity for this opportunity."

71. Notwithstanding Petitioner's contention, three of the four members of the Evaluation Committee testified to the contrary. Given their testimony and consideration of the evidence received, the Hearing Officer has no reason to believe that the fourth Evaluation Committee member, Ms. Dennis, who did not testify, was misled. Petitioner certainly produced no evidence that she was beyond the general allegations made as to all Evaluation Committee members.

72. The Hearing Officer is mindful of his role to consider whether the Evaluation Committee (and the Authority) had an accurate understanding of the facts before them. Satisfied that the Evaluation Committee did, it is not the Hearing Officer's role to challenge the Evaluation Committee evaluated and scored the Proposers based upon those facts.

73. Petitioner contends that Intervenor was evaluated too high and it was evaluated too low. Thus, Petitioner challenges the scoring done and essentially asks the Hearing Officer to re-score the Proposals. But, as Petitioner admitted during its closing arguments at the Hearing, the Hearing Officer cannot provide such relief. Therefore, the scoring of the Evaluation Committee stands.<sup>15</sup>

74. Petitioner attempts to lend credence to its complaints by pointing to the price differential between the two Proposals. "The \$7 million price difference between [Intervenor's] and

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<sup>15</sup> The Hearing Officer does not doubt that Petitioner was qualified to perform the Contract if the Authority had determined that it was in its interests to award the Contract to Petitioner. The Hearing Officer discounts completely Intervenor's testimony and allegations to the contrary. However, it is still the Authority who determines which Proposer and Proposal better serves its needs.

[Petitioner's] Proposals for the same work warrants heightened scrutiny of the intended Contract award..." Petitioner's Position Statement, p.5.

75. Petitioner cites *Overstreet Paving Co. v. Dept. of Trans.*, 608 So.2d 851 (Fla. 2d DCA 1992), but that case does not support Petitioner's contention in this context.
76. Both the RFP and the Authority's Procurement Rules (Exhibit J-11) provide for an "A+B" type evaluation where price is only one consideration. The Authority decided that for its competitive selections, where price is even a factor to be considered, price is no more than 40% of the overall consideration. Exhibit J-11, Section V.B.10. Thus, it is inherent in this RFP that a scenario such as this one could occur. A proposer with a higher price is determined to be in the Authority's better interests.
77. Even if there was some merit to Petitioner's contention that the weighting of the Price Proposal was too low as stated in the RFP, Petitioner waived that argument by failing to file a protest with respect to the terms of the RFP itself. See Rule 3-1.001.1.
78. Petitioner has failed to prove that the Evaluation Committee members were misled by Intervenor or Intervenor's Proposal.

**E. The Intervenor did not receive a competitive advantage**

79. Petitioner contends that Intervenor received an unfair competitive advantage because: (1) the Evaluation Committee scored AECOM and not URS E&C; and, (2) the Intervenor enjoyed a "cozy" relationship with at least one of the Evaluation Committee members.
80. Having already found that the Evaluation Committee members were not misled and did not favor on Proposer over the other, the Petitioner's first contention fails.
81. Petitioner attempted to make much of the April 19, 2015 email exchange between Mr. Goff and Mr. Wynne to support its contention that a "cozy" relationship existed further implying that Mr. Wynne showed favoritism or bias in his scoring. However, the facts do not bear out Petitioner's contention. The Hearing Officer finds the testimony of Mr. Wynne and Mr. Goff to be credible as it relates to the email exchange. The Hearing Officer further finds Mr. Wynne's testimony credible that he fairly and objectively evaluated the Technical Proposals and Oral Presentations and his scores do not reflect any favoritism or bias.
82. In its Position Statement, Petitioner cites two cases (*Wester* and *Logisticare*) in an effort to support its contention that the referenced email exchange was so improper as to require

rejection of Intervenor's Proposal.<sup>16</sup> However, *Wester* is merely a recitation of existing law that competitive selection contracts are to be awarded based on merit, not favoritism. See *Wester v. Belote*, 138 So. 721, 724 (Fla. 1931).

83. With respect to *Logisticare*, the facts are inapposite to the facts in this matter. *Trans. Mgt. Serv. of Broward v. Logisticare Solutions, LLC, et al.*, 2005 WL 1210021, DOAH Case No. 05-0920BID (May 2005). There, one of the evaluation committee members had a direct, on-going business relationship with the winning proposer's subcontractor.

80. The on-going business, personal, and professional relationship between Siedlecki (as evaluator) and Caputo (owner of AAA) **clearly presents** the appearance of a conflict of interest ... (Emphasis added).

81. As a result of Siedlecki's extensive and on-going relationship with Caputo and AAA, there was, at a minimum, the appearance of conflict of interest ...

82. In addition, the evaluations conducted by Siedlecki were both arbitrary and capricious. First, he **failed to even read the entire RFP** or to properly apply the definition of "Proposer" contained in the RFP as it applied to Petitioner. (Emphasis added).

On these facts, the Hearing Officer is not surprised that Administrative Law Judge in *Logisticare* recommended that award to the Intervenor be rejected. Here, the facts do not begin to approach the conduct described *Logisticare*.

84. The undisputed testimony from the three Evaluation Committee members who testified is that their interaction with any of the key personnel identified in Intervenor's Proposal was limited to FTS' performance of the existing contract with the Authority. Further, there was no independent business or personal relationship between the members and the key personnel.<sup>17</sup>

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<sup>16</sup> Petitioner also contends that Evaluation Committee members improperly relied on "outside" influences because certain key personnel from Intervenor's Technical Proposal provide services to the Authority through FTS. Petitioner's Position Statement, p. 14. However, Petitioner developed no facts to support its contention that any of the Evaluation Committee members were improperly influenced or scored the Proposers based on criteria beyond the terms of the RFP. In fact, the Evaluation Committee members testified to the contrary and that testimony stands unrefuted.

<sup>17</sup> Again, Ms. Dennis did not testify for reasons explained above. But the Hearing Officer has no doubt that her testimony would be the same as her fellow Evaluation Committee members in this regard. Indeed, Petitioner made no allegations and presented no evidence to contrary.

85. As explained under the Summary of Recommendation section, the Hearing Officer understands the concerns Petitioner raised given the nature of the Technical Proposal Intervenor submitted, the exchange of emails introduced into evidence, and the Oral Presentation Intervenor made. However, because the Authority showed no bias or favoritism to either Proposer, neither received any.

86. Petitioner has failed to prove that Intervenor received a competitive advantage over Petitioner.

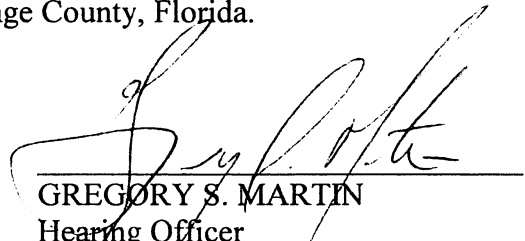
## **VII. RECOMMENDATION**

Based upon the foregoing Findings of Material Fact and Conclusions of Law, it is:

RECOMMENDED that Petitioner's Protest be **DENIED** and the instant matter be dismissed.

Further, RECOMMENDED that the Authority give consideration to return of Petitioner's Protest Bond in full given that Petitioner's concerns and questions raised, though not sufficient to overturn the intended award, were reasonable.

DONE AND ENTERED August 3, 2015, in Orange County, Florida.



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