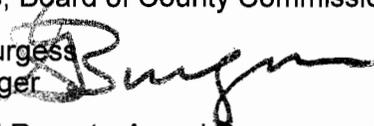


Memorandum



Date: October 6, 2009

To: Honorable Chairman Dennis C. Moss
and Members, Board of County Commissioners

From: George M. Burgess
County Manager 

Subject: Supplemental Report - Award Recommendation for Non-exclusive
Telecommunications & Network Services Management Agreement at Miami
International Airport, RFP No. MDAD-08-06

Supplement to
Agenda Item No. 8A(1)a

This supplemental report to the award recommendation to Norstan Communications, Inc. d/b/a Black Box Network Services ("Black Box"), for the Non-exclusive Telecommunications & Network Services Management Agreement at Miami International Airport ("MIA"), RFP No. MDAD-08-06, provides the Board with a synopsis of the hearing examiner's Findings and Recommendations associated with the protest filed by Air Transport IT Services, Inc. ("Air-IT") and denied by the hearing examiner, and to present a revised five (5) year project budget.

PROTEST

The hearing examiner issued his Findings and Recommendations (copy attached), and affirmed the recommendation of the County Manager authorizing the County's execution of an agreement with Black Box.

On July 1, 2009, a bid protest hearing was held. Air-IT protested that although all three (3) firms which responded to Request for Proposals ("RFP") MDAD-08-06 (Black Box, Shared Technologies and Air-IT) were deemed responsive by the County Attorney's Office, the evaluation/selection committee deemed Shared Technologies and Air-IT non responsible because they did not meet the minimum qualifications. The RFP states that proposers must be both responsive and responsible to be eligible to continue in the process for award. Since Black Box was the only responsive and responsible proposer, it was recommended for award. Air-IT stated that Black Box received preferential treatment from the County and therefore the County's recommendation for award was arbitrary, capricious, and unfair. Air-IT also stated that the RFP was flawed because the minimum qualifications were (i) set too high, (ii) arbitrary, capricious, vague, and anti-competitive, and (iii) only an entity with prior knowledge of the Miami-Dade Aviation Department ("MDAD") telecommunications and network systems could qualify. Air-IT alleged Black Box had an unfair advantage because of its acquisition of NextiraOne, LLC in 2006,² given the RFP minimum qualifications were as stringent as those contained in the 2004 RFP procurement for the same services, which were unduly restrictive, and arbitrary and capricious. The hearing examiner found (a) the RFP language was neither arbitrary nor capricious, (b) the minimum qualifications did not favor Black Box, (c) MDAD could not verify the information provided by Air-IT as proof of its requisite experience, and (d) the experience of Air-IT's sister corporation was justifiably not considered by MDAD in its determination of Air-IT's responsibility. More importantly, the hearing examiner "[did] not accept the position advanced by Air-IT that the County could not and should not have used the experience of the various Black Box entities [(i.e., NextiraOne)] as part of its evaluation process and therefore Black Box should have been deemed a non-responsible bidder."

In addition, Air-IT contested:

² NextiraOne, LLC has been the MDAD's telecommunications and voice/data network manager since the County purchased the systems in 2002. Black Box acquired NextiraOne on April 30, 2006.

1. The Transition Plan to be submitted with the RFP created an unfair advantage for the incumbent, Black Box.

A Transition Plan detailing a proposer's implementation phases is critical to the continuity of these vital services at MIA.³ In addition, MDAD had no confidence in Air-IT's ability to perform, given Air-IT's documented solicitation of Black Box employees providing the subject telecommunications and network services at MIA.

Hearing Examiner's Finding: Given the RFP process could produce a new service provider, change was a contemplated by-product of the solicitation, and the RFP language neither created an unfair competitive advantage for the incumbent, nor a disadvantage to any other Proposer.

2. The County determined that the financial information provided by Air-IT did not meet the minimum qualifications because it was not information from the "Proposer", but rather from its parent corporation.

One of the reasons Air-IT was deemed non-responsible, was its failure to provide the required three (3) years of either federal tax returns or audited financials. Air-IT was provided an opportunity to cure this matter, and failed to provide the requested information. MDAD should not have to accept the financials from Fraport AG for this RFP, because MDAD previously accepted a bond from Air-IT's parent company through an invitation to bid ("ITB") solicitation process for another contract (AOIS). The AOIS ITB process did not require financial documents. Furthermore, it should be noted that under the AOIS ITB process, Air-IT executed the bond, not Fraport (parent company). Given the existing economically volatile corporate environment, the prudent action on the part of MDAD was to request the actual financials from the proposer intending to contract with the County.

Hearing Examiner's Finding: The RFP only requires that the Proposer provide evidence of its financial resources, and the County's determination that Air-IT was non-responsible based upon a failure to meet the Financial Responsibility minimum qualifications was arbitrary. However, the evidence presented indicated there were other independent bases for MDAD's determination that Air-IT was a non-responsible proposer.

3. The determination that Air-IT was non-responsible.

MDAD provided Air-IT with an opportunity to cure both its financial and technical expertise minimum qualification submission deficiencies. With respect to technical experience, Air-IT stated its intent to partner and work with a sister company, GEDAS AG, in order to satisfy the minimum qualifications. No technical information was submitted by Air-IT in either its initial submission or after an additional request for information, to show or verify the type, nature, or length of GEDAS' experience (i.e., actual contracts in North America required by the minimum qualifications). In addition, MDAD contacted all supplied North American references, including one in Puerto Rico, and every reference stated the project(s) worked on by Air-IT was predominantly applications/software development, and not telecommunications related. There was no corroboration that Air-IT performed the type of work required under the RFP.

Hearing Examiner's Finding: Absent a showing that MDAD's determination that Air-IT was a non responsible bidder was arbitrary or capricious, or that it was the product of fraud, dishonesty, illegality, oppression or misconduct, the determination by MDAD must stand.

³ Under the Scope of Services, the successful proposer shall "furnish all labor, new materials, tools, supplies, and other items required for the design, installation, maintenance, repair, and management and operational support services for: (i) all voice and data network infrastructure for MDAD, its users and tenants; and (ii) the management of shared airport tenant services ("SATS") for the County to tenants and users at the Airport...."

4. Air-It contended that it was treated unfairly during the bid process, and that Black Box was a non-responsible bidder, and therefore not eligible to receive the additional award of this contract.

On April 20, 2006, prior to Black Box's acquisition of NextiraOne, NextiraOne pled guilty to one (1) count of wire fraud in South Dakota federal court, arising out of its participation in the E-Rate program. Pursuant to Florida Statutes, Black Box timely disclosed this guilty plea to the State of Florida Department of Management Services, and upon request provided additional information. No further action was taken by the State of Florida. Air-IT contended Black Box failed to submit a Public Entity Crimes Affidavit and subsequently submitted a deficient affidavit, therefore Black Box was both non-responsive and non-responsible and not subject to award. MDAD investigated the issues related to Black Box's affidavit and the requirements under section 287.133 of Florida Statutes, in addition to checking both the state and federal public records, and determined that (i) Black Box properly submitted its affidavit with its proposal, and (ii) neither NextiraOne nor Black Box were placed on a convicted vendors list.

Hearing Examiner's Findings: The County's actions in determining Black Box satisfied the necessary requirements to fully and accurately complete the Public Entity Crimes Affidavit did not create a process unfair to either Air-IT or other bidders. In this regard, all the proposers were treated equally and fairly.

5. MDAD did not request the Proposal Guarantee Deposit (the "Negotiation Bond") prior to negotiations, which created an unfair advantage for Black Box.

The intent of the Negotiation Bond is to protect MDAD by assuring that a firm recommended for negotiations, executes the agreement, and is committed to a timely transitional process. Given this solicitation had only one (1) responsive, responsible proposer. MDAD intended to request the bond prior to the negotiations, but did not. MDAD's inaction did not create a competitive advantage for the incumbent, Black Box. Furthermore, since the incumbent was the recommended firm, MDAD was operating under an existing contract, and was not facing any risks associated with transitional delays. Black Box timely posted the Negotiations Bond upon notification by MDAD.

Hearing Examiner's Finding: Both elements of the criteria weigh in favor of MDAD's discretion to waive the requirement, and the post-negotiation bond requirement was not anti-competitive, since it was only imposed after a bidder was selected for negotiation.

PROJECT BUDGET

Although the item was withdrawn during the Airport and Seaport Committee ("ASC") meeting of June 11, 2009 due to the bid protest action, a request by a committee member instructed MDAD staff to seek to improve on the original rates with Black Box. Black Box has agreed to reduce the proposed multiplier rate from 2.13, to 1.96, resulting in a cost reduction of approximately \$3 million dollars over the five (5) year period of the contract. However, as noted in the original item, the project budget remains at \$50 million overall in order to prudently support new construction and tenants, mitigate unforeseen circumstances, and have the required funding to cover the additional two (2) year extension should the County exercise this option.


Assistant County Manager



Harvey Ruvin
CLERK OF THE CIRCUIT AND COUNTY COURTS
Miami-Dade County, Florida

CLERK OF THE BOARD OF COUNTY COMMISSIONERS
STEPHEN P. CLARK MIAMI-DADE GOVERNMENT CENTER
SUITE 17-202

111 N.W. 1st Street
Miami, FL 33128-1983
Telephone: (305) 375-5126
Fax: (305) 375-2484

July 10, 2009

Miguel De Grandy, P.A.
800 Douglas Road, Suite 850
Coral Gables, FL 33134

Re: Bid Protest – RFP No. MDAD-08-06
Non-exclusive Telecommunications & Network Services Management Agreement

Dear Mr. De Grandy:

Pursuant to Section 2-8.4 of the Code and Implementing Order 3-21, forwarded for your information is a copy of the Findings and Recommendation filed by the hearing examiner in connection with the foregoing bid protest hearing which was held on July 1, 2009.

Should you have any questions regarding this matter, please do not hesitate to contact this office.

Sincerely,
HARVEY RUVIN, Clerk
Circuit and County Courts

By *Diane Collins*
Diane Collins, Acting Division Chief
Clerk of the Board Division

DC/fcd
Attachments

cc: Honorable Carlos Alvarez (via email)
George Burgess, County Manager (via email)
Ysela Llor, Assistant County Manager (via email)
Hugo Benitez, Assistant County Attorney (via email)
David Hope, Assistant County Attorney (via email)
Jose Abreu, Director, MDAD (via email)
Ana Sotorrio, Associate Aviation Director, MDAD (via email)
Lenora Allen-Johnson, MDAD (via email)
Tony Quintero, MDAD (via email)
Marie Clark-Vincent, MDAD (via email)
Air Transport IT Services, Inc. (via US Mail)
Norstand Comm./Black Box Network Services (via US mail)
Shared Technologies, Inc. (via US mail)

CLERK OF THE BOARD

DOUTHIT LAW, LLC
5955 NE 4th Court
Miami, FL 33137

2009 JUL 10 AM 11:04

CLERK, CIRCUIT & COUNTY COURTS
DADE COUNTY, FLA.
#1

(305) 893-0110 (305) 893-7499 Fax

July 9, 2009

TO: Clerk of the Board
FROM: Marc Anthony Douthit, Esq.
RE: Bid Protest—Project No. MDAD-08-06
Non-exclusive Telecommunications and Network Services Management Agreement

MEMORANDUM OPINION

This matter came before this Hearing Examiner on July 1, 2009 on the Bid Protest of Air Transport IT Services, Inc. (Air-IT), protesting Miami-Dade County's Recommendation of Award of Project Number MDAD-08-06, Non-exclusive Telecommunications and Network Services Management Agreement (Contract) to Norstan Communications d/b/a Black Box Network Services (Black Box). Air-IT was represented by Miguel DeGrandy, Esq., the Office of the County Attorney was represented by David Stephen Hope, Esq. and Black Box was represented by Jose Villalobos, Esq.

Prior to the Hearing, Black Box moved to intervene in the proceedings, arguing that as the recommended bidder they had a vested interest in the outcome of these proceedings. In reviewing Air-IT's Written Intent to Protest, the relief it seeks is that the Contract in question be rejected and the recommendation of award to Black Box be

thrown out and a new solicitation issued. Clearly, Black Box has an interest in the outcome of this matter and as such, its intervention in this matter was allowed.¹

PROCEDURAL BACKGROUND

Miami-Dade County, through the Miami Dade Aviation Department (County or MDAD) issued a Request for Proposal for project MDAD-08-06 on May 2, 2008 (RFP). The RFP sought responses from vendors to perform telecommunications and network management services at Miami International Airport, the general aviation airports and other Miami-Dade Aviation Department facilities which may be added in the future (collectively "the Airport"). Air-IT, Black Box and a third entity, Shared Technologies, Inc. responded to the RFP.

Prior to the bid submission deadline, Air-IT, through counsel submitted to MDAD in accordance with Implementing Order, IO 3-21, certain objections to the RFP as written. This letter dated June 4, 2008 was written with the specific intention to allow Air-IT to preserve its rights in the event it later filed a Bid Protest directed to the issues raised in the letter. At the hearing the parties agreed that the issues raised in the Pre-Bid letter of objection, from a procedural standpoint at least, were properly preserved by Air-IT and those issues were submitted and argued before this Hearing Examiner at the Hearing.

¹At the time of the hearing, both the Protestor and the County Attorney indicated that they did not have any objection to the intervention of Air-IT in these proceedings.

6

Air-IT also raised several other issues in its Written Intent to Protest which can be generally divided into two categories. First, are those issues raised in the Pre-Bid Objection letter dated June 4, 2008. The remaining issues relate to the "administration" of the bid process. This second category of issues go to the heart of Air-IT's assertion that the recommended bidder, Black Box was, in both the structure and language of the RFP and in the County's treatment during the bid process, given preferential treatment. This in turn skewed the bid process in favor of Black Box.²

By Memorandum dated August 5, 2008, all of the bidders were found to be "responsive" to the RFP. However, the proposals of Shared Technologies and Air-IT were found by the Evaluation Committee to be non-responsive due to their failings in meeting the Minimum Qualifications of the RFP. Subsequently, Black Box was notified by the County that it was the highest ranked responsive and responsible bidder and a recommendation was made to the County Manager to award the contract to Black Box. The County Manager in turn, recommended to the Board of County Commissioners that the contract be awarded to Black Box. It is from that recommendation of award that Air-IT filed its Written Notice of Intent to Protest.

IMPACT OF MDAD-04-01

Air-IT has asserted that the current RFP, which is the subject of this Protest is essentially identical to Request for Proposals, MDAD-04-01 (2004 RFP), issued for the

² Air-IT also makes a general objection to the RFP that the language contained in the RFP was so vague and unrelated to the project at hand as to render it arbitrary and capricious. Without going into to detail as to each such issue, I do not find that the language of the RFP is unusually vague and therefore not arbitrary

same services in 2004. Without going into a detailed comparison of the similarities of the terms of the two RFP's, the impact of the terms and conditions of the 2004 RFP on this process is limited. Air-IT contends that the County recognized the flaws in the 2004 RFP when none of the bidders were able to meet the Minimum Qualification Requirements. As a result, in 2008, using those same criteria, the only bidder who could possibly meet the Minimum Qualification Requirements in this RFP would be the incumbent, which in this case would be Black Box. Black could accomplish this by virtue of their purchase of the recommended bidder in the 2004 RFP, Nextira One.

Pedro Garcia, the Chair of Telecommunications for the Aviation Department, testified that to his recollection, the Minimum Qualification Requirements in the 2004 RFP were changed to lessen the number of years of prior experience that was required to meet the Minimum Qualification Requirements of the 2004 RFP. Air-IT points out that the 2004 Evaluation Committee expressed concern that none of the 2004 bidders met the Minimum Qualification Requirements of 2004 RFP. As such, the Minimum Qualification Requirements were adjusted so that some or all of the 2004 bidders to be able to meet them.

In 2008, using the same criteria, only Black Box met the Minimum Qualification Requirements and Air-IT suggests that not only did these criteria eliminate many potential bidders, but also favored Black Box as the incumbent. While it is impossible to tell whether the Minimum Qualification Requirements prevented any potential bidders

or capricious. Any questions which a potential Proposer may have could have been addressed prior to the bid submission date and indeed Air-IT took advantage of this opportunity.

from responding to the 2008 RFP it cannot be said that using these same minimum qualifications somehow favored Black Box. The mere passage of time is sufficient to change the dynamic in such a way that makes qualifications that may have indeed been unreasonable and unreachable in 2004, perfectly reasonable and reflective of the current market conditions in 2008. I have no evidence before me, nor am I aware of any legal authority that requires the County to treat each of these RFP's identically, particularly four years later.

Related to this issue is the question of whether the incumbent, Black Box somehow benefited by the language of the RFP, particularly with respect to the inclusion of a Transition Plan as a requirement of the RFP response. Air-IT was careful to point out in its Written Intent to Protest that it was not challenging the relative weight being given to the Transition Plan requirement, but rather, its issue is with the perceived advantage gained by Black Box as the incumbent.

Air-IT points out that in attempting to comply with the Transition Plan requirement, it contacted certain key members of the existing provider's staff to determine if they would, if Air-IT was the recommended bidder for the RFP, be willing to work with the Air-IT team. In response, Black Box sent Air-IT a letter demanding that Air-IT refrain from any contact with its employees. Air-IT suggests that Black Box was and is the only bidder who can provide a "seamless" transition, since it is currently performing these services at the Airport.

In reading the plain language of the RFP as it relates to the Transition Plan, I find no language which would tend to show a bias towards Black Box or against Air-IT. While Air-IT has interpreted the Transition Plan requirement as the need to create a "seamless" transition, there is nothing in the language of the RFP that imposes such a requirement.

I do not think it reasonable to expect that any member of the evaluation committee who has had experience with Black Box as the incumbent, could completely overlook and ignore that information and experience in their evaluation. However, Black Box's incumbency can work in both directions. The experiences can be positive and negative. While Air-IT believes that incumbency will assist Black Box, it is entirely possible that the position of being the incumbent could have had a negative impact on the Black Box bid.

Air-IT suggests as much in its May 23, 2008 letter from its counsel to Black Box, implying that although the County has the option to extend the existing contract, it has chosen to put the contract back out for bid, something not routinely done when the County is satisfied with the services of the incumbent. Certainly, there is nothing in the language of the RFP which tends to give any indication either way.

The language simply calls for a Plan. Given, that at the end of the day, the RFP process could result in a new provider, change was a contemplated by-product of the process. Air-IT could create a Plan of its own choosing detailing how it would handle the changed circumstances which would exist from Air-IT replacing Black Box at the

Airport. The language in the RFP related to the Transition Plan does not impose a “seamless” requirement, but merely a statement as to how Air-IT was going to manage that change. I do not find that this language creates an unfair competitive advantage for the incumbent, nor does it create a disadvantage to any other Proposer.

FINANCIAL VIABILITY OF AIR-IT

One of the basis’ for the County declaring Air-IT a non-responsible bidder was Air-IT’s failure to provide Tax Returns and audited Financial Statements for Air-IT. Air-IT provided financial information from its parent company FRAPORT. The County determined that the information provided by Air-IT did not meet the minimum qualifications because it was not information from the “Proposer”, but rather from its parent corporation.

Air-IT contrasts this determination by the County against the determination by the County that Black Box could utilize the prior experience of its affiliated corporations to bolster its “resume” showing that it provided the services sought under the RFP in other places. The testimony of Gregory Nicholson, Vice President and General Counsel of Nextira One d/b/a Black Box Network Services indicated that Norstan Communications, Inc., the bidder under for the RFP has a very complex corporate structure and there are many entities that do business as Black Box Network Services. He explained that Black Box Corporation is a holding company and it has many subsidiaries many of which using the Black Box name in one form or another.

When questioned about the experience of "Black Box" having performed like services for other facilities and in other locations, Mr. Nicholson conceded that he was unaware of which Black Box Network Services actually performed the services for these facilities. Further, Pete Betancourt, Aviation Chief Procurement Contracting Officer for MDAD, testified that in his inquiry regarding the experience of Black Box, he did not seek to make any distinction between the various Black Box entities and considered the experience of each as meeting the experience qualifications.

The County counters the Air-IT position by stating that Black Box and Nextira One, the current contractor is one in the same, since Black Box purchased Nextira One in 2006. Both Pedro Garcia and Pete Betancourt of MDAD considered the work and experience of Nextira One as applicable to Black Box, since the same individuals who were performing the work at the airport for Nextira One are now performing the work for Black Box.

The language of the Financial Viability Section of the RFP provides in relevant part: "The Proposer must provide evidence to indicate that the Proposer has financial resources..." In its June 27, 2008 letter, MDAD requested financial information from Air-IT. The information that Air-IT had provided in its bid proposal related to its parent corporation, FRAPORT which they assert "stands in the shoes" of Air-IT. Air-IT's reliance on this arrangement being satisfactory to the County was partly based on the fact that Air-IT is currently under contract with the Airport to provide Airport Operation Information Systems (AOIS) services at the Airport. In response to the Request for

Proposals that was issued for that project, Air-IT provided the financial information of FRAPORT, its parent company and that was acceptable under those circumstances.

I do not mean to suggest or imply that the County is under any obligation to administer the RFP process for every contract in an identical fashion. Indeed, there may be perfectly valid and legitimate reasons for the acceptance of this type of financial information under the AOIS RFP that are not applicable here. The County certainly has the right and ability to make these independent determinations and it is not my place to replace my judgment for the judgment of the County. However, the conduct of the County under the AOIS contract does show recognition of the complex and intertwined business structures of many of today's large, multi-national corporations. Air-IT is a part of a larger body of inter-related companies. Depending on corporate structure of these types of companies, the parent corporation may be the source of all of its financial strength. This structure is consistent with the language of the RFP in that a fair reading of the language only requires that the Proposer provide "evidence" of the Proposer's financial resources. There is nothing in this language that points a Proposer to any particular type of evidence and while the County may value and give more weight to certain types of evidence, the determination that Air-IT was non-responsible based upon its failure to meet the minimum qualifications for Financial Responsibility was arbitrary and in this regard Air-IT's point is well taken.

The County's analysis with respect to Black Box's experience in meeting the minimum qualifications regarding Black Box's prior experience at other facilities further

highlights this point. Black Box is also a part of a large conglomerate of corporations. Mr. Nicholson testified that while he was unsure of the exact number, there may well be over fifty affiliated companies all doing business as Black Box Network Services. While no one could testify with any absolute certainty, it is clear that Black Box was permitted to utilize the experience of many of these affiliates to bolster its bid proposal.

I have been unable to identify a difference between the use of affiliated companies and for this purpose and the use by Air-IT, of its parent company for the purpose of Financial Viability. The distinction might be that one usage is limited to the financial qualifications and the other is related to the ability to perform the work under the RFP. However, the language of the two sections of the RFP which both specifically refer to the Proposer's information, do not warrant a completely different outcome in this regard.

That being said, I do not accept the position advanced by Air-IT that the County could not and should not have used the experience of the various Black Box entities as part of its evaluation process of Black Box's bid and therefore Black Box should have been deemed a non-responsible bidder. As with the submission of Air-IT's financial information, the County is free to give appropriate weight to how a Proposer seeks to meet the Minimum Qualification Requirements. The County's discretion in this regard is not at issue however, it is the apparent unequal application of these standards that have given legitimacy to Air-IT's challenge in this regard. The County rightfully made a

determination with respect to Black Box and a fair interpretation of the RFP should have compelled a similar result with respect to Air-IT.

If Financial Viability was the sole basis for the determination that Air-IT was non-responsible, then no further analysis of this Bid Protest would be required. However, the evidence presented indicates that there were other independent bases for MDAD's determination that Air-IT was a non-responsible bidder.

DETERMINATION OF AIR-IT'S NON-RESPONSIBILITY

Responsibility is a question of the evaluation of a bidder to perform a contract and invest public authorities with discretionary power to pass upon the honesty and integrity of the bidder necessary to a faithful performance of the contract - upon his skill and business judgment, his experience and his facilities for carrying out the contract, his previous conduct under other contracts, and the quality of his previous work"

Engineering Contractors Association of South Florida v. Broward County, 789 So.2d 445 (Fla. 4th DCA 2001). A RFP is used when the public authority is incapable of completely defining the scope of work required, when the service may be provided in several different ways, when the qualifications and quality of service are considered the primary factors instead of price, or when responses contain varying levels of service which may require subsequent negotiation and specificity. *Sys. Dev. Corp. v. Dep't of Health & Rehabilitative Servs.*, 423 So.2d 433, 434 (Fla. 1st DCA 1982). The complexity of the scope of work and the need to utilize the RFP process in this instance is not in dispute.

While the September 19, 2008 letter to Air-IT from MDAD informing Air-IT that they were found to be a non-responsible bidder does not go into detail, MDAD asserted at the hearing that there were several reasons for this determination. Primary among them was the lack of requisite experience of Air-IT in performing the scope of services.

According to the testimony of Pete Betancourt, MDAD could not verify the information listed by Air-IT as proof of its requisite experience. Significantly, he was unable to find any corroboration for Air-IT's having performed similar work to what is required under this RFP. The prior experience he was able to verify did not indicate that Air-IT had the requisite telecommunications experience that was necessary and required. Based upon this, both he and Pedro Garcia testified that the Evaluation Committee determined that Air-IT was not a responsible bidder.

There was some mention of the experience of Air-IT's sister corporation, Gedas, A.G. and the experience they had in providing the services required under the RFP. These experiences may have bolstered the experience and capabilities of Air-IT. However, this experience was not included by Air-IT in its Bid and was justifiably not considered by MDAD in its determination of Air-IT's responsibility.

It is not my place to insert my judgment in the place of MDAD. Absent a showing that MDAD's determination that Air-IT was a non responsible bidder was arbitrary or capricious or that it was the product of fraud, dishonesty, illegality, oppression or misconduct, the determination by MDAD must stand. *Liberty County v.*

Baxter's Asphalt & Concrete, Inc., 421 So.2d 505 (Fla. 1982). There has been no evidence presented which would lead to this conclusion.

PUBLIC ENTITY CRIMES AFFIDAVIT

In its Written Intent to Protest, Air-IT's ultimate request for relief is to have the recommendation to award the contract to Black Box thrown out and to have the project re-advertised for bid. In order to justify this position, Air-IT has asserted not only that it has been unfairly treated during the bid process, but also that Black Box is not a responsible bidder and therefore not eligible to receive the award of this contract.

One of the justifications that Air-IT uses for its assertion that Black Box is not a responsible bidder centers around the County's handling and treatment of Black Box's Public Entity Crimes Affidavit. This issue, according to Air-IT is symbolic of the preferential and disparate treatment received by Black Box as the incumbent during the entire Bid Process.

Black Box is considered the incumbent by virtue of its purchase of Nextira One, who was the recommended bidder from the 2004 RFP and is currently performing the work at the airport. In 2006, Nextira One pled guilty to a single count of Wire Fraud in Federal Court. As a result, Black Box was required to disclose certain information on its Public Entity Crimes Affidavit as part of its Bid submission. Air-IT contends that the affidavit of Black Box was deficient and should have caused Black Box to be deemed non-responsive to the RFP.

17

Pete Betancourt testified that he investigated the issues related to the Public Entity Crimes Affidavit and the corresponding requirements of Florida Statute, Section 287.133. The County further performed a check of the Public Records and determined that Nextira One was not on any Convicted Vendors List and any prior period of debarment had expired. Pursuant to the language of the RFP, this is all that is required.

I do not find that the County's actions in either determining that Black Box had either satisfied the requirements necessary to fully and accurately complete the Public Entity Crimes Affidavit created a process which was somehow unfair to Air-IT or any other bidder.

MDAD requested additional information from Black Box for the purpose of clarification and met with Black Box on the issue. This is no different than the County requesting the additional written information from Air-IT regarding the Financial Viability information Air-IT provided in its Bid Proposal. Each Proposer had the opportunity to respond to MDAD's inquiry and satisfy their concerns. In this regard, all the bidders have been treated equally and fairly.

PROPOSAL GUARANTEE DEPOSIT

The requirement of the Proposal Guarantee Deposit raises an interesting point. It is a requirement imposed upon a bidder after determinations of responsiveness and responsibility have already been made. The Office of the County Attorney had already made a determination that Black Box is a responsive bidder. Further, a determination by the RFP Evaluation Committee had already been made that Black Box was a responsible

bidder. If the Proposal Guarantee Deposit is an ongoing "responsibility" requirement, then the question becomes is this a material provision of the RFP that cannot be waived either intentionally or by mere inaction as appears to be the case here.

Pete Betancourt testified that it was his belief that Black Box was required to post the Proposal Guarantee Deposit within seven days of being notified by the County to do so, which they did. He provided no substantive explanation for why the County waited until after negotiations to make this request except to say it appeared to be an oversight.

The County has wide discretion in exercising its judgment over the contracting decisions. However, as a public body the County is not entitled to omit or alter material provisions required by the RFP because in doing so the public body fails to "inspire public confidence in the fairness of the [RFP] process." *State, Dep't of Lottery v. Gtech Corp.*, 816 So.2d 648 (Fla. 1st DCA 2001). Although a bid containing a material variance is unacceptable, *Glatstein v. City of Miami*, 399 So.2d 1005 (Fla. 3d DCA), rev. denied, 407 So.2d 1102 (Fla.1981), not every deviation from the invitation is material.

The question is whether or not the Proposal Guarantee Deposit provision of the RFP is a "material" provision. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition. (*Robinson Electrical Co., Inc. v. Dade Co.*, 417 So.2d 1032, 1034 (Fla. 3d DCA 1982). See also Rule 13A-1.02(9), Fla.Admin.Code, which reserves to the agency the right to waive any minor irregularities in an otherwise valid bid, a minor irregularity being a variation which "does not affect the price of the bid, or give the bidder an advantage or benefit not

enjoyed by other bidders or does not adversely impact the interests of the agency." *Tropubest Foods, Inc. v. State, Dept. of General Services*, 493 So.2d 50 (Fla. 1st DCA 1986). A material provision has been found to mean a provision which gives one bidder a substantial advantage over another. *Robinson Electric, Co. v. Metropolitan Dade County*, 417 So.2d 1032 (Fla. 3rd DCA 1982). In determining whether a specific noncompliance constitutes a substantial and hence nonwaivable irregularity, the courts have applied two criteria--first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition. *Robinson* at 1033.

Here both elements of the two part criteria weigh in favor of this requirement being one that MDAD would have the discretion to waive. MDAD was apparently satisfied that a valid contract would be entered into since it engaged in negotiations with Black Box and expressed no concern over the lack of a Proposal Guaranty Bond. More importantly in this instance, this deviation was regarding a requirement that was only imposed after the "notification" that Black Box was invited to negotiate. The competitive bidding process was not affected to the extent that it was compromised in any way. *Robinson* which involved a question of a bidder's failing to submit a bid bond, but rather

submitted a cashier's check cites *Bryan Construction, Co. v. Board of Trustees*, 31 N.J.

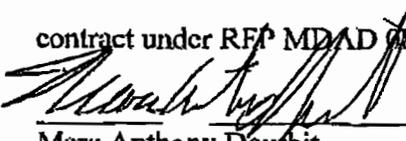
Super. 200, 106 A.2d 303 (App.Div. 1954), which states:

"If it can be said any irregularity here existed, it is patent that competitive bidding was not in any wise affected. It prevented no one from bidding, and all those that did bid were on equal footing, having the same opportunities as the defendant to read and utilize the instructions."

Here the same is true. This post negotiation requirement was not anti-competitive, since it was only imposed after a bidder had already been singled out for negotiation. Whether by intent or by accident, it cannot be said that the County's interpretation of when the Proposal Guarantee Deposit was due, right or wrong somehow so taints the bid process as to warrant granting the relief sought by Air-IT.

CONCLUSION

The Protestor has a high burden to carry in protesting a recommendation under a RFP. The County has wide latitude in the administration of the Bid Process and in its determinations of responsibility. The depth and breadth of that latitude is certainly being tested in this case. However, I cannot find that as a whole, the RFP, the administration of the bid process or the conclusions reached by MDAID are either arbitrary and capricious or the product of dishonesty, fraud, illegality, oppression or misconduct. I am constrained to the boundaries of those criteria in reaching my conclusions and as such find and recommend that the Recommendation of the County Manager to award the contract under RFP MDAID 06-06 be AFFIRMED and the protest of Air-IT be DENIED.


Marc Anthony Douthit
Hearing Examiner