

# Memorandum



**Date:** July 17, 2008

**To:** Honorable Chairman Bruno A. Barreiro  
and Members, Board of County Commissioners

**From:** George M. Burgess  
County Manager

Supplement to  
Agenda Item No.  
8(Q)3(A)

**Subject:** Supplement to Contract Award Recommendation for Terminal D Parking  
Garage Re-bid – Project No: 2006.019R; Contract No. 2006.019R, to Perez-  
Gurri Corporation dba N&J Construction Corporation

This supplement is presented to report that during the bid protest period, a bid protest was filed on the subject contract award by the third lowest bidder, JCI International, Inc. (“JCI”). In accordance with the bid protest procedures, a hearing examiner was appointed and a hearing was conducted on June 27, 2008.

There were three issues cited by JCI. Two of these issues were that one of the CSBE companies listed by Perez-Gurri Corporation dba N&J Construction Corporation (“N&J”) was not certified nor licensed as a CSBE to perform waterproofing. The third issue raised was that certifications for two other CSBE companies listed by N&J were current at the time of bid but had expired shortly after. This last issue was dismissed prior to the hearing. The hearing examiner ruled that JCI’s bid protest be denied and that the recommendation to award the contract to N&J be upheld because the award was made to the lowest, responsive and responsible bidder. Attached is the Order of Bid Protest of JCI International, Inc. filed by the hearing examiner.

Based on the hearing examiner’s ruling, it is recommended that this contract award recommendation to Perez-Gurri Corporation dba N&J Construction Corporation be approved.

A handwritten signature in black ink, appearing to read "George M. Burgess".

Assistant County Manager

**CLERK OF THE  
BOARD OF COUNTY COMMISSIONERS  
MIAMI-DADE COUNTY, FLORIDA**

In re: **BID PROTEST OF JCI INTERNATIONAL, INC.**  
Miami-Dade County Seaport Department,  
Project No. 2006.019R  
Terminal D Parking Garage

---

**FINDINGS AND RECOMMENDATIONS OF HEARING EXAMINER**

Pursuant to Section 2-8.4 Miami-Dade County Code and Administrative Order 3-21

This matter was heard before the undersigned Hearing Examiner on June 27, 2008 at 9:30 a.m. at the Stephen P. Clark Center, 111 N.W. 1st Street, Miami, Florida, upon the Notice of Intent to Protest Bid (the "bid protest") filed by JCI International, Inc. ("JCI") challenging Miami-Dade County's ("the County") decision to recommend award of the contract for the above referenced project to Perez-Guirri Corporation d/b/a N & J Construction Corporation ("N&J").

Having reviewed the bid protest, the motions filed, the memorandum in opposition to the bid protest, the exhibits admitted at the June 27, 2008 Hearing and the proposed Findings of Fact submitted by all parties; having heard the testimony and arguments of the County, JCI and N&J; and being otherwise fully advised, I find that JCI's bid protest should be denied, and that the recommendation to award the contract to N&J should be upheld because the award was made to the lowest, responsive and responsible bidder, and was not based on "illegality, fraud, oppression, or misconduct." *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982).

Z

## FINDINGS OF FACT

1. The County, through the Seaport Department, issued an Invitation to Bid to construct a parking garage at the Seaport. The project is titled terminal D Parking Garage Re-Bid Project No. 2006.019R.

2. The project specifications specifically required a twenty percent (20%) Community Small Business Enterprise (“CSBE”) subcontractor goal. As indicated in the Bid Documents, bidders were required to submit what is referred to as “Statement of Intent” affidavits (“SOI”). The SOI affidavit lists the CSBE contractors that the bidder intends to enter into subcontracts with in order to meet the CSBE goal if awarded the contract.

3. On May 21, 2008 The Tower Group, the initial apparent low bidder, was disqualified by the County for being non-responsive. As a result N&J became the lowest responsive and responsible bidder.

4. On June 5, 2008, the County issued its bid award letter to N&J. JCI then became the second lowest bidder.

5. JCI has standing to file its Bid Protest. *Douglas N. Higgins, Inc. v. Florida Keys Aqueduct Authority*, 403 So. 2d 1042 (Fla. 3d DCA 1981). On June 9, 2008, JCI filed and served its Bid Protest in accordance with Section 2-8.4 of the Miami-Dade County Code (the “Code”).

6. On June 16, 2008, counsel for N&J filed a letter with the Clerk of the Board of County Commissioners in response to JCI’s Bid Protest. The letter contained various exhibits and attachments.

7. On June 25, 2008, County filed Miami-Dade County's Opposition to JCI International's Bid Protest (the "Response"). The Response included various exhibits and attachments.

8. In accordance with the CSBE requirements, N&J submitted SOI affidavits with their bid submission identifying the CSBEs that it intended to use to satisfy the CSBE requirements in the Bid Documents. One of the CSBE subcontractors listed by N&J was A1 All Florida Painting ("A1"). The SOI indicates that A1 will perform "painting, waterproofing" and that the total amount of the work that they will perform constitutes 3.666% of the work. A1 is licensed by Miami-Dade County to perform painting and is a certified CSBE contractor in painting and wallcovering.

9. In accordance with the County Code and the Bid Documents, the Department of Small Business Development ("SBD") performed a compliance review of the bids offered to determine compliance with the CSBE requirements. SBD determined that N&J's bid was in compliance.

10. JCI's protest centers on the argument that A1 is not licensed nor certified as a CSBE in "waterproofing." However, the Code of Miami-Dade County, Chapter 10, clearly indicates that a painter may perform waterproofing. In Bulletin No. 67-12-10B, Section 18d of the Code it clearly states that "a painting contractor is qualified and certified. . . to apply waterproofing, paint and related liquid or viscous products thereon by brush, rollers or spray method".

11. Jose Lezcano, a representative from the County's Building Code Compliance Office ("BCCO") testified at the Hearing that the current code states that a painter may

perform certain types of waterproofing. Mr. Lezcano also testified that there was not a separate license issued by the County for waterproofing.

12. Under Certification in Article III of the Instructions to Bidders at Page 9, the Specifications stated:

The firms of the Certification list will be identified by each SIC/NAICS category and each Specialty Trade the CSBE is certified in. DBD shall certify each CSBE by the type of construction they perform in accordance with the two-digit NAICS code applicable to such type of construction for which the CSBE is licensed.

13. Section 10-33.02(4) of the Code further provides:

*Certification requirements:* The County Manager shall implement eligibility criteria and procedures for entities to be certified as CSBEs based on regulations outlined in this section. Firms exceeding size limitations established hereunder and under Appendix A [which can be found in the County Clerk's office attached to Ordinance Number 97-52] are not eligible for contract measures or participation in these programs.

1. The Department of Business Development shall maintain and publish at least every other week an updated list of CSBEs, identifying each listed CSBE on each SIC category and each specialty trade the CSBE is certified in, and noting what contracting participation level the firm is classified in.

...

3. Applicants and certified CSBEs must be properly licensed to conduct business in Miami-Dade County, must perform a commercially useful function with an actual place of business in Miami-Dade County, and must continue to perform commercially useful function in Miami-Dade County to be eligible for certification or to remain certified.

14. The Participation Provisions in the Specifications specifically provide:

16. CSBE must be certified by the SIC or NAICS code ... See Page 4.

...

II(C) The firms on the Certification list will be identified by each SIC/NAICS category and each Specialty Trade the CSBE is certified in. DBD shall certify each CSBE by the type of construction they perform in accordance with the two-digit SIC or six digit NAICS code applicable to such type of construction for which the CSBE is licensed. See Page 9.

D. In order to participate as a CSBE on this contract, a CSBE must have a valid certification in effect at the time of bid submittal. The CSBE must maintain certification from the time of bid submittal throughout the duration of the contract.

15. Administrative Order 3-22, entitled Community Small Business Program for the Purchase of Construction Services, specifically provides:

II(A)(1) DBD is the County agency responsible for certifying applicants, decertifying and recertifying CSBEs, and maintaining the Certification List. DBD shall maintain and publish at least every other week an updated list of CSBEs, identifying each listed CSBE based on each SIC/NAICS category, and each Specialty Trade certification and noting the Contracting Participation Level classification.

...

II(B)(6) A CSBE must have a valid certification in effect at time of bid submittal. For Successful Bidders, certification must be maintained from the time of bid submittal throughout the duration of the contract.

...

II(B)(9) Applicants and certified CSBEs must be properly licensed to conduct business in Miami-Dade County, must perform a commercially useful function with an actual place of business in Miami-Dade County, and must continue to perform a commercially useful function in Miami-Dade County to be eligible for certification or to remain certified.

...

II(D)(2)(a) When determining whether the applicant has an actual place of business in Miami-Dade County, DBD shall consider evidence such as, but not limited to, the following:

...

6. The possession of licenses required to conduct the business in Miami-Dade County.

16. Based upon the Specifications, the Miami-Dade County Code, and the Administrative Order, the following requirements must be met with respect to A-1 for N&J's Bid to be responsive:

- (a) Each CSBE must be identified by each SIC/NAICS category and each Specialty Trade the CSBE is certified in;
- (b) DBD shall certify each CSBE by the type of construction they perform in accordance with the two-digit NAICS code applicable to such type of construction for which the CSBE is licensed;
- (c) DBD is required to maintain and publish at least every other week an updated list of CSBEs, identifying each listed CSBE on each SIC category and each specialty trade the CSBE is certified in, and noting what contracting participation level the firm is classified in;
- (d) Applicants and certified CSBEs must be properly licensed to conduct business in Miami-Dade County, must perform a commercially useful function with an actual place of business in Miami-Dade County, and must continue to perform commercially useful function in Miami-Dade County to be eligible for certification or to remain certified;
- (e) In order to participate as a CSBE on the contract for the Project, a CSBE must have a valid certification in effect at the time of bid submittal. The CSBE must maintain certification from the time of bid submittal throughout the duration of the contract;
- (f) N&J was required to submit a completed Schedule of Intent Affidavit on the bid submittal date identifying each CSBE to be utilized to meet the first tier subcontractor goal and the trade designation of work each CSBE will perform. The SOI constituted a written representation by N&J that, to the best of N&J's knowledge, A-1 is qualified and available to perform painting and waterproofing on the Project. The SOI is a commitment by

N&J that it will enter into a written subcontract with A-1 for the scope of work and price set forth in the SOL.

17. In support of their protest, JCI submitted the minutes from one meeting of the Construction Trade Qualifying Board ("CTQB") where the CTQB board denied a contractor's request to perform waterproofing with a painter's license. The minutes indicated that the painter's request was turned down. It is not clear from the minutes as to what the actual circumstances of the request were or the basis of the denial. It is also unclear from the minutes whether the waterproofing work requested was within the scope of work of a painter or performed in the method prescribed for a painter or such that it was outside the usual scope of a painter's work or done in a method not prescribed for by a painter. While the Code authorizes painters to perform waterproofing, it seems to limit the method of application to "brush, rollers or spray." It is unclear the means and method of the waterproofing that was applied for and denied.

18. The CTQB is not authorized to contradict the Code but merely to interpret and apply it. Where the Code allows a painter to do waterproofing, the CTQB is not authorized to prohibit a painter to perform waterproofing in the method permitted by the Code.

19. There no longer exists a separate licensure for waterproofing. In fact, several licenses, such as licenses for painters allow waterproofing to be performed as part of and incident to their job.

20. At the Hearing there was insufficient evidence to show that A1 could not perform its waterproofing work in compliance with the Code.

21. At the Hearing there was insufficient evidence presented that the requirements set forth in number 16 above were not met.

22. There was no evidence presented at the Hearing that A1 could not perform 3.666% of the work of the project by painting and applying waterproofing through the means authorized for a painter to do so in compliance with the Code.

23. At the hearing there was no evidence presented that the County acted in an illegal, fraudulent, dishonest, oppressive, or arbitrary manner in deciding to recommend award of the contract to N&J.

### FINDINGS AND CONCLUSIONS

Based upon the foregoing Findings of Fact, the undersigned Hearing Officer makes the following findings, conclusions and recommendations. JCI has standing to bring this Bid Protest. *Douglas N. Higgins, Inc. v. Florida Keys Aqueduct Authority*, 403 So. 2d 1042 (Fla. 3d DCA 1981). JCI is the second lowest, responsible, responsive bidder.

Where, as here, there is mandatory competitive bidding, the contract must be awarded to the lowest responsible bidder whose bid is responsive. *Caber Systems, Inc. v. Department of General Services*, 530 So. 2d 325 (Fla. 1<sup>st</sup> DCA 1988); *Couch Construction Co. v. FDOT*, 361 So. 2d 184 (Fla. 1<sup>st</sup> DCA 1978); *Intercontinental Properties, Inc. v. State Department of Health and Rehabilitative Services*, 606 So. 2d 380 (Fla. 3d DCA 1992). The purpose of public competitive bidding is to ensure transparency in the bidding process so that each bidder is competing on a level playing field. *Baxter's Asphalt & Concrete, Inc. v. Liberty County*, 406 So. 2d 461 (Fla. 1<sup>st</sup> DCA 1981), quashed 421 So. 2d 505 (Fla. 1982).

The standard of review to be applied when reviewing the decisions of governments in the area of competitive bidding in the State of Florida has been clearly

spelled out by the Florida Supreme Court. According to the Court, “[i]n Florida . . . a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons disagree.” *Liberty County v. Baxter’s Asphalt & Concrete, Inc.*, 421 So.2d 505,507 (Fla. 1982). Finding that there was “no illegality, fraud, oppression or misconduct” on the part of the government entity, the Court found that “it was clearly within the commission’s discretion to award the subject bid...” *Id.*

“[O]nly [a] showing of clear illegality will entitle an aggrieved bidder to judicial relief.... Judicial intervention in an agency decision... is limited to those few occasions where fraud or corruption has influenced the conduct of officials.” *Department of Transportation v. Groves-Watkins Constructors*, 530 So.2d 912, 913-914 (Fla. 1988). Furthermore, the scope of review of a government’s action with regards to competitive bidding is “limited to whether the purpose of competitive bidding has been subverted. In short, the hearing officer’s sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally or dishonestly.” *Id.*

An “agency’s decisions with respect to competitively bid contracts” is given “strong judicial deference.” *Miami-Dade County v. Church & Tower, Inc.*, 715 So.2d 1084, 1089-1090 (Fla. 3d DCA 1998). Furthermore, “so long as such a public agency acts in good faith, even though they may reach a conclusion on facts upon which reasonable men may differ, the courts will not generally interfere with their judgment, even though the decision reached may appear to some persons to be erroneous.” The 3<sup>rd</sup> DCA in *Church and Tower* found that while the bid protest showed substantial disagreement with

the action of the commission and the hearing examiner it fell short of showing arbitrary or capricious action, much less illegality, fraud, oppression or misconduct.”

JCI relies on *Harry Pepper & Associates, Inc. v. City of Cape Coral*, 352 So.2d 1190 (Fla. 2d DCA 1977) for the proposition that “. . . the entire scheme of bidding on public projects is to insure the sanctity of the competitive atmosphere prior to and after the actual letting of the contract. In order to insure this desired competitiveness, a bidder cannot be permitted to change his bid after the bids have been opened, except to cure minor irregularities.” *Id* at 1192. JCI argues that N&J’s bid fails to comply with the CSBE requirements and the award of the contract to N&J by the County deviates from the requirements set forth in the Bid Documents. In *Harry Pepper*, the County discovered that the bid did not conform to the bid document requirements and therefore contacted the winning bidder requesting it to file an amendment to the bid in order to be in compliance and responsive. This deviation was sufficiently material to destroy the competitive character of the bid process and allowed for an unfair advantage or benefit being provided to one bidder.

JCI further relies on the facts set forth in the case of *City of Opa Locka v. Trustees of the Plumbing Industry Promotion Fund*, 193 So. 2d 29 (Fla. 3d DCA 1966). In *City of Opa Locka*, the City advertised for bids on a project. The bids were formally opened, and a contractor’s bid was substantially lower than all others submitted. The contractor submitting the bid did not hold the requisite certificate of competency as required by a Miami-Dade County ordinance. The City of Opa Locka allowed the contractor to obtain the certificate of competency after the bids were formally opened and passed an

ordinance accepting the contractor's bid. The second lowest responsible and responsive bidder sued the City of Opa Locka for injunctive relief.

The trial court determined that the Miami-Dade County ordinance requiring the contractor to hold a certificate of competency in its trade to bid on the project to be constitutional. Since the contractor did not hold the requisite certificate of competency at the time of bid, the trial court determined that the contractor was not qualified to bid the project. The City of Opa Locka challenged the ordinance on constitutional grounds on appeal.

The Third District Court of Appeals affirmed the trial court's ruling. The Court specifically opined:

To allow the city to permit bidders to qualify after their bids are accepted would circumvent the intent of § 10-3(b). It would be an unfair advantage over those who must prequalify. If the city may in its discretion waive this section it would be conducive to favoritism by allowing some bidders to qualify after their bids are accepted while refusing to consider bids of others on the ground that they did not prequalify.

Nothing of the sort even similar to the facts set forth in *Harry Pepper, supra* or *City of Opa Locka, supra*, occurred here. JCI's argument is whether A1 can perform waterproofing within the requirements of the bid documents. There is no separate licensure for waterproofing. Bulletin No. 67-12-10B, Section 18d of the Code clearly states that "a painting contractor is qualified and certified . . . to apply waterproofing, paint and related liquid or viscous products thereon by brush, rollers or spray method."

In contrast to *City of Opa Locka*, in this case, the County has determined that A1 is properly licensed and certified and was so at the time of the bid to do the work it has

set forth it would complete in the SOI. No accommodations have been made or given to A1 in order for it to be able to complete its job. No accommodations were given to N&J in order for its bid to be in compliance and responsive to the bid documents as occurred in *Harry Pepper*. Additionally, it is reasonable to conclude that based upon the facts presented and the Code as it currently exists A1 is in fact licensed and certified to perform the job it proposes to complete in the SOI and that N&J is in compliance, is responsive and meets the CSBE requirements set forth in the Bid Documents.

Furthermore, there is no evidence that the County's actions in recommending the award of the contract to N&J were illegal, fraudulent, dishonest, oppressive, or arbitrary. The County's decision was based on an honest exercise of its discretion without any illegality, fraud, dishonesty or arbitrariness. The County's award of the bid to N&J was based on it being the lowest, responsive and responsible bidder.

For these reasons, I recommend that the bid protest filed by JCI be denied and that the award be made to N&J, as the lowest, responsive and responsible bidder.

Dated this 6<sup>th</sup> day of July, 2008.

---

LOREE SCHWARTZ FEILER  
Hearing Examiner

cc: Daniel Frastaj, Asst. Co. Atty  
Michael Peterson, Esq.  
Alan Geffin, Esq.