

BEFORE THE FLORIDA HOUSING FINANCE CORPORATION

VILLAS ON THE GREEN, LTD.,

Petitioner,

vs.

Application No. 2002-178C

FLORIDA HOUSING
FINANCE CORPORATION

REQUEST FOR RECONSIDERATION OR,
IN THE ALTERNATIVE, PETITION
FOR FORMAL ADMINISTRATIVE HEARING

Pursuant to Section 120.569, and .57 *Florida Statutes* ("F.S), Petitioner, VILLAS ON THE GREEN, LTD. ("Villas"), files this request for reconsideration or, in the alternative, petition for administrative hearing which seeks to challenge the Florida Housing Finance Corporation's ("FHFC") decision not to review or score Application #2002-178C. In support of its request and petition, Villas provides as follows:

1. Villas is a for profit limited partnership that is authorized to do business in the State of Florida. Villas' principal place of business is 1130 Washington Avenue, 4th Floor, Miami Beach, Florida 33139, and its telephone number is 305/538-9552, extension 103. Villas is in the business of developing and providing affordable housing in the State of Florida.

2. FHFC is the agency of the State of Florida delegated the authority and responsibility for administering affordable housing programs in the State of Florida pursuant to Chapter 420, F.S., and Rule 67-48, F.A.C.

3. One of the programs administered by FHFC is the Housing Tax Credit Program (“HC”). The HC program is a federally funded program which awards project owners a dollar-for-dollar reduction in income tax liability in exchange for the acquisition and substantial rehabilitation or new construction of low and very low income rental housing units. FHFC is the designated housing credit agency for the allocation of tax credits in the State of Florida.

4. The award of HC funds is made through a competitive process in which applicants apply using a Universal Application (“Application”). The 2002 Application is comprised of an application and numerous exhibits which request information of each applicant. FHFC has adopted the Application by reference in Rule 67-48.004, F.A.C.

5. This year, for the first time, FHFC allowed applicants to submit Applications online at www.floridahousing.org. In addition to the online submittal, Applicants were also required to submit an “Original Hard Copy” application. Regardless of whether an applicant submitted the application online or otherwise, all applicants were required to submit:

- one printed version of the completed Application, including applicable exhibits and the Applicant

Certification and Acknowledgment exhibit with an original signature. The Applicant must label this printed version of the Application as the “Original Hard Copy”;

- Three photocopies of the “Original Hard Copy”;
- MMRB Applicants that anticipate participating in HUD Risk Sharing must submit one additional photocopy of the “Original Hard Copy.”

6. Page 2 of the Application General Instructions indicates that “The application fee must be paid by check or money order, payable to the Florida Housing Finance Corporation and **submitted** with the completed ‘Original Hard Copy’ application. Failure to **submit** the correct fee with the ‘Original Hard Copy’ application by the Application Deadline or failure to **submit** the Application by the Application Deadline will result in automatic rejection of the application and no action will be taken to score the Application.”

7. In responding to the Application requirements, Villas **submitted** its Application online to FHFC on April 12, 2002. In actuality Villas, in an abundance of caution, completed its application earlier in the week. The online application was presumably **received** by FHFC on April 12, 2002. Additionally, on April 12, 2002, Villas **submitted** its “Original Hard Copy” application, three copies, and the application fee via Federal Express (see Exhibit A). The clear directions given to Federal Express were that the package must be delivered by Monday, April 15, 2002, by 10:30 a.m.

8. Through no fault of Villas, the “Original Hard Copy,” copies, and application fee, despite the clear directions mentioned above, were delivered to FHFC on April 17, 2002. On May 13, 2002, and June 10, 2002, FHFC issued a 2002 Universal Scoring Summary for Villas’ application. The scoring summaries should have reflected FHFC’s preliminary application score as well as the results of any Notice of Proposed Scoring Errors (“NOPSE”) submitted and received by other applicants. Apparently, FHFC decided not to review and score Villas’ application because the Villas failed to comply with the Application Deadline requirements. FHFC still possesses Villas’ Application.

9. Villas has contacted Federal Express to determine the circumstances of the “Original Hard Copy” package delivery. In a letter dated April 17, 2002, Federal Express acknowledged that Villas had indeed **submitted** its response on April 12, 2002, with the expectation that the proposal would be delivered to FHFC by 10:30 a.m. on April 15, 2002. The package, however, was detained in the Federal Express sorting system and not delivered as requested. (See Exhibit B.)

10. FHFC’s action in not reviewing and scoring Villas’ Application is erroneous for several reasons. Initially, Villas has complied with the Application General Instruction Requirements. Indeed, on April 12, 2002, Villas, consistent with the Application Instructions, **submitted** its completed Application online.

This online Application was immediately **received** by FHFC well in advance of the Application Deadline of April 15, 2002, at 5:00 p.m..

11. Additionally, on April 12, 2002, Villas **submitted** via Federal Express an “Original Hard Copy,” photocopies, and the required application fee. There is no specific requirement in the Application General Instructions that these additional documents be “received” by FHFC by the Application Deadline. Rather, they must simply be submitted to FHFC. Indeed, FHFC, in the Application General Instructions, advised all applicants that it would **first** consider Applications submitted online and then only if there were any deficiency or any confusion, the “Original Hard Copy” would be reviewed. The online Application must be the same as the “Original Hard Copy.” Villas’ online version is identical to its “Original Hard Copy.”

12. Based on the Application Instructions, it is clear that FHFC desired that either an online version of the application or an “Original Hard Copy” of the application be **submitted** and **received** from all applicants by 5:00 p.m., April 15, 2002. To the extent an applicant submitted its application online by the Application Deadline, the instructions indicate that the remaining documents must be submitted by the Application Deadline as opposed to received. As indicated previously, Villas satisfied both these requirements.

13. Even if FHFC interprets its Application Instructions to require both the online and “Original Hard Copy” be received by the deadline, the Doctrine of Equitable Tolling is applicable in this case. As Florida case law has made clear, the Doctrine of Equitable Tolling serves to ameliorate harsh results that sometimes flow from a strict, literalistic instruction and application of administrative time limits contained in statutes and rules. *Machules v. Department of Administration*, 523 So. 2d at 1132 (Fla. 1988). (See Exhibit C.) To not score Villas’ Application is certainly the type of harsh result contemplated.

14. Additionally, in a case factually identical to the instant case, an Administrative Law Judge (“ALJ”) held that the decision to transmit a package by Federal Express with a guaranteed delivery date is not unreasonable when attempting to meet a delivery deadline. Moreover, the ALJ held that the agency erred in rejecting the package because through no fault of the sender, the package arrived after the delivery deadline. *Medimpact Healthcare Systems, Inc. v. Department of Management Services*, DOAH Case No. 00-3900(BID). (See Exhibit D.) The same rationale used in *Medimpact* is applicable here.

15. The Application and Rule 67-48.004, F.A.C., also provide guidance which supports the review and scoring of Villas Application. For example, Rule 67-48.004, F.A.C., provides an applicant the opportunity to cure a broad number of items in connection with each application. The deadline for submitting cures is

June 26, 2002. In the event FHFC determines Villas' Application was submitted late, Villas has in essence cured the late submittal in that the "Original Hard Copy," copies and application fee were received by FHFC on April 17th.

Additionally, Rule 67-48.004(13), F.A.C., lists the basis upon which FHFC may reject an application "following the submission of the additional documentation, revised pages and other information as the Applicant deems appropriate...." In the instant case, none of the four conditions listed at Rule 67-48.004(13), F.A.C., apply to the Villas Application.

16. Further, Rule 67-48.004(14), F.A.C., provides for certain items that "cannot be revised, corrected, or supplemented after the Application Deadline." Even if FHFC interprets its Application Instructions to require both the online and "Original Hard Copy" be received by the deadline, tardy delivery of the Application is not a non-curable item per Rule 67-48.004(14), F.A.C. Therefore, FHFC should review and score Villas' application.

17. In the instant case, Villas **submitted** prior to the Application Deadline both an online version and an "Original Hard Copy" of its application with copies and application fee. Through no fault of its own, Villas' "Original Hard Copy" with copies and application fee was not received by FHFC by the Application Deadline. Based on the facts of this case, the failure to receive the "Original Hard Copy," copies and fee should be deemed excusable.

18. This fact is especially true given that FHFC did not complete its initial “preliminary” review of all applications until May 13, 2002, well after the April 15, 2002, deadline. Moreover, Villas in no way gained any advantage over other applicants in the process by its “Original Hard Copy” being received subsequent to the Application Deadline. To review and score Villas’ Application would in no way give Villas an advantage or any other applicant. Other applicants would still have an opportunity to file NOPSE’s and NOAD’s in connection with Villas’ Application.

19. By filing this request, Villas in no way seeks preferential treatment. Villas simply requests that its Application be reviewed, scrutinized and scored like all other applications. FHFC has deemed it appropriate in previous cycles to amend the review timeframes for certain applications. For example, during last year’s funding cycle, FHFC, in its discretion, allowed additional time for applicants to submit cures, as well as file NOPSE’s. Accordingly, should FHFC decide to review and score Villas’ Application, it could also amend the established timeframes to allow for NOPSE’s, any necessary cures and NOAD’s.

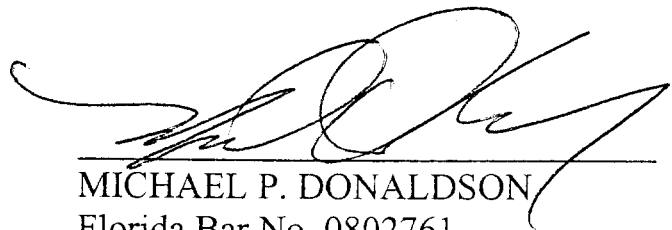
20. The following material issues of fact and law are raised in this proceeding:

- (a) Whether Villas complied with the Universal Application requirements;

- (b) Whether Villas submitted an online application to FHFC on April 12, 2002;
- (c) Whether Villas submitted its “Original Hard Copy,” copies, and application fee to FHFC on April 12, 2002;
- (d) Whether FHFC received Villas online application on April 12, 2002; and
- (e) Whether the Doctrine of Equitable Tolling is applicable in the instant case.

WHEREFORE, based on the foregoing, Villas requests the following:

- (a) That based on the facts presented in this matter, FHFC reconsider its decision not to review and score Villas’ application, including an opportunity for other applicants to review and file NOPSE’s as well as a cure period; and
- (b) To the extent FHFC declines to reconsider its actions and disputes the facts contended in this petition that this matter be referred to DOAH for purposes of considering an administrative hearing.
- (c) To the extent FHFC declines to reconsider its actions and there are no disputed facts that this matter be referred to an informal hearing officer for purposes of conducting an informal hearing.

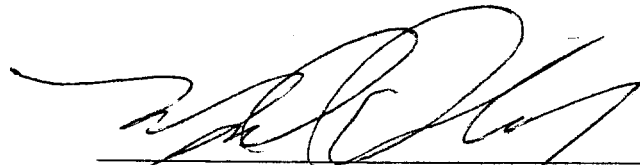


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Attorneys for Petitioner,
Villas on the Green, Ltd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed by Hand Delivery with the Agency Clerk, Florida Housing Finance Corporation, 227 N. Bronough Street, Suite 5000, Tallahassee, FL 32301, and a copy furnished by Hand Delivery to Wellington H. Meffert, II, General Counsel, Florida Housing Finance Corporation, 227 N. Bronough St., Suite 5000, Tallahassee, FL 32301, this 13th day of August, 2002.



MICHAEL P. DONALDSON

FedEx Express
Customer Support
Dorinda Trace
3976 Airways Boulevard
Module H, 4th Floor
Memphis, TN 38118

U.S. Mail: PO Box 727
Memphis, TN 38194-4843

Telephone 901-489-3800



April 18, 2002

NANCY MESA
(305) 538-9553

Dear NANCY MESA:

Our records reflect the following delivery information for the shipment with the tracking number 931649230820.

Delivery Information:

Signed For By: A.PATTERSON

Delivered to: FLORIDA HOUSING FINANCE C

Delivery Date: April 17, 2002

Delivery Time: 09:49 AM

Shipping Information:

Shipment Reference Information: VILLAS ON THE GREEN

Tracking No: 931649230820

Ship Date: April 12, 2002

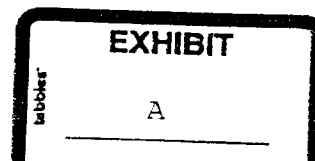
Shipper:
LANDMARK COMPANIES,
THE
1130 WASHINGTON AVE FL 4
MIAMI BEACH, FL 331394600
US

Recipient:
CHRIS BOSWELL
FLORIDA HOUSING FINANCE
CORP
227 N BRONOUGH ST STE
500
TALLAHASSEE, FL 32301
US

Thank you for choosing FedEx Express. We look forward to working with you in the future.

FedEx Worldwide Customer Service
1-800-Go-FedEx (1-800-463-3339)
Reference No: 0417018265

This information is provided subject to the FedEx Service Guide.



Track Track Switch To...

Tracking Request

Track By: Tracking Number Add -->

Tracking Number:

Ship Date: 04/12/2002 <-- Remove

Destination Country: United States

Shipments To Track

Tracking Nu...	Ship Date	Destinat
831649230820	04/12/2002	United S

Tracking Detail

Tracking #: 831649230820 Date: _____ Time: _____
 Delivered To: _____ Signed For By: _____ Service Type: _____
 Invoice #: _____ Reference: _____ Customer Reference: _____
 P.O. #: _____
 Current Status: _____

Description	City	State	Date	Time
Rerouted to revised address	07 TALLAHASSEE	FL	20020416	0823
Package in FedEx location	07 TALLAHASSEE	FL	20020415	1001
Held at FedEx recipient p/up	41 TALLAHASSEE	FL	20020415	1000
Delivery attempt	30 TALLAHASSEE	FL	20020415	1000

Status Exception: Package in FedEx location Dispatch Exception: Non-FedEx Agent



8316 4923 0820

0215

SOR12

1 From *Please print in press hard*

Date: 4/12/02 Sender's FedEx Account Number: 1404-1371-2

Sender's Name: FRANCISCO POJO Phone: (305) 536-9552

Company: THE LANDMARK COMPANIES

Address: 1130 WASHINGTON AVE FL 4

City: MIAMI BEACH State: FL ZIP: 33139

2 Your Internal Billing Reference: VILLAS ON THE GREEN

3 To Recipient's Name: CHRIS BUSWELL Phone: 850 488-4197

Company: Florida Housing Finance Corp.

Address: 227 North Bronough Street Suite 5000

City: TALLAHASSEE State: FL ZIP: 32301-1329

4a Express Package Service

FedEx Priority Overnight FedEx Standard Overnight FedEx First Overnight

FedEx 2Day FedEx Express Saver FedEx Extra Hours

4b Express Freight Service

FedEx 1Day Freight FedEx 2Day Freight FedEx 3Day Freight

5 Packaging

FedEx Envelope FedEx Pak Other Pkg.

6 Special Handling

SATURDAY Delivery: HOLD Weekday at FedEx Location HOLD Saturday at FedEx Location

7 Payment Bill to: Sender Recipient Third Party Credit Card Cash/Check

Total Packages: 1 Total Weight: 35 Total Declared Value: 00

DOM. CUST. RELATIONS

9019221539

04/17/02 13:33 :01/01 NO:270

Customer Relations
Delivery Code 4034
3875 Airways Boulevard, 3rd Floor
Memphis, TN 38116

US MAIL PO Box 727
Memphis, TN 38194 4634

Telephone 901.348.9306
Fax 901.927.1539



FedEx
Express

VIA FACSIMILE

April 17, 2002

Mr. Francisco Rojo
The Landmark Companies
1130 Washington Ave., 4th Floor
Miami Beach, FL 33139

Dear Mr. Rojo:

Your request for documentation regarding the shipment destined for Florida Housing Finance Corporation on FedEx tracking #831649230820 was brought to my attention.

This FedEx Priority Overnight shipment was tendered to us on Friday, April 12, for delivery by 10:30 a.m. on Monday, April 15. The electronically generated scan information for this item indicates that it arrived at our Tallahassee office on the 15th. Our records indicate, however, that the airbill had become detached from the packaging; therefore, our personnel were unable to determine the delivery address. Available information reflects that our personnel conducted research and were able to determine the recipient address on the 16th. The shipment was taken out for delivery this morning. A. Patterson signed for receipt of this item at 9:49 a.m.

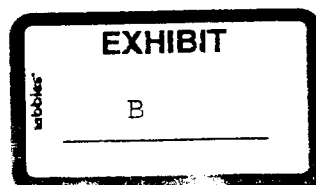
Mr. Rojo, we realize our customers entrust to us their most important shipments because of our reputation for the reliable transportation of these items, and we take this responsibility seriously. Please be assured that the circumstances surrounding this shipment were electronically captured for review by senior management in our daily quality assurance meeting. I feel confident that every effort will be made to maintain our commitment to providing only the best possible service to our customers.

On behalf of FedEx, I offer our sincerest apologies for any consequences caused by this unfortunate incident. It is our hope that, due to the aforementioned circumstances, this will not be allowed to reflect negatively on your efforts, and that we will have future opportunities to serve all parties involved more favorably.

Very truly yours,

Joan M. Kintzele
Customer Relations Department

jmk 118185



would answer that question, as rephrased, in the negative, and to the extent necessary, I would recede from *Roberts v. Roberts*, 414 So.2d 190 (Fla.1982).



John J. MACHULES, Petitioner,

v.

DEPARTMENT OF
ADMINISTRATION, Respondent.

No. 70311.

Supreme Court of Florida.

March 31, 1988.

Former state employee petitioned for review of finding that he had abandoned his employment. The Department of Administration denied petition and appeal was taken. The District Court of Appeal, 502 So.2d 437, affirmed and review was sought. The Supreme Court, Barkett, J., held that although state employee erred in filing grievance instead of appeal of his termination, his employer acquiesced in error by participating in grievance process until after appeal period had run, so that doctrine of equitable tolling was applicable.

Certified question answered in affirmative and decision of District Court of Appeal quashed.

Grimes, J., dissented and filed opinion in which McDonald, C.J., joined.

1. Limitation of Actions ⇐104½

Doctrine of equitable tolling was developed to permit under certain circumstances the filing of lawsuit that otherwise would be barred by limitations period.

2. Administrative Law and Procedure ⇐723

Twenty-day appeal period in state Administrative Code was not jurisdictional in

sense that failure to comply was absolute bar to appeal, but was more analogous to statute of limitations which were subject to equitable consideration such as tolling.

3. Limitation of Actions ⇐104½

Equitable tolling doctrine is used in interest of justice to accommodate both defendant's right not to be called upon to defend stale claim and plaintiff's right to assert meritorious claim when equitable circumstances have prevented timely filing.

4. Limitation of Actions ⇐104½

Equitable tolling is type of equitable modification which focuses on plaintiff's excusable ignorance of limitations period and on lack of prejudice to defendant.

5. Administrative Law and Procedure ⇐722

Officers and Public Employees ⇐72.27

Equitable tolling, unlike estoppel, does not require act of deception or employer misconduct in order to toll 20-day appeal period in State Administrative Code, but focuses rather on employee with reasonably prudent regard to his rights.

6. Administrative Law and Procedure ⇐723

Officers and Public Employees ⇐72.27

Although employee erred in filing grievance instead of appeal of Department of Insurance's decision to terminate his employment by reason of abandonment, employer countenanced and acquiesced in error by participating in grievance process until after appeal had run so as to sufficiently mislead employee and excuse his failure to timely file in appropriate forum, and thus doctrine of equitable tolling required relief from 20-day appeal period.

Ben R. Patterson of Patterson and Traynham, Tallahassee, for petitioner.

Augustus D. Aikens, Jr., Gen. Counsel, Dept. of Admin., Tallahassee, for respondent.

BARKETT, Justice:

We have for review *Machules v. Department of Administration*, 502 So.2d 437

EXHIBIT

C

(Fla. 1st DCA 1986), in which the district court certified the following as a question of great public importance:

May the tolling doctrine espoused in federal administrative law decisions be applied to toll the time for seeking review with the Department of Administration without being in conflict with the decision in *Hadley v. Department of Administration*, 411 So.2d 184 (Fla.1982), and other decisions upholding the validity of the presumption of abandonment and 20 day time requirement in rule 22A-7.10(2)?

Id. at 440. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer the certified question in the affirmative and quash the decision of the district court.

Petitioner John Machules was employed as a Special Investigator for the Department of Insurance ("Employer"). He missed three consecutive workdays due to alcoholism. On February 4, 1985, he was notified by the Employer that he had been terminated from his employment by reason of abandonment under Rule 22A-7.10(2), Florida Administrative Code (1985).¹ He was informed that he had the right to appeal to the Department of Administration (DOA) within twenty days.

Machules took the notice to his union representative, the American Federation of State, County and Municipal Employees ("AFSCME"), which filed a contractual grievance on his behalf on February 4, 1985. The Employer set a hearing date of February 25 on the grievance. The hear-

ing was held and the grievance subsequently denied on the ground that it was not cognizable under the labor agreement and could only be appealed to the DOA under the provisions of Rule 22A-7.10(2).

The union immediately appealed to DOA, requesting that the twenty-day time limitation be tolled for the period during which the grievance was being pursued and noting that the Employer had set the grievance hearing for February 25, the day after the appeal period had expired. The appeal was rejected as untimely and outside the agency's jurisdiction. Machules filed a petition for rehearing, again arguing that the Employer's participation in the grievance process led him to believe that the grievance procedure was the appropriate method of review and supporting his disagreement with the Employer's finding of abandonment with evidence indicating that the Employer had authorized his absence from work on the third day. The rehearing was denied, and Machules appealed to the First District, asserting that he should be permitted to file a late appeal under the doctrine of equitable tolling. A majority of the district court disagreed, but certified the question as one of great public importance.

[1-5] The doctrine of equitable tolling was developed to permit under certain circumstances the filing of a lawsuit that otherwise would be barred by a limitations period.² See *Bailey v. Glover*, 88 U.S. (21

1. Rule 22A-7.10(2), renumbered as Rule 22A-7.010(2), effective November 14, 1985, provides:

(2) Abandonment of Position.—

(a) An employee who is absent without authorized leave of absence for 3 consecutive workdays shall be deemed to have abandoned the position and to have resigned from the Career Service. An employee who separates under such circumstances shall not have the right of appeal to the Career Service Commission; however, any such employee shall have the right to petition the Department of Administration for a review of the facts in the case and a ruling as to whether the circumstances constitute abandonment of position.

(b) Each employee separated under conditions of abandonment of position shall be notified in writing. . . . The employee may petition the Department of Administration for

review of the action taken by the employing agency only within 20 calendar days after the date that written notification is effectuated.

A petition is timely made under this rule if postmarked within the 20-day period or if physically received in the Office of the Secretary of the Department of Administration within the 20-day period.

The decision of the Department of Administration on such a petition shall be final and binding on both the employee and the employing agency.

2. As a threshold matter, we agree with Judge Zehmer that the 20-day appeal period is not jurisdictional in the sense that failure to comply is an absolute bar to appeal but is more analogous to statute of limitations which are subject to equitable considerations such as tolling. 502 So.2d at 444.

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Wall.) 342, 22 L.Ed. 636 (1874). The tolling doctrine is used in the interests of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which "focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant." *Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559, 1561 (11th Cir.1987) (quoting *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir.1981)). Contrary to the analysis of the majority below, equitable tolling, unlike estoppel, does not require active deception or employer misconduct, but focuses rather on the employee with a reasonably prudent regard for his rights. *Id.* See also Doi, *Equitable Modification of Title VII Time Limitations to Promote the Statute's Remedial Nature: The Case for Maximum Application of the Zipes Rationale*, 18 U.C. Davis L.Rev. 749, 779-80 (1984) (waiver and estoppel generally based on employer's actions, whereas tolling may arise out of broader range of events). As Judge Zehmer notes in his dissent below:

The doctrine [of equitable tolling] serves to ameliorate harsh results that sometimes flow from a strict, literalistic construction and application of administrative time limits contained in statutes and rules.

502 So.2d at 446.

Although there is no Florida decision pertaining to the application of the tolling doctrine in administrative proceedings, federal courts have applied it in many differing contexts.

Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum. See, e.g., *Burnett v. New York Central R.R.*, 380 U.S. 424, 428-30, 85 S.Ct. 1050, 1054-55, 13 L.Ed.2d 941 (1965) (wrong forum); *Miller v. Marsh*, 766 F.2d 490, 493 (11th Cir.1985)

(lulled into pursuing other channels by official action); *Martinez v. Orr*, 738 F.2d 1107, 1112 (10th Cir.1984) (misled or lulled into inaction); *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1261-62 (10th Cir.1976), *aff'd* 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977) (lulled into inaction); *Frabutt v. New York, Chicago & St. Louis R.R. Co.*, 84 F.Supp. 460 (W.D.Pa.1949) (war); *Osbourne v. United States*, 164 F.2d 767, 769 (2d Cir.1947) (war). Other courts have recognized the doctrine but refused to apply it under the circumstances. See *Electrical, Radio & Machine Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976); *School District v. Marshall*, 657 F.2d 16 (3d Cir. 1981); *Smith v. American President Lines, Ltd.*, 571 F.2d 102 (2d Cir.1978).

[6] We find the doctrine of equitable tolling applicable under the facts of this case for two reasons: petitioner was misled or lulled into inaction by his Employer, and his appeal to DOA raised the identical issue raised in the original timely claim filed in the wrong forum.

First, we agree with petitioner's contention that although he erred in filing a grievance instead of an appeal, his Employer countenanced and acquiesced in the error by participating in the grievance process until after the appeal period had run. We find the Employer's actions in this instance sufficiently misled petitioner so as to excuse his failure to timely file in the appropriate forum. This is not a case of mere inaction in the face of petitioner's mistake. The hearing was not set by an automatic process with a form letter. Rather, the record before us indicates knowledge on the part of the Employer of the specific facts of petitioner's situation, and communication by the Employer to petitioner based upon that knowledge. In a letter dated February 21, 1985 to Machules' union representative, the Employer stated:

This is a follow-up to our telephone conversation today in which we discussed the scheduling of a Step 2 grievance meeting concerning Mr. John Machules' separation from the Department of Insurance.

As agreed, the meeting is scheduled for 11:00 a.m., Monday, February 25, 1985, at the Tampa Service Office, Suite 809, 1313 North Tampa Street, Tampa, Florida, Phone 272-2330.

Our Step 2 agency representative is Mr. Dennis Silverman. Mr. Silverman will be accompanied by Mr. Bill Canova, Director of Insurance Consumer Services, and Mr. Joe Townsend, Investigator Administrator.

Should you have any questions concerning this matter, please contact me....

We do not find it unreasonable to excuse Machules, a layperson, from clearly understanding which avenue of review to pursue when the Employer itself acquiesced in the procedure chosen.³ We note that both the Employer and the union failed to determine that the grievance procedure was inappropriate until it was too late. Clearly, this is a factor to be considered. Several courts have allowed tolling, partly because the plaintiff was acting without counsel or the untimely filing was due to attorney ineptitude. See, e.g., *Martinez*, 738 F.2d at 1111; *Dartt*, 539 F.2d at 1262; *Volk v. Multi-Media, Inc.*, 516 F.Supp. 157, 162 (S.D. Ohio 1981). But see *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1200 n. 8 (5th Cir.1975).

In *Martinez*, the claimant had received notice informing him of his right to file a civil action within thirty days as well as his right to request that his EEOC complaint be reopened. During the process of requesting reopening and reconsideration by the EEOC, he missed the deadline for filing a civil suit. The court noted that "the notice says only that suit *may* be filed within thirty days; it does not specify that this period represents the claimant's one and *only* opportunity to file suit." Under these circumstances, the court reasoned that equitable tolling was appropriate:

3. The review process under this rule is not as clear as it might appear. In *Hadley v. Department of Administration*, 411 So.2d 184, 186-87 (Fla.1982), this Court noted that the Department of Administration itself was confused as to when and how the appeal procedure under that rule would apply. In the present case, the Step 2 grievance procedure did include a finding that

To be sure, a trained lawyer or a particularly prudent and savvy layperson might recognize the inviolability of the thirty-day deadline and thus would be certain to preserve the right to sue by taking both actions simultaneously. However, the protections of Title VII were not intended only for the prudent, the savvy, or the legally trained.... [W]e do not think it unreasonable for a pro se recipient of the notice to request EEOC reconsideration on the assumption that if the request were denied, a new thirty-day period within which to file suit would arise thereafter.

738 F.2d at 1111.

We also find petitioner entitled to relief because he made identical claims in both administrative proceedings. We agree with petitioner that the rationale of *Burnett* is applicable to the circumstances now before us. In *Burnett*, the plaintiff initially brought suit in an Ohio state court under the Federal Employee's Liability Act (FELA) for an alleged injury incurred on the job. This action was dismissed for improper venue. Eight days later the plaintiff brought the identical suit in federal district court. The district court dismissed the suit because it was not brought within the statutory limitations period. The United States Supreme Court reversed, noting that the plaintiff had not "slept on his rights" and that service of process in the Ohio suit had been effected on the defendants giving them timely notice of the exact nature of plaintiff's claim. The Court observed that the purpose of limitations periods was not being thwarted since the "[r]espondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy." 380 U.S. at 429-30, 85 S.Ct. at 1055. Accordingly, the Court determined

the Employer had established a prima facie case of abandonment, that "Mr. Machules was absent from his job assignment without authorized leave for the period January 25, 1985 through January 29, 1985." This determination suggests that the matter may have been resolved through the grievance process if the Employer had failed to make this prima facie showing.

that the interests of justice outweighed the policy of repose underlying the statutory time limitation and applied the doctrine of equitable tolling to permit the plaintiff to "vindicate his rights" by bringing the lawsuit. *Id.* at 428, 85 S.Ct. at 1054.

Respondent attempts to distinguish *Burnett* and urges us to deny relief as did the United States Supreme Court in *Electrical Workers*. In *Electrical Workers*, the plaintiff was discharged from employment purportedly for her failure to comply with procedures contained in the collective bargaining agreement pertaining to leaves of absence. Two days later, she filed a grievance alleging "unfair action" in her termination. One hundred and eight days after her discharge, the plaintiff filed a charge of racial discrimination with the EEOC against both the union and the employer. The EEOC denied the plaintiff's claim on the merits. The district court denied her appeal because she had not filed charges with the EEOC within the required ninety-day period of limitations. The United States Supreme Court refused to apply the doctrine of equitable tolling on the grounds that the Title VII remedy for racial discrimination was independent of other preexisting remedies available to an aggrieved employee for "unfair action." The Court held this result was compelled by its conclusion in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52, 94 S.Ct. 1011, 1021, 39 L.Ed.2d 147 (1974) that:

"[I]n instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process."

429 U.S. at 236, 97 S.Ct. at 441 (emphasis added).

We find *Electrical Workers* distinguishable. Unlike the claimant in *Electrical Workers*, who had available two separate and independent rights, petitioner here had only one claim, one right, and one remedy, which he mistakenly chose to pursue in the wrong forum. In *Electrical Workers*, the

4. There is no question that Machules was asserting the same factual defense to the finding of "abandonment" in both actions. Machules claims that he did not "abandon" his job be-

cause on the morning of the third day, his supervisor visited him at home and, despite Machules' offer to return to work, told him to wait and return the following morning.

failure to timely file was due to the claimant's choice of alternative remedies. Here, petitioner had only one remedy: a review of the facts to determine whether the circumstances constituted abandonment. Indeed, this is precisely what Machules sought in both the grievance procedure and the subsequent appeal to DOA.⁴ He simply chose the wrong forum. Thus, this case is more like *Burnett* than *Electrical Workers*.

We are further persuaded, as was the Court in *Burnett*, by the analogous rules devised by both federal and state courts to preclude the dismissal of an action solely because a prior timely action was dismissed for improper venue after the applicable statute of limitations had run. 380 U.S. at 430-32, 85 S.Ct. at 1055-57. See also *Board of County Comm'rs of Madison County v. Grice*, 438 So.2d 392, 395 (Fla. 1983) (Ehrlich, J., specially concurring) (transferring an action circumvents the operation of the statute of limitations and promotes the ends of justice). Had an action been filed in county court, we would have permitted the transfer of the action to circuit court. Had an action been filed in the wrong circuit, we would have permitted the transfer to the appropriate circuit. The application of this principle is even more compelling when the issue is simply which administrative agency or procedure will be utilized to review the pertinent finding.

In conclusion, we concur with Judge Zehmer that to deny relief in this case

does little to engender public confidence in the needed simplicity and certainty of the administrative process, which is a primary objective of the Administrative Procedure Act, chapter 120, Florida Statutes (1983). The present Florida Administrative Procedure Act was intended to simplify the administrative process and provide the public with a more certain administrative procedure, thereby insuring that the public would receive due process and significantly improved fair-

cause on the morning of the third day, his supervisor visited him at home and, despite Machules' offer to return to work, told him to wait and return the following morning.

ness of treatment, than was commonly afforded under the predecessor act.

502 So.2d at 445-46.

Accordingly, we hold that the doctrine of equitable tolling is applicable in this case. We find nothing in *Hadley* to suggest that equitable tolling cannot or should not apply under the circumstances here. *Hadley* merely held that Rule 22A-7.10(2), limiting an employee's appeal of abandonment to a petition for review of the facts without a hearing, does not violate due process. 411 So.2d at 189.

Finally, the Employer, as the party relying on the time limitation, clearly was not prejudiced by the delay since the Employer obviously was on notice that petitioner intended to appeal its determination of abandonment. We conclude that equity requires relief from the twenty-day appeal period in this case and remand with directions that petitioner shall be allowed to file a petition for review to the DOA.

It is so ordered.

OVERTON, EHRLICH, SHAW and KOGAN, JJ., concur.

GRIMES, J., dissents with an opinion, in which McDONALD, C.J., concurs.

GRIMES, Justice, dissenting.

I agree that application of the doctrine of equitable tolling should be permitted in Florida administrative proceedings under the proper circumstances. However, the facts of this particular case do not warrant the application of the doctrine.

The Department of Insurance specifically notified Machules in writing that he could appeal the termination of his employment by filing a petition for review with the Department of Administration within twenty days. Rather than doing so, he took the notice to his union representative who filed a contractual grievance on his behalf. The grievance was ultimately denied because it was not cognizable under the labor agreement and could only be appealed in the manner originally prescribed.

The majority reasons that Machules was misled or lulled into inaction simply because the Department of Insurance agreed to a date for a hearing on the grievance at a time which happened to be one day after the expiration of the original appeal time. Apparently, the majority feels that in the course of setting a time and place for the hearing, the department was obligated to warn Machules that he was pursuing the wrong remedy by seeking to obtain relief through the grievance procedure. I see no basis for the conclusion that the actions of the department misled or lulled Machules into inaction. To apply the doctrine on an ad hoc basis to bail out persons who mistakenly sleep on their rights will create too much instability.

This is not a case in which, because of doubt over the propriety of alternative remedies, the claimant sought to prosecute both of them at the same time. Here Machules had only one remedy, and despite the specific instructions how to pursue it, he failed to do so.

I would affirm the district court of appeal in refusing to permit Machules to file a late appeal.

McDONALD, C.J., concurs.



THE FLORIDA BAR, Complainant,

v.

Kerry J. NAHOOM, Respondent.

No. 67891.

Supreme Court of Florida.

April 20, 1988.

In disciplinary proceeding, the Supreme Court, approving the referee's report, held that attorney's knowingly, willfully, and intentionally combining, conspiring, confederating, and agreeing with oth-

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MEDIMPACT HEALTHCARE SYSTEMS,)
INC.,)

Petitioner,)

vs.)

Case No. 00-3553RU

DEPARTMENT OF MANAGEMENT)
SERVICES,)

Respondent,)

and)

MERCK-MEDCO MANAGED CARE, L.L.C.)
and CAREMARK INC.,)

Intervenors.)

MEDIMPACT HEALTHCARE SYSTEMS,)
INC.,)

Petitioner,)

vs.)

Case No. 00-3900BID

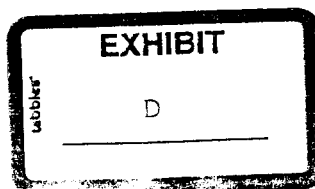
DEPARTMENT OF MANAGEMENT)
SERVICES,)

Respondent,)

and)

MERCK-MEDCO MANAGED CARE, L.L.C.)
and CAREMARK INC.,)

Intervenors.)



RECOMMENDED ORDER

These two cases were heard in a consolidated proceeding on October 3, 2000, in Tallahassee, Florida by David M. Maloney, Administrative Law Judge. This Recommended Order covers the issues in Case No. 00-3900BID. A separate Final Order has been issued simultaneously with this order in Case No. 00-3553RU.

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STATEMENT OF THE ISSUES

Among the many issues in Case No. 00-3900BID, there are three main issues: whether it was proper for the Division of State Group Insurance ("DSGI" or the "agency") to reject and return unopened the response of Petitioner MedImpact Healthcare Systems, Inc., to DSGI's Invitation to Negotiate (the "ITN") for pharmacy benefits management services? If not, and the response should have been accepted and opened, whether DSGI's selection of an ITN as the method for soliciting suppliers eligible to provide pharmacy benefits management services for DSGI is an issue properly in the case? Finally, whether Merck-Medco Managed Care L.L.C. ("MMMC") has standing to intervene in this proceeding?

PRELIMINARY STATEMENT

On September 20, 2000, the Division of Administrative Hearings ("DOAH") received under cover of a letter from Sylvan Strickland, Hearing Officer, a referral of MedImpact Healthcare Systems, Inc., Case No. DMS 00-32. The referral bore the letterhead of the Department of Management Services ("DMS") with the name of Thomas D. McGurk, Secretary of the Department. Hearing Officer Strickland wrote:

The case referred to above is a bid protest. The Department of Management Services appointed an informal hearing officer. In response to a DMS suggestion of mootness, the hearing officer (the undersigned) issued an order that the petition is not moot and converting the case into a formal proceeding.

This petition is transferred to the Division of Administrative Hearings with the request that a hearing officer be designated to conduct the proceeding in accordance with subsection (3) of Section 120.57, Florida Statutes, and other statutes and rules pertinent to bid protests. Our file is delivered herewith.

DMS Letter of Referral, September 20, 2000.

In addition to the petition of MedImpact Healthcare Systems, Inc. ("MedImpact"), the DMS file reflected that DMS, in response to MedImpact's petition for hearing pursuant to Section 120.569, Florida Statutes, had offered MedImpact an informal hearing pursuant to Section 120.57(2), Florida Statutes, rather than a formal proceeding worthy of a petition alleging disputed issues of material fact as provided for in Section 120.57(1), Florida Statutes. In the end, DMS, of course, as reflected in Hearing Officer's Strickland's order, concluded that the proceeding was subject to the procedures (additional to those provided in Section 120.569 and 120.57, Florida Statutes) found in Section 120.57(3), Florida Statutes, those "APPLICABLE TO PROTESTS TO CONTRACT BIDDING OR AWARD." See the "catchline" to Section 120.57(3), Florida Statutes.

Most notable among the documents in the DMS file is Hearing Officer Strickland's "Order on Suggestion of Mootness and Request for Reference to DOAH." In the order, filed in the Office of the Clerk of DMS on September 19, 2000, the hearing officer found

that MedImpact's petition set out disputed issues of material fact. One set of issues was described as "not settled in the pleadings and [issues that] appear to be a proper subject for a formal hearing." Order on Suggestion of Mootness and Request for Reference to DOAH, Sept. 19, 2000, p. 3. This set of issues, found by the hearing officer to be clearly in dispute and relevant to the resolution of MedImpact's claims, concerned both the facts surrounding the delivery to DSGI by Federal Express of MedImpact's response to the ITN and facts surrounding the granting of extensions of time to other proposers.

Also expressed in the order was a depiction of another set of facts in support of the reference of the case to DOAH:

Another alleged subject of potentially disputed facts is the absence of documentation that an ITB or RFP was not practicable [and therefore an ITN was an appropriate solicitation method for procurement of pharmacy benefits management services.]

Id., (emphasis supplied).

The referral of the case to DOAH was accepted. The case was assigned Case No. 00-3900BID and the undersigned was designated as the administrative law judge to conduct the proceedings.

In the meantime, a hearing before the undersigned on motions filed in Case No. 00-3553RU (a proceeding referred to in the letter of referral in Case No. 00-3900BID as "[a] companion case . . . [that] involves the same controversy" DMS Letter of

Referral, September 20, 2000) had been set for September 21, 2000. By the time of the hearing, the undersigned had been designated as the administrative law judge to conduct the proceedings in Case No. 00-3900BID. At the September 21 motion hearing, inquiry was raised as to the efficacy and propriety of consolidating the two cases. All parties to this proceeding were represented at the hearing and all assented to the consolidation by way of raising no objection to it. Accordingly, the two cases were consolidated by order rendered September 25, 2000.

The order of consolidation directed that the consolidated hearing would take place as noticed earlier in Case No. 00-3553RU, that is, on October 3 and 4, 2000, at the Division of Administrative Hearings in Tallahassee. The order also put the parties on notice that, despite consolidation, separate orders (a recommended order in this case and a final order in Case No. 00-3553RU) would be issued. (No objection has been raised to any of the notices and directions in the order.)

During the discovery phase of the proceeding, MMMC gave notice of depositions for the day before hearing was to commence. The purpose of the depositions was to discover the scoring process by which Caremark's negotiation in response to the ITN was ranked higher than MMMC's. On Friday, September 29, 2000, two business days before the hearing's commencement, DSGI filed by fax a motion in limine. The motion sought in advance of

hearing to exclude from admission any evidence of the scoring process on the ground the MMMC had failed to protest the ranking under procedures provided in Section 120.57(3), Florida Statutes. MMMC, in turn, responded in writing by filing its response to the motion on the same day. During a telephone hearing that afternoon, it became apparent there was no dispute among the parties that MMMC had failed to avail itself of a point of entry into administrative proceedings for which proper notice was given by the agency and by which the ranking could have been contested. DSGI's motion in limine, therefore, was granted by order entered the same day..

The consolidated cases proceeded to final hearing as noticed. As it turned out, only one day, October 3, was necessary for the parties to present evidence and arguments related to the consolidated cases.

Six joint exhibits were offered into evidence at the opening of MedImpact's case-in-chief. All were received into evidence. Inadvertently omitted from Joint Exhibit 2, the Invitation to Negotiate, itself (ITN Number - DSGI 00-001) was the "Invitation to Negotiate Acknowledgement," a purchasing form identified as PUR 7015. The form shows an "Agency Mailing Date" on its face of April 3, 2000, the same date the ITN, itself was issued. Produced by counsel for the Department at the moment of the offer of the joint exhibits, the Acknowledgement was offered as a

supplement to Joint Exhibit 2 and was so received without objection.

A single-page document with information on front and back, the Acknowledgement shows on its face that it is "Page 1 of 86 pages." Without the Acknowledgement, Joint Exhibit 2 consists of a title page, a table of contents numbered with small roman numerals from i through iv and 86 pages consecutively numbered, including another page 1 containing Subsections 1.1 through 1.3 of Section 1 (the "Overview"), as well as three addenda including a "Draft Sample Contract for PBM Services." In all likelihood, then, one could reasonably suppose that the form was not a part of the ITN (and testimony at the final hearing seems to support such a supposition). Whether intended to be part of the ITN or not, there does not appear to be a good place for the Acknowledgement among the pages of Joint Exhibit 2. To dispel any confusion that might result from two "page ones" of Joint Exhibit 2, the Acknowledgement has been re-numbered as Joint Exhibit 2A and remains in the front pocket on the inside of the blue binder containing all six of the joint exhibits where it was placed at hearing. (See Tr. 9).

At the hearing, MedImpact called H.P. Barker, Jr., and William Francis as witnesses. It also read into the record portions of the deposition of Susan Phillips, Ph.D. (the entire transcript of which was admitted into evidence as Petitioner's

No. 15). MedImpact further made a proffer of the testimony of Dr. Debra Reissman, whose testimony was not allowed during MedImpact's case-in-chief following objections by both DSGI and Caremark. A ruling sua sponte followed the presentation of DSGI's case-in-chief that Dr. Reissman could be called as a rebuttal witness by MedImpact. (See Tr. 177). The sua sponte ruling was rescinded and the original ruling sustaining the objecting to her testimony in the case reinstated (see Tr. 180) when DSGI and Caremark stipulated "[t]hat, for purposes of this proceeding only, MedImpact's proposal was comparable to the other proposals." (Tr. 179).

MedImpact offered 16 exhibits that were its alone, Petitioner's Exhibit Nos. 1-7, 8a, 8b, 9, and 11-16. Petitioner's Exhibit No. 10 was not offered into evidence.

The Division of State Group Insurance presented the testimony of Susan Phillips, Ph.D., and offered no exhibits other than the supplement to Joint Exhibit 2, now numbered Joint Exhibit 2A. MMMC presented the testimony of Connie Ruth Martin and no exhibits solely its own. Caremark presented no live witnesses but offered the deposition of William Francis. The deposition was admitted into evidence, without objection, as Caremark No. 1.

Proposed recommended orders were received from all parties in a timely fashion. This Recommended Order follows.

FINDINGS OF FACT

The State Group Insurance Program

1. The State Group Insurance Program (the "Program") is established in Section 110.123, Florida Statutes. Its purpose is the provision of a comprehensive package of health care benefits to state employees.

2. Responsibility for management, administration, and procurement for the Program is assigned to the Division of State Group Insurance ("DSGI") in the Department of Management Services ("DMS").

3. Program members include active state employees, retired state workers, surviving spouses of employees or retirees, persons eligible for COBRA, and eligible dependents.

4. It is the intention of DSGI that the Program's benefits be offered to members in a cost-efficient and prudent manner and that members be given a choice of benefits that best meets their individual needs. The Division of State Group Insurance, therefore, offers two options to members.

5. One of the options is a preferred provider organization (the "PPO Plan"). The PPO Plan is "a self-insured plan offering health care benefits administered by Blue Cross and Blue Shield of Florida (BCBSF) and prescription drug care benefits administered [at the time the procurement commenced in this

proceeding] by Eckerd Health Services (EHS)." (Joint Exhibit 2, p. 1, Section 1.0, OVERVIEW, Subsection 1.1).

6. With regard to pharmacy benefits management under the Plan, the State's objective, inter alia, is "to ensure that PPO Plan participants have access to high quality pharmacy benefits that are provided in a cost-efficient manner." (Joint Exhibit 2, p. 1, Section 1.2). With that objective in mind, DGSI, on April 3, 2000, sought proposals from pharmacy benefits management organizations licensed to do business in the State of Florida. The procurement method by which the proposals were sought was an Invitation to Negotiate (an "ITN"), one of the solicitation methods used by the state of Florida when procurement is competitive.

Competitive Procurement Solicitations

7. When a state agency wants to procure commodities or contractual services subject to competition, there are three main methods of solicitation: Invitations to Bid ("ITB"), Requests for Proposals ("RFP") and Invitations to Negotiate ("ITN").

8. The first two, ITBs and RFPs, enjoy the status of specific recognition in statute:

(11) "Invitation to bid" means a written solicitation for competitive sealed bids with the title, date, and hour of the public bid opening designated and specifically defining the commodity, group of commodities, or services for which bids are sought. It includes instructions prescribing all

conditions for bidding and shall be distributed to all prospective bidders simultaneously. The invitation to bid is used when the agency is capable of specifically defining the scope of work for which a contractual service is required or when the agency is capable of establishing precise specifications defining the actual commodity or group of commodities required.

* * *

(15) "Request for proposals" means a written solicitation for competitive sealed proposals with the title, date, and hour of the public opening designated. The request for proposals is used when the agency is incapable of specifically defining the scope of work for which the commodity, group of commodities, or contractual service is required and when the agency is requesting that a qualified offeror propose a commodity, group of commodities, or contractual service to meet the specifications of the solicitation document. A request for proposals includes, but is not limited to, general information, applicable laws and rules, functional or general specifications, statement of work, proposal instructions, and evaluation criteria. Requests for proposals shall state the relative importance of price and any other evaluation criteria.

Section 287.012, Florida Statutes. A bid that conforms in all material respects to the invitation to bid and is submitted by a qualified bidder is a "[r]esponsive bid." Section 287.012(16), Florida Statutes. Similarly, a proposal that conforms in all material respects to a request for proposals submitted by a qualified proposer is a "responsive proposal." Id.

9. Invitations to negotiate do not enjoy the status of specific statutory recognition. The term "invitation to negotiate" is currently defined by a DMS rule that was amended effective January 2, 2000, three months or so before the ITN in this case was issued. The current rule provides both a definition of "invitation to negotiate" and requirements to be met when such an invitation is selected as the solicitation document for procurement:

(2) Invitation to Negotiate - Competitive solicitation used when an Invitation to Bid or Request for Proposal[s] is not practicable. Agency shall document file as to conditions and circumstances resulting in this decision.

Rule 60A-1.001(2), Florida Administrative Code. This definitional section contains the only criteria expressed in agency rules "for the selection of an invitation to negotiate as the chosen method for procurement." (Petitioner's Exhibit 16, Barker Deposition, pgs. 13-14.)

10. A submission in response to an ITN is referred to by DMS in its ITN Acknowledgement Form as a "negotiation." (See Joint Exhibit 2a). If a submission pursuant to an ITN is not unresponsive, it is denominated a "responsive negotiation."

11. As testified to by Mr. Barker, the concept of an "invitation to negotiate" grew out "of a very large contract the state entered into some years back [when] . . . it became

apparent that the invitation to negotiate would give agencies latitude, particularly in very complex, difficult procurements, an opportunity to at least structure how they were going to go out and negotiate and lend to them general conditions to be considered in this negotiation process." (Id., at 15-16.)

12. Indeed, an "invitation to negotiate" provides greater flexibility than the other two competitive solicitation methods just as an RFP provides more flexibility over an ITB.

13. This flexibility is advantageous not just for the State but for the vendors and suppliers as well. For example, one of the main advantages of the ITN over an RFP is that when the highest ranked negotiator and the state cannot reach a contract, the next ranked negotiator can be considered. By way of comparison, when the highest ranked proposer to an RFP cannot reach a contract with the agency, the procurement process must begin anew. Beginning anew will often greatly delay ultimate procurement for commodities or services needed by the state and can be extremely frustrating for the proposer next-in-line who has submitted a responsive proposal. Hence, when appropriate for use, a state agency may very well choose an ITN as its solicitation method. Vendors of commodities and suppliers of services, moreover, may be reluctant to contest the agency's selection of an ITN because they know that if they are next-in-line after a higher-ranked vendor or supplier is unable to reach

a contract, then they have a chance at a contract much sooner than if the procurement process begins anew.

Non-rule Requirements for ITNs prior to the existing rule

14. Although ITNs are not specifically recognized in statute, the state has authority in statute to negotiate in competitive procurement. In order for invitations to negotiate to "happen without a rule [the Bureau of Procurement and Contract Management in DMS] put in place a memorandum that instructed agencies . . . to ask for authority to negotiate." (Id., at 16).

15. The memorandum was prepared and drafted by H.P. Barker, Jr., Chief of the Bureau of Procurement and Contract Management, the bureau in DMS "responsible for contracting for personal property that's used by the state in large volume."

(Petitioner's Exhibit No. 16, Deposition of H.P. Barker, Jr., p. 3). Ultimately, the memorandum was published June 15, 1998, by George C. Banks, CPPO, Director of State Purchasing. DMS Memorandum No. 21-(97-98), in pertinent part, reads:

The purpose of this memorandum is to clarify the current procedure for an agency to use an Invitation to Negotiate as an alternative process to Invitation to Bid or Request for Proposal.

Until a revision is made to our current rules, agencies cannot proceed with an Invitation to Negotiate without prior approval from this office. However, an agency head may make a one-time request for this authority. Upon approval, the attached procedures are to be utilized in this process

and agencies may proceed in the same manner they do when selecting an invitation to bid or request for proposal.

(Petitioner's Exhibit No. 3, emphasis supplied.)

Selection of ITNs by DSGI in the Midst of Changing Rules

1 - DSGI's Chief of the Bureau for Policy and Development: Dr. Phillips

16. After a career beginning in 1981 as an agricultural economist followed by work as a health care economist and consultant doing research in the health care field, Susan Phillips, Ph.D., came to work for DSGI in July of 1998. She remains today in the position for which she was hired: Chief of the Bureau for Policy and Development. Her duties include the procurement of insurance and related products.

17. At the time Dr. Phillips commenced employment with it, DSGI, was in the Executive Office of the Governor. Its statutory duties and staff soon thereafter were transferred to DMS by an act of the legislature. The transfer was effective July 1, 1999. See Section 110.123, Florida Statutes.

2 - The January 1999 ITN

18. In January of 1999, Dr. Phillips was appointed by Charles Slavin, Director of DSGI, as the Issuing Officer for the procurement of a health insurance management information system and related services.

19. To the best of Dr. Phillips' recollection, she recommended to Director Slavin that the solicitation be by ITN and "he agreed." (Petitioner's Exhibit 15, p. 38). The recommendation and the approval by the director were not written but communicated in oral conversation, most likely in Director Slavin's office. The conversations were not memorialized.

20. Following the approval, Director Slavin sent a letter to the Director of State Purchasing, Mr. Banks. The letter, drafted by Bill Dahlem and reviewed and approved by Dr. Phillips, is dated January 4, 1999. About the choice of an ITN for solicitation, the letter states:

We are seeking authority because we have determined that the Request for Proposal process is not the most appropriate means for securing the commodities and services desired. We believe the Invitation to Negotiate method is more appropriate because the commodities and services we are seeking can be provided in several different ways. Also, the contractor's qualifications and the quality of the commodities and services provided are at least as important as the contract price.

(Petitioner's Exhibit No. 4, emphasis supplied). Dr. Phillips' intent with regard to the letter "was to comply with all rules and regulations." (Petitioner's Exhibit No. 15, p. 53).

21. The rule in effect at the time of the selection of the January 1999 ITN and governing such selection was Rule 60A-1.018, Florida Administrative Code. In pertinent part, it states:

60A-1.018 Procedures for Negotiation of
Contracts for Purchases of
Commodities/Contractual Services.

* * *

(2) Negotiation of Contracts Without First Seeking Competitive Sealed Bid/Proposals Exceeding the Threshold for Category Two -- When determined to be in the best interests of the State, the Division may contract by negotiation or may delegate to any agency the authority to contract by negotiation. When contracting by negotiation, the following procedures shall be followed:

(a) An agency seeking delegated authority to negotiate a contract shall submit a request in writing to the Division, detailing the necessity to contract by negotiation, the proposed steps to be followed by the agency in negotiating the contract, and the proposed vendors that will be used in the negotiations.

(b) The Division's intended decision to contract by negotiation or to delegate to an agency the authority to contract by negotiation shall be posted in the office of the Division. Any person adversely affected by the Division's intended decision may protest in accordance with Rule 60A-1.006(3), F.A.C.

(Rule 60A-1.018 was repealed prior to the selection of the ITN with which this case is concerned.)

22. The Invitation to Negotiate (the "January 1999 ITN") was duly issued. When the January 1999 ITN was issued it was accompanied by "PUR Form 7006." The form included a "notice of protest rights" (Petitioner's Exhibit No. 15, p. 51). The notice provided a "point of entry" into administrative proceedings for

parties who might choose to contest the selection of the January 1999 ITN as the solicitation method for the procurement.

3 - Selection of the ITN in this case

23. In March of 2000, Dr. Phillips was named as the Issuing Officer for the procurement of the pharmacy benefits management services in conjunction with the PPO Plan. The decision to solicit suppliers of the services by ITN was made around the time she was named the Issuing Officer.

24. The decision to use an ITN came about through a multi-step process. Just as in the case of the January 1999 ITN, Dr. Phillips recommended to the Director of the Division, Charles Slavin, that an ITN be used. He concurred and authorized its use. Both the recommendation from Dr. Phillips and the authorization by Director Slavin were done in oral conversation rather than in writing. As before, in the case of the January 1999 ITN, the conversation was not memorialized as to either the recommendation or the approval.

25. Unlike in the case of the January 1999 ITN, however, no request was made by DSGI or any other DMS personnel in writing to the Division of State Purchasing, as had been done through Mr. Banks' letter on January 4, 1999, for the January 1999 ITN. It was the understanding of Dr. Phillips in the spring of 2000 that a written request and written approval from the Division of State Purchasing were not required.

26. Ms. Phillips' understanding was based in part on another conversation held the year before when she received approval for the January 1999 ITN. This conversation was between Dr. Phillips and H.P. Barker, Jr., Chief of the Bureau of Procurement and Contract Management for DMS. It took place in January of 1999. During this conversation, Dr. Phillips requested and was granted approval in writing to use an ITN for the procurement of the health insurance management information system and related services. Following the conversation with Mr. Barker, Dr. Phillips was left with the impression that approval by DMS was not necessary every time the bureau selected an ITN as a procurement method for commodities or services needed by DSGI. Dr. Phillips' impression that Mr. Barker had so told her, however, was mistaken. Mr. Barker did not tell her that an ITN could be selected as the procurement solicitation method without seeking further approval.

27. It is easy, nonetheless, to comprehend why Dr. Phillips might have had a such a misimpression. Dr. Phillips had received written approval to use the January 1999 ITN. That coupled with the statement in DMS Memorandum No. 21-(97-98) [the memorandum referred-to in Finding of Fact No. 15, above] that an agency could make a one-time request for authority to use invitations to negotiate for solicitation of vendors and suppliers in a

competitive procurement explains why Dr. Phillips believed she no longer needed prior approval.

28. As it turned out, Dr. Phillips was right that she no longer needed prior approval but not because of impressions she took from conversation with Mr. Barker. Moreover, miscommunication occurred between Dr. Phillips and Mr. Barker about prior approval, proved immaterial. It was unnecessary, actually, for Dr. Phillips to obtain approval of the use of the ITN because of a change in DMS rules governing ITNs.

4 - DMS Rules Change

29. On July 16, 1998, through publication in the Florida Administrative Weekly, the Division of Purchasing had commenced rule development by proposing a number of amendments to the General Regulations of the Division's rules. Two months prior to Dr. Phillips' appointment as the Issuing Officer for the pharmacy benefits management service procurement at least one of the proposed amendments became effective. It provided a new definition of "Invitation to Negotiate" and set out substantive requirements for the circumstances under which an ITN could be selected.

30. The amended rule, effective January 2, 2000, that freed DSGI from obtaining prior approval for the ITN is Rule 60A-1.001(2), Florida Administrative Code. It rendered any conversation with Mr. Barker or anyone else in the Agency that

might be contrary to its requirements and DMS Memorandum No. 21-(97-98) obsolete.

5 - Rule 60A-1.001(2), the ITN Rule

31. Rule 60A-1.001(2), Florida Administrative Code (the "ITN Rule"), is clear and brief. However curt, it is comprehensive in attempt. It provides a definition of an ITN. It states when an ITN may be used in favor of other solicitations. And it succinctly sets out what an agency must do when an ITN is selected as the solicitation method for competitive procurement:

60A-1.001 Definitions.

* * *

(2) Invitation to Negotiate - Competitive solicitation used when an Invitation to Bid or Request for Proposal is not practicable. Agency shall document file as to conditions and circumstances resulting in this decision.

32. Unfortunately, Dr. Phillips did not know at the time of her appointment as Issuing Officer in March of 2000, that Rule 60A-1.001, Florida Administrative Code, had been amended effective two months or so earlier.

33. Dr. Phillips' testimony that she did not know of the existence of the ITN Rule as amended January 2, 2000, is consistent with other testimony that she offered in the proceeding. For example, she testified that she did not the know the rule change was underway. She was not asked for any input

into the Rule's development. Nor did she know that the Rule change had taken place even after rule-making had concluded and the rule had taken effect. (Petitioner Exhibit No. 15, p. 50). As odd as Dr. Phillips' unawareness of the Rule may seem to some, particularly since DSGI and the Bureau for Policy and Development are within DMS, the promulgator of the ITN Rule, her testimony about being out of the rule-making loop went unrefuted in the proceeding.

6 - Decision to Use an ITN

34. In any event, the ITN was selected as the solicitation method. Dr. Phillips, as the Issuing Officer, determined that an ITN was the "most appropriate" solicitation method and that it was a method "more appropriate" than either an ITB or an RFP. Most critically, because she was unaware of the Rule, Dr. Phillips did ensure that the selection complied with Rule 60A-1.001(2), Florida Administrative Code, the new rule governing ITNs.

35. A decision was not made that an ITB or an RFP "is not practicable." A decision was made only that it was more "appropriate" to use an ITN than an RFP. The terms "appropriate" and "practicable" have meanings that are at the very least slightly different. "Appropriate" means "suitable or fitting for a particular purpose, occasion, person, etc." The Random House College Dictionary, Revised 1988. On the other hand,

Practicable is that which may be done, practiced, or accomplished; that which is performable, feasible, possible;

(Petitioner's Exhibit 13, Black's Law Dictionary: 1979). There is, then, an obvious difference between the two words in the context of cases involving selections of procurement solicitations. It might be suitable to use an ITN in a given case. But if it is also practicable to use an ITB or an RFP then no matter how suitable an ITN is, its use is not allowed under the ITN Rule.

36. There was no evidence in this case that a decision was made that an ITB or an RFP was not practical. Not only is there no evidence of such a decision but the "conditions and circumstances resulting in [any such] decision [if made]" were not documented and placed in the file.

37. In short, the decision to use an ITN in this case did not conform to the rules of DMS, the agency within which DSGI is housed.

7 - No Objection or Protest to Use of the ITN

38. MedImpact received a copy of the ITN, albeit later than it should have. See paragraphs 65 to 71, below.

39. Representatives of MedImpact did not at any time after receiving notice of the selection of the ITN contact DSGI for the purpose of discussing the use of an ITN. Nor did representatives

of MedImpact raise any objection to its use prior to the rejection of its late-submitted negotiation.

40. The lack of discussion about the use of an ITN and the failure to object to its use prior to the rejection were not for lack of opportunity. Representatives of MedImpact not only contacted DMS personnel about the pharmacy benefits management services procurement but also attended the proposer's conference on April 28, 2000.

41. MedImpact, moreover, despite the opportunity provided by the ITN, did not submit to DSGI any written questions or comments of objections regarding the use of an ITN as they were allowed to do under the terms of the ITN.

42. Even in this proceeding, despite its position that the parties should return to the "status quo ante" the selection of the ITN, MedImpact has not asserted any manner in which the use of an ITN prejudiced or affected them in the procurement process at issue.

8 - Selection of a Third ITN

43. After selection of the ITN in this case, DSGI selected an ITN for a third competitive procurement, this one described by DSGI as the "Long-term Care Insurance" ITN. Again, Dr. Phillips was the Issuing Officer. Consistent with what she had done with regard to the January 1999 ITN and the ITN in this case and consistent with someone unaware of the amendments to Rule 60A-

1.001(12) that govern ITNs, Dr. Phillips determined that an ITN was more "appropriate" than an RFP.

44. "The Long-term Care Insurance Invitation to Negotiate (ITN Number DSGI 00-002) was issued on August 15, 2000." (Petitioner's Exhibit No. 12.)

45. On August 29, 2000, a memorandum was issued by Dr. Phillips to the Long-term Care Insurance Invitation to Negotiate File. The subject of the memorandum is "Justification to use Invitation to Negotiate." The memorandum, in part, states:

On August 29, 2000 it was learned that the Division must document to the file the justification for using an ITN instead of an Invitation to Bid (ITB) or a Request for Proposal (RFP). The purpose of this memorandum is to comply with Rule 60A-1.001(2).

The Division believes that the ITN method is more appropriate than the ITB or RFP because the product and services we are seeking can be provided in different ways. Also, vendor qualifications and the quality of products and services provided are at least as important as price. . . .

(Id.)

46. The memorandum demonstrates that, in late August, Dr. Phillips had become aware of the ITN Rule. Nonetheless, she continued to fail to comply with it. While the memorandum documents the file as to conditions and circumstances resulting in the decision to use an ITN, as required by the ITN Rule, it

does not document the decision to choose an ITN over an ITB or RFP because the latter two "are not practicable."

47. For the second time this year, but this time with professed awareness of the ITN Rule, DSGI failed to comply with the rules of the agency in which it is housed, DMS. In other words, for the second time this year, DSGI failed to follow its own rules.

The ITN, itself

48. Among the many provisions in the ITN are the following:

Section 2.0 INVITATION TO NEGOTIATE PROCESS
AND PROCEDURES

2.1 General Information

It is entirely the proposer's responsibility to examine this Invitation to Negotiate, to ensure that its requirements are clearly understood, and to submit its proposal in a timely, complete, and procedurally correct manner.

(Joint Exhibit 2, p. 6, emphasis supplied).

49. Section 2.2, entitled "ITN Calendar of Events" contains a chart with columns that sets out a "[d]eadline for receipt of proposals from proposers" (Joint Exhibit 2, p. 7) of 5:00 PM EDT, May 12, 2000. The same calendar provides a location for the receipt by DSGI at its Tallahassee address.

50. Section 2.13 of the ITN denominated "Deviations from ITN Specifications" (Id. at p. 10) states "[t]he Division

reserves the right to reject any proposal not prepared according to the requirements set forth in this ITN.

51. Section 2.18, entitled "Minor Irregularities and Clarification" (Id. at p. 11) states:

The Division, by means of this ITN, has established certain proposal requirements and reserves the right, in its sole discretion, to waive minor irregularities in proposals

If the Division determines that a proposal contains a minor irregularity . . . the proposer will be notified of the irregularity This provision will not . . . provide one proposer any advantage over any other proposer. Furthermore, this provision applies only to the submission and evaluation of the written proposal

(Id., at page 11).

52. Section 2.19, entitled "Rejection of Proposals" provides in pertinent part:

The Division will reject proposals that do not conform or that are not in substantial accord with the requirements of this ITN. Proposals may be rejected for reasons that include, but are not limited, to the following:

a. The proposal is received after the submission deadline;

* * *

g. The proposal is incomplete, or contains irregularities which make the proposal indefinite or ambiguous and which cannot be

waived in accordance with Section 2.19, Minor Irregularities and Clarification;

(Id., at p. 12)

53. Section 3.0 governs the "organization and submission of proposals." Section 3.1, entitled "Proposal Submission Requirements", provides in pertinent part,

* * *

The original and duplicate copies of the proposal must be received by the issuing officer at the address provided in Section 1.6, Issuing Officer, no later than the time and date specified in Section 2.2, ITN Calendar of Events.

(Id. at page 14) The section ends with the following statement in bold: **PROPOSALS RECEIVED AFTER THE SPECIFIED TIME AND DATE WILL BE RETURNED UNOPENED.**" (Id.).

54. Section 4.0 of the ITN governs "proposal evaluation." Subsection 4.2 is denominated "Mandatory Requirements." It states, in pertinent part:

Determining compliance with the mandatory requirements will occur at the proposal opening. The Issuing Officer will observe the proposal opening and verify compliance with the mandatory requirements Only those proposals meeting the mandatory requirements will continue in the evaluation process.

The mandatory requirements include:

a. The Division received the proposal no later than the deadline specified in Section 2.2, ITN Calendar of Events.

* * *

(Id., at page 17.)

55. There is no statement anywhere within the body of the ITN as to why an ITN was selected as the procurement method instead of an RFP or an ITB. Nor is there any statement in the ITN, itself, that provides a point of entry to parties who would choose to contest the decision to select the ITN. There is, however, such a point of entry provided in the "Acknowledgement" mailed to those who were selected by the agency to receive the ITN or parties who, like MedImpact, as discussed below, requested the agency to send them an ITN. The "Acknowledgement" is on a purchasing form used by the agency, "PUR 7105."

PUR 7105

56. Revised as of June 1, 1998, PUR 7105 was sent to every company that received an ITN. In the General Conditions section of the form, potential responders to the ITN are informed as to what to do if they intend to accept the invitation to negotiate. (See Joint Exhibit 2a [renumbered after the final hearing], General Conditions, 1. NEGOTIATION). On the other hand, if a party who receives the invitation decides not to submit a response, the party is asked to return the "acknowledgement form, marking it "NO RESPONSE" and explain the reason . . ." (Joint

Exhibit 2a, General Condition, 3., NO RESPONSE). Failure to respond to the procurement solicitation without giving reasonable justification is cause for removal of the supplier's name from the Agency's supplier list.

57. PUR 7105 also contained "point of entry" language as follows:

Any person who is adversely affected by an Agency decision or intended decision concerning a procurement solicitation or contract award and who wants to protest such decision or intended decisions shall file a protest in compliance with Chapter 28-110, Florida Administrative Code. Failure to file a protest within the time prescribed in Section 120.57(3), F.S. or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under Chapter 120 F.S.

(Joint Exhibit. 2a, General Conditions, 5.

INTERPRETATIONS/DISPUTES).

58. The Acknowledgement Form also under the heading of "General Conditions" contains a paragraph entitled "NOTICE OF NEGOTIATION PROTEST BONDING REQUIREMENT." The paragraph details the requirements for posting a bond (or cashier's check or money order) with the state whenever a party files a protest pursuant to Section 120.57(3), Florida Statutes. The paragraph concludes, "FAILURE TO FILE THE PROPER BOND AT THE REQUIRED TIME WILL RESULT IN A DENIAL OF THE PROTEST."

(Joint Exhibit 2a).

EHS and Mr. Francis

59. EHS is a joint venture between Eckerd Corporation and the petitioner in this case, MedImpact. In 1996, it won the contract for pharmacy benefits management in conjunction with the PPO Plan after it had made a proposal in response to an RFP.

60. EHS' proposal was submitted by William Francis, an employee of Eckerd Corporation. At Eckerd, Mr. Francis' main duties were related to pharmacy benefits management. In fact, he had been "brought down to start [Eckerd Corporation's] PBM ["pharmacy benefits management"] . . ." (Tr. 131).

61. EHS was the highest-ranked proposer, and EHS and the state were able to reach an agreement memorialized by a written contract. The contract was signed by Roger Davis, the vice president of Eckerd Corporation of Florida, Inc., as one of the general partners of the joint venture that together with MedImpact comprised EHS. It was also signed by the Deputy Secretary of the DMS on behalf of the state of Florida.

62. In August of 1998, Mr. Francis left Eckerd Corporation to become an employee of MedImpact Healthcare Systems in California (the other venturer in the joint venture that with Eckerd Corporation comprised EHS). Today, he is the manager of business development for MedImpact. It is his job to "network in the managed care community, to develop relationships there, to get [the company] on vendors' bidders lists and so forth with

different public sector entities . . ." (Tr. 130). His duties extend to many public sector entities. Among them is the state of Florida and with regard to the state, consistent with his experience, he is responsible in particular in the arena of pharmacy benefits management.

Dissatisfaction with EHS

63. The contract entered into by DMS with EHS in 1996 allowed for renewal after a term of four years. The decision not to renew but to enter a new procurement process was explained in testimony by Dr. Phillips:

Q . . . What were the reasons that you chose to initiate this procurement if there was a renewal on the EHS contract?

A We chose to initiate a new procurement because we were not completely satisfied with the services being delivered under the current contract and, because PBM services had evolved very quickly over a number of years, we believed that we could get better service, better clinical programs for a better price.

Q And can you give me an idea of what kind of changes you had noted in the pharmacy management services area?

A One of the biggest areas would be clinical management, specifically disease management.

Q Does the current contract meet those needs and those changing needs of the State?

A We do not believe so, no.

(Tr. 159, 160).

Events Between the Issuance of the ITN and MedImpact's Rejection

64. From the time he left Eckerd Corporation, Mr. Francis remained cognizant of the EHS pharmacy benefits management contract with DMS. He knew that the contract was set to expire and that a new contract would be "going up for bid this year." (Tr. 134).

65. Mr. Francis was very interested in submitting on behalf of MedImpact a negotiation pursuant to the ITN. He made his interest known in several ways, ways that could not have been overlooked by personnel at DMS.

66. He attended the proposer's conference on April 28, 2000. As the representative of MedImpact, an active partner in the incumbent provider, everyone at the conference, including DSGI, had to have been aware that MedImpact intended to submit a "negotiation" package in response to the ITN.

67. When an ITN had not been received in the time in which Mr. Francis expected it, he called Mike McCaskill, his "contact person with the state" (Tr. 134) to inquire "where the RFP process was . . ." (Id.)

68. In the conversation, Mr. McCaskill corrected him. An RFP was not being issued; rather the procurement method selected by the state was an ITN. Mr. McCaskill further informed

Mr. Francis that the ITN had been issued "the day before."

Mr. Francis' response was "that's great, we should expect it soon." (Id.).

69. But the ITN was not delivered to MedImpact.

Mr. Francis inquired of Mr. McCaskill again. In the follow-up conversation, Mr. Francis learned that MedImpact was "not on the [supplier's] list to receive an invitation." No explanation for this omission was offered at hearing by way of document or testimony except by Mr. Francis. The following colloquy occurred after counsel asked Mr. Francis the question of whether he had learned how the suppliers' list was generated:

A Yes, he said that his [Mike McCaskill's] management team had made the decision to inquire with a company called Pharmacy Benefit Management Institute out of Scottsdale, Arizona, and get a listing from them of the top five PBMs in the country.

Q And was MedImpact included among the top five PBMs in the list?

A It depends on really where -- you know, on where you look for your resources. Sometimes we're listed fifth, sometimes sixth.

Q And would MedImpact be listed in any position on the list generated by that company?

A No.

Q Why not?

A We don't subscribe to their research services.

(Tr. 134, 135).

70. In response to the follow-up conversation, however, Mr. McCaskill promised to send the ITN to MedImpact. In fact, Mr. Francis testified, Mr. McCaskill "very promptly Fed Ex'd it to us. I think we received it toward the end of the week." Exactly what week Mr. Francis was referring to between the early part of April when the ITN was issued and May 12, 2000, when the response was due, is not disclosed by the record.

71. Nor is it clear from the record in this case precisely when Mr. Francis' conversations took place with Mr. McCaskill. It may be that they took place prior to the April 28 conference. When is immaterial aside from the fact that the conversations took place after the ITN was actually issued and mailed to suppliers other than MedImpact. The point is that Mr. Francis made it abundantly clear to the agency that MedImpact was very interested in submitting a negotiation in response to the ITN.

72. For MedImpact, and presumably for the others who responded to the ITN in this case, it is a time-consuming and costly process to prepare and submit a response. Once the ITN was received, it took MedImpact at least 150 man hours among its upper level professional to prepare its response to the ITN.

73. The delay caused by the Agency in getting the ITN to MedImpact must have been at least a contributing factor if not the determinative factor in the preparation of MedImpact's "negotiation" not being finished until Thursday, May 11, 2000. Since there was only one day left in which to make delivery in Tallahassee, MedImpact took the response to the Fed Ex office in San Diego. Indeed, the FedEx Airbill, with a FedEx tracking number of 8116 8522 0322 and dated "5/11" shows that a package was sent by "Bill Francis" of MedImpact in San Diego, California, to Susan Phillips, "State of Florida, Department of Management, Bureau of Policy Development" at the DMS address in Tallahassee by "FedEx Priority Overnight" for delivery "next business morning." (Petitioner's Exhibit 7). Instructions given by MedImpact to FedEx were that "the box was to be delivered by 10:30 the following morning in Tallahassee" (Tr. 138), the following morning, of course, being the morning of Friday, May 12, 2000.

74. The package containing the response was not delivered on Friday, May 12, 2000, as FedEx had promised. The delivery was delayed in air transit by "one of the worst thunderstorms of the year" (Joint Exhibit 4) over Memphis, Tennessee, a critical hub in FedEx's delivery and sorting system.

75. Delivery of MedImpact's negotiation occurred at 1:33 p.m. the afternoon of Monday, May 15, 2000. The moment of

delivery was approximately three and one-half hours after the Agency commenced opening six negotiations submitted in response to the ITN. By the time MedImpact's submission was received, all six had been opened. The six parties whose negotiation packages were opened were: Caremark, Eckerd Health Services, Merck-Medco, PCS Health System, Advance Paradigm and Express Scripts.

The Rejection

76. Dr. Phillips, as the Issuing Officer of the ITN, was responsible for making the decision as to whether to accept or reject MedImpact's late negotiation package.

77. Despite the clarity with which portions of the ITN describe the consequences of failure to deliver a negotiation on time to DSGI, Dr. Phillips believed on May 15 that she had discretion to accept or reject the proposal. Dr. Phillips continued to maintain that she had such discretion throughout this proceeding. No witness from DMS or produced by any party disputed that such discretion exists.

78. As Dr. Phillips testified in her deposition read, in part, into the record at hearing, "I had the authority to determine if the proposal were going to be accepted or rejected." (Tr. 95).

79. There are several sources from which Dr. Phillips' authority to exercise discretion in the decision might be derived. One is the ITN, itself. In the "Minor Irregularities

and Clarification" subsection (Subsection 2.18), DSGI reserved the right, in its sole discretion, to waive minor irregularities. These irregularities expressly include irregularities in both "the submission and the evaluation of the written proposal." (Joint Exhibit 2, p. 11). There is also a "Minor Irregularity" Rule of the DMS.

The Minor Irregularity Rule

80. Rule 60A-1.002(10), Florida Administrative Code, states:

(10) Right to Waive Minor Irregularities for Commodities or Contractual Services -- The agency shall reserve the right to waive any minor irregularities in an otherwise valid bid or proposal or offer to negotiate. Variations which are not minor can be waived.

(See Joint Exhibit 1, DMS Rule Chapter 60A, F.A.C. [as amended from 1996 to present, V. 17, p. 55, R.1/00]).

81. The term "minor irregularity" is defined in Rule 60A-1.001(17), Florida Administrative Code:

(17) Minor irregularity -- A variation from the invitation to bid or invitation to negotiate or request for proposal terms and conditions which does not affect the price of the commodities or services, or give the bidder or offeror an advantage or benefit not enjoyed by other bidders or offerors, and does not adversely impact the interests of the agency.

82. In considering how to exercise the Agency's discretion, Dr. Phillips wisely sought the advice of counsel first. Counsel

advised her that she was free to reject the submission.

Dr. Phillips then decided that MedImpact's late negotiation should be rejected.

83. At hearing, Dr. Phillips explained some of the circumstances to be taken into consideration in the discretionary decision-making process in situations of late-filed bids, proposals, and negotiations. In every case, Dr. Phillips would seek the advice of counsel before making a decision. She would be more comfortable in accepting a late-filed submission in a case in which there was an Act of God (as in this case) but in which many submitters were late (unlike this case). From her testimony, it is apparent, as is to be expected in decision calling for the exercise of discretion, that there is not a bright line as to when a late-filed submission should be accepted and when not.

84. Dr. Phillips explained further, however, her decision in this case. Critical to her decision were two facts: 1) there was only one late-filed submission, and 2) there were six timely submissions. In light of ample timely competitive submissions, the purpose of competitive procurement was served by going forward, in her view, without MedImpact's submission being in the mix. Dr. Phillips reasoned that the interest of the state and the public was protected by the number of accepted submissions. In light of this protection and in light of the clear language of

the ITN requiring submission on time, Dr. Phillips rejected the submission of MedImpact.

85. Application of the Minor Irregularity Rule or the "minor irregularity" portion of the ITN in light of the definition of minor irregularity in Rule 60A-1.001(17), Florida Administrative Code, should have led to a different result. The late submission of MedImpact's negotiation constituted a variation from the ITN. The variation did not affect the price of the services. It did not give MedImpact an advantage not enjoyed by the other negotiators since the negotiation left MedImpact's control once handed over to FedEx and remains unopened to this day. It did not adversely affect the interests of the Agency save the possibility of exposing it to a protest from one of the other negotiators, a possibility that could not be more adverse to the Agency than what has ensued in the wake of its decision to reject, namely this case and Case No. 00-3553RU.

Events Post-Rejection

86. DSGI returned MedImpact's response unopened under cover of a letter from Dr. Phillips to Mr. Francis dated May 17, 2000.

Dr. Phillips wrote:

Thank you for your response to our Invitation to Negotiate for Pharmacy Benefits Management Services. Unfortunately, the Department received your proposal at 1:33 p.m. on Monday, May 15, 2000. The deadline for submission of your proposal was 5:00 p.m., Friday, May 12, 2000 as outlined in Section

2.2, Calendar of Events. Therefore, in accordance with Section 2.19, Rejection of Proposals, paragraph a, your proposal has been rejected. We are returning your unopened proposal via Federal Express.

(Joint Exhibit 3).

87. Shortly thereafter, FedEx described the cause of the late delivery as a FedEx error. In a letter dated May 18, 2000, to Ms. Julie Smith of MedImpact, Theresa E. Ledbetter of FedEx's Customer Relations Department wrote:

According to our records, the above referenced priority package was tendered to us for carriage with delivery scheduled by 10:30 AM on Friday, May 12. Unfortunately, due to our error, your package was delayed in our sorting network and did not arrive in our Tallahassee FedEx office until Monday, May 15. I note final delivery was completed on Monday at 1:33 p.m.

Petitioner's Exhibit 9. The letter from FedEx did not sway DSGI from its rejection of MedImpact's negotiation.

Challenge to the Rejection, Posting, a Contract and Referral

88. On June 30, 2000, MedImpact filed a petition for formal administrative hearing. The case was treated by DMS as one without disputed issues of fact and so it kept jurisdiction of the case and assigned it to Hearing Officer Strickland for informal hearing.

89. On July 17, 2000, the results of the evaluation of the submitted negotiations and the scoring of the submissions were posted. Express Scripts received a "TOTAL Weighted Score" of 70;

Advance Paradigm, 72; PCS Health System, 73; MMMC and EHS tied at 75; and, Caremark received a total weighted score of 77.

90. On August 25, 2000, MedImpact filed an amended petition by which it hoped to convince the hearing officer that the case contained disputed issues of material fact.

91. While the informal proceeding pended at DMS, Caremark and DSGI conducted negotiations. They were successful. Caremark and DMS entered a contract on August 28, 2000.

92. Three weeks later, on September 20, 2000, when Hearing Officer Strickland found that there were indeed disputed issues of material fact (born out abundantly by the record in this case) he referred the case to DOAH. In his letter of referral he called the case a "bid protest."

DOAH Proceedings

93. During the pendency of the "bid protest" at DMS, MedImpact discovered two statements by DSGI it believed constituted unpromulgated rules.

94. MedImpact filed a proceeding challenging the two statements pursuant to Section 120.56(4), Florida Statutes. Its petition was assigned Case No. 00-3553RU. When the challenge to the rejection reached the Division of Administrative Hearings via Hearing Officer Strickland's order, the two cases were consolidated.

Bond or a Substitute

95. As of the day of hearing, MedImpact had not filed any bond or substitute therefor with DSGI.

Intervention by MMMC

96. At hearing, Connie Martin, MMMC's Vice President for National and Special Accounts testified that if MedImpact's negotiation is ultimately accepted by DMS and scored higher than MMMC's, she would recommend that MMMC file a protest. (See Tr. 57).

CONCLUSIONS OF LAW

Jurisdiction

97. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Sections 120.569 and 120.57, Florida Statutes.

Application of Section 120.57(3)

98. MedImpact filed both its petition and amended petition "pursuant to Section 120.57(1), Florida Statutes, . . ." It did not file the petitions pursuant to Subsection (3) of Section 120.57(1). In fact, Subsection (3) is not mentioned in the two petitions. DMS argues that "this case is not a bid protest."

DMS PRO, p. 13.

99. Contrary to the position of DMS advanced in this forum, DMS Hearing Officer Strickland recognized in his letter of referral that this proceeding is governed by the additional

procedures applicable to decisions related to the competitive procurement process found in Subsection (3) of Section 120.57, Florida Statutes.

100. Some might argue that competitive procurement processes initiated by invitations to negotiate are not covered by Section 120.57(3), Florida Statutes. For example, the word "negotiation" does not appear in the subsection whereas there is frequent reference to "bids" and "proposals." While not entirely clear, however, it appears from the use of the term "competitive-procurement protest" in paragraph (f) in Subsection (3) of Section 120.57, Florida Statutes, that Subsection (3) applies to competitive procurement processes irrespective of what method of solicitation (ITB, RFP or ITN) has been used by the procuring agency.

In a competitive-procurement protest, no submissions made after the bid or proposal opening[,] amending or supplementing the bid or proposal shall be considered. 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, 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 bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary or capricious

101. DMS' argument that this case is not a bid protest is expressed at page 13 of its Proposed Recommended Order: "Case No. 00-3900BID is not a bid protest. It is a challenge to DSGI's decision to reject a late-filed proposal."

102. While DMS is quite right that the challenge is to the decision to reject, that simply means that the "proposed agency action" is the decision to reject. No authority for its view that the case is not subject to Section 120.57(3), Florida Statutes, is advanced by DMS. Nor is there any authority for its novel view that has come to light anywhere else in this proceeding.

103. In sum, this proceeding is governed by Section 120.57(3), Florida Statutes.

Failure to Timely Protest

104. Section 120.57(3), Florida Statutes, provides in paragraph (b):

Any person who is adversely affected by the agency decision . . . shall file with the agency a notice of protest in writing within 72 hours after . . . receipt of the notice of the agency decision . . . and shall file a formal written protest within 10 days after filing the notice of protest.

Under the plain wording of the statute, MedImpact's protest of the rejection of its negotiation, filed June 30, 2000, approximately six weeks after it was informed by the May 17

letter that the negotiation was being returned unopened, is in violation of the mandate of the statute. Nonetheless, the proceeding is not subject to dismissal because DSGI on the advice of counsel failed to provide MedImpact with notice of its protest rights. In other words, it failed to provide MedImpact with a point of entry into administrative proceedings to contest the rejection. Failure to provide such notice and a point of entry cures MedImpact's late filing of its protest. Had such notice and a point of entry been provided and MedImpact failed to take advantage of it, then the petition in this case would have been foreclosed. See Lamar Advertising Co. v. Department of Transportation, 523 So. 2d 712 (Fla. 1st DCA 1988); and, Xerox Corp. v. Florida Department of Professional Regulation, 489 So. 2d 1230 (Fla. 1st DCA 1986).

Burden of Proof, De Novo Proceeding, Standard of Proof

105. "Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action." Section 120.57(3)(f), Florida Statutes. The burden of proof is not "otherwise provided by statute." MedImpact has the burden of proof.

106. Likewise, since this is a competitive procurement protest, it is 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 bid or proposal specifications." Id.

107. The standard of proof that applies is "whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary or capricious." Id.

108. Agency action is clearly erroneous if it results from substantial procedural error or a clear misapplication of the law or is contrary to the clear weight of the evidence. An agency action is capricious if the agency takes the action without thought or reason, or irrationally. An agency decision is arbitrary if it is not supported by facts or logic or is "despotic." Agrico Chemical Co. v. State Department of Environmental Regulation, 365 So. 2d 759 (Fla. 1st DCA 1978), cert. den. 376 So. 2d 74 (Fla. 1979). The "contrary to competition" standard in a competitive procurement involving bids requires that an agency "secure fair competition on equal terms to all bidders by affording an opportunity for an exact comparison of bids." Harry Pepper and Associates v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2d DCA 1977). Applying Harry Pepper to this case requires that the agency secure fair competition on equal terms to all negotiators. As explained below, the agency did not do so.

Proposed Agency Action

109. The Agency's proposed action subject to de novo review in this proceeding is not the selection of the ITN as the method for solicitation. (Any such challenge was waived when MedImpact failed to timely protest selection of the ITN pursuant to Section 120.57(3) as it was informed by DMS it had a right to do in the ITN Acknowledgement, Form PUR 7015.) It is not a challenge to any term or condition in the ITN. It is not the ranking of the negotiations under DMS' scoring process. Nor is it DMS' entry into the contract with Caremark. The Agency proposed action which is subject to de novo review in this proceeding and which is the subject of MedImpact's protest, is the rejection of MedImpact's negotiation by letter dated May 17, 2000.

Propriety of the Rejection

110. Whether DMS' rejection of MedImpact's negotiation is allowed to stand must be viewed in the context of all of the evidence.

111. MedImpact was an active partner in the joint venture whose contract was not renewed because DMS was "not completely satisfied with the services being delivered under the current contract" (Tr. 160).

112. Before DMS mailed the ITN, it looked for an outside service to compile a list of the top pharmacy benefits management organizations for DMS to solicit by the ITN, presumably so that it could avoid the appearance of favoritism in compiling the

list. Nonetheless, DMS chose an institute on whose list MedImpact did not appear at all. The reason DMS did not appear anywhere on the list is because MedImpact did not subscribe to the institute's research services.

113. When Mr. Francis on MedImpact's behalf inquired by telephone in early April of 2000 as to the status of the "pharmacy benefits management services RFP," DMS personnel informed him that the ITN had been mailed but did not inform him that it had not been mailed to MedImpact.

114. DMS did not send MedImpact the ITN until MedImpact in a second follow-up conversation contacted DMS personnel and requested directly that it be given an ITN and an opportunity to submit a negotiation.

115. DMS' action and inaction in dealing with MedImpact, a pharmacy benefits management company it had to know was keenly interested in the pharmacy benefits management contract, were contributing factors to the lateness of MedImpact's submission.

116. When MedImpact finished its negotiation on Thursday, May 11, 2000, it was presented with a difficult situation. Under the circumstances, there may have been ways to transmit its negotiation better than by FedEx, but these ways, in all likelihood, had potential flaws at least as likely to occur and frustrate timely delivery as the one to which FedEx's delivery

was subject: severe thunderstorms over Memphis a hub critical to its delivery system, force majeure, an Act of God.

117. Under the circumstances, MedImpact's decision to transmit the negotiation via FedEx with a guaranteed delivery time of 10:30 a.m. on Friday, May 15, 2000, was not unreasonable.

118. While an argument could be fashioned on the basis of the terms and conditions of the ITN that DMS had no choice but to return the MedImpact negotiation unopened, Dr. Phillips has consistently maintained that DSGI had discretion to accept as well as reject. No one at DMS came forward in this proceeding to refute this assertion. Not even Caremark, the highest-ranked negotiator now favored with a contract, disagrees with this contention. See paragraphs 36 and 37 of Caremark's PRO. There is, moreover, a basis in the "Minor Irregularity" provisions of the ITN which reflect the provisions in DMS' Minor Irregularity Rule for the exercise of discretion in a case such as this one.

119. As stated in the findings of fact portion of this order, the application of the Minor Irregularity Rule and the minor irregularity provisions of the ITN should have led to acceptance of MedImpact's negotiation in light of the definition of "minor irregularity" in Rule 60A-1.001(17), Florida Administrative Code. The late submission of MedImpact's negotiation constituted a variation from the ITN. The variation did not affect the price of the services. It did not give

MedImpact an advantage not enjoyed by the other negotiators since the negotiation left MedImpact's control once handed over to FedEx and remains unopened to this day. It did not adversely affect the interests of the Agency save the possibility of exposing it to a protest from one of the other negotiators, a possibility that could not be more adverse to the agency than what has ensued in the wake of its decision to reject, namely this case and Case No. 00-3553RU. Application of the rule together with the facts discussed in paragraphs 110 through 116, support the conclusion that DSGI should have accepted MedImpact's late-filed submission.

120. DSGI's decision to reject MedImpact's negotiation was clearly erroneous. The action was capricious not because it was not taken without thought or reason but because it was irrational in the context of all the evidence available to DMS the week of May 15, 2000. When Dr. Phillips testified at hearing, it was obvious that she had thought a great deal about what would justify a rejection. She offered reasons for the rejection that appeared on their face to be sensible. Those reasons might have stood up had they not been contrary to the greater weight of the evidence. In the end, the decision by DSGI to reject was irrational because it did not secure fair competition on equal terms to all negotiators. Instead, the rejection was contrary to

the competition that competitive procurement law is designed to foster.

Selection of the ITN

121. As determined earlier, selection of the ITN as the method of solicitation in this competitive procurement was done in violation of DMS' rules. There is nothing that can be done about the violation in this proceeding. MedImpact and all the other negotiators under the ITN were provided notice of a clear point of entry into administrative proceedings to contest the selection through the recitation of Section 120.57(3) protest rights in the ITN Acknowledgement, Form PUR 7015, a notice given to all of the negotiators. All waived their right to protest.

122. The selection of the ITN is not an issue properly in this case.

Standing of the Intervenors

123. Caremark as the top-ranked negotiator with which DMS has entered a contract clearly has standing to intervene in this proceeding under Rule 28-106.201, Florida Administrative Code.

124. MMMC's Vice-president testified that if MedImpact is rated higher than MMMC then she would recommend filing a competitive procurement protest. This testimony demonstrates standing consistent with that required for an intervenor under Rule 28-106.201, Florida Administrative Code. But MMMC's

standing is more firmly bolstered by the status of the case once MedImpact's negotiation is accepted.

125. The moment that matters took a wrong turn in this case was the moment of rejection of MedImpact's negotiation. The competitive procurement process should be restored, therefore, to its "status quo ante" that moment. MedImpact's negotiation should be evaluated, scored, and ranked. Parties to the process should be able to protest any scoring and ranking at that point that they did not waive when they failed to protest the scoring and ranking posted last July.

Posting of a Bond or Substitute

126. Since this proceeding is governed by Section 120.57(3), Florida Statutes, MedImpact should have posted a bond or provided DMS with a substitute for a bond pursuant to the statute. In an ordinary case, failure to do so would be fatal to MedImpact's protest. In this case, however, the consequences of the failure can hardly be brought to bear on MedImpact by DMS when DMS, itself (contrary to its own hearing officer) maintains that this case "is not a bid protest," and chose to describe this case in its PRO not as a protest governed by Section 120.57(1), Florida Statutes, and the additional procedures of Section 120.57(3), but as a case that with Case No. 00-3553RU

raise[s] creative and interesting issues
regarding the interplay between
administrative proceeding typically called

"bid protests" which are governed by Section 120.57(3), rule challenges governed by Section 120.56 and hearings on an agency action in which there is a disputed issue of material fact, governed by Sections 120.569 and 120.57(1), (2), (4) and (5), Florida Statutes.

Proposed Final Order and Proposed Recommended Order, filed by DMS, p. 12.

127. Upon receipt of this Recommended Order, DMS should give MedImpact a reasonable time within which to post a bond or provide a substitute for a bond as called for by Section 120.57(3), Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that:

1. The Department of Management Services give MedImpact a reasonable amount of time to post a bond or provide a substitute for a bond as required by Section 120.57(3), Florida Statutes, in order to continue to pursue this protest related to competitive procurement;

2. The Division of State Group Insurance accept MedImpact's negotiation, open it, and subject it to its process for evaluation applicable to negotiations under ITN Number DSGI 00-001; and,

3. Post the results of the evaluation of all the negotiations submitted to the ITN; and

4. Provide the seven negotiators to the ITN rights to protest the results of the posting that have not been waived when the results of the posting in July 2000 were not protested.

DONE AND ENTERED this 21st day of November, 2000, in Tallahassee, Leon County, Florida.

DAVID M. MALONEY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.