

Memorandum



Date: March 2, 2010

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

From: George M. Burgess
County Manager 

Subject: Supplement to Recommendation for Approval to Award Contract No.
RFP683: Gasoline and Diesel Fuel

Supplement to
Agenda Item No.
801J

This supplement is presented to advise the Board that BV Oil Company, the second ranked proposer, filed a bid protest on December 30, 2009 regarding the subject contract award. In accordance with the bid protest procedures, a hearing examiner was appointed and a hearing was scheduled for January 19, 2010.

The solicitation was advertised on May 11, 2009. Eight proposals were received on July 2, 2009. The proposals were evaluated and the County proceeded to negotiate with the highest ranked proposer, Macmillan Oil Company of Florida, Inc. (Macmillan). Upon completion of negotiations, contract award was recommended to that firm.

BV Oil Company protested the award recommendation based on the following:

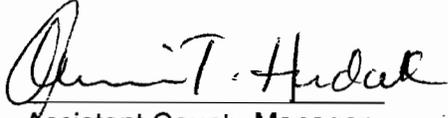
1. The subcontractor listed by Macmillan, Cason Investments, Inc., a Small Business Enterprise (SBE) firm, does not own tank wagons and would be subcontracting their work out to other fuel haulers that are not certified SBE firms.
2. Cason Investments, Inc. does not make deliveries, but uses an outside source and cannot be held responsible for deliveries.
3. A claim that Macmillan does not have the fuel storage tank capacity stipulated in its proposal and that the fuel storage tanks were not in compliance with local and state regulatory agencies.

The solicitation had an SBE selection factor that, consistent with the Code, is applied only to proposers. None of the proposers are SBE firms, and as such, were not eligible for the SBE selection factor. The proposal submitted by Macmillan stipulates that Cason Investments, Inc. would only be considered to make fuel deliveries if it had the necessary equipment, qualifications, and personnel. Furthermore, subsequent to the bid protest, County staff conducted a site visit of Macmillan's facility and found sufficient fuel storage tank capacity as stipulated in its proposal. Macmillan provided documentation to the County, verifying that its facility is in compliance with local and state regulations.

The County conducted a responsibility review prior to the award of the contract. The County's selection of Macmillan was not based on its use of Cason Investments, Inc. or any subcontractors. Macmillan has the ability to provide the services under the contract as demonstrated by its proposal, review of D&B financial reports and the PACER (Public Access to Court Electronic Records) legal action records, discussions during negotiations, and performance checks conducted by the County.

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and Members, Board of County Commissioners
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Upon receipt of the County's information in opposition to the claims in the bid protest (copy attached), BV Oil Company elected to withdraw its protest on January 14, 2010. The hearing examiner accepted the withdrawal as settlement of the bid protest. The recommendation to award to Macmillan remains unchanged.


Assistant County Manager

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

In re: Gasoline and Diesel
Fuel for Miami-Dade County
RFP 683
Bid Protest of BV Oil Company

**MIAMI-DADE COUNTY'S MEMORANDUM IN OPPOSITION TO
BV OIL COMPANY'S BID PROTEST**

BV Oil Company's ("BV") skeletal bid protest to Request for Proposals No. 683, Gasoline and Diesel Fuel ("RFP") simply has no meat on its bones. The grounds identified for protest, even if true, are insufficient to disturb the County Manager's recommendation to award the RFP to Macmillan Oil Company of Florida, Inc. ("Macmillan"). Under the County Code and Florida law, a bid protest may only be sustained if the County Manager acted "fraudulently, arbitrarily, illegally, or dishonestly" in recommending a vendor to the County Commission for award. *Dep't of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 914 (Fla. 1988) ("the hearing officer's sole responsibility [in reviewing a protest] is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly"). Here, there are no allegations that implicate any of these standards.

Instead, BV's brief protest only raises two issues: (1) whether a proposed subcontractor, Cason Investments, Inc. ("Cason"), is responsible to provide fuel hauling services; and (2) whether Macmillan has the fuel storage capacity that it has bid. Neither of these arguments have merit because: (1) Cason is not the entity recommended for award and will not, if that recommendation is accepted, enter into a contract with the County; and (2) County staff has confirmed that Macmillan has sufficient fuel storage capacity to meet its contractual obligations. As such, neither grounds of protest raised by BV meet the bid protest standard and demonstrate

that the award recommendation is the result of an improper act. Instead, these allegations, when stated in their best light, are an invitation for the hearing examiner to do what he can not, replace the County Manager's discretion on who to recommend for a contract with his own.

Moreover, BV has not submitted a single piece of evidence to support its protest as required by the Code of Miami-Dade County. Section 2-8.4 of the Code requires, in pertinent part:

The protester shall then file all pertinent documents and supporting evidence with the Clerk of the Board and mail copies to all participants in the competitive process and to the County Attorney within three (3) working days after the filing of a written intent to protest. No bid protest shall be accepted unless it complies with the requirements of this Section.

As such, BV's protest must be denied.

BACKGROUND

On May 11, 2009 Miami-Dade County released RFP 683 Gasoline and Diesel Fuel ("RFP") to establish a contract to purchase fuel for various County departments and have that fuel hauled to various locations around the County. See Recommendation for Approval to Award Contract No. RFP683: Gasoline and Diesel Fuel dated December 24, 2009 ("Recommendation") (attached hereto as Exhibit A). The RFP requested contract pricing on a firm, fixed differential added to the cost of fuel posted by the Platts Index. *Id.* The RFP secures a contract for a stable fuel supply to the County and includes the hauling of the fuel to County locations.

On July 2, 2009, seven proposals were received. *Id.* One proposal, not at issue in this protest, was reviewed and rejected by the County Attorney's Office as non-responsive. *Id.* After the remaining six proposals were deemed responsive, a technical and price selection committee was empanelled. *Id.* On July 20, 2009, the selection committee reviewed the six responsive

proposals and recommended that the County Manager enter into negotiations with Macmillan as the highest ranked responsive responsible proposer. *Id.* The selection committee gave Macmillan 475 points out of a possible 500 points and only awarded BV 438 points. *See* Final Score of Selection Committee (attached hereto as Exhibit B). Significantly, Macmillan was the favored vendor in every single category of evaluation and received significantly more points than BV on its price bid. *Id.* The County Manager accepted this recommendation and on October 5, 2009 the County entered into negotiations with Macmillan. After a few months of negotiation, the County Manager issued the Recommendation asking the Board of County Commissioners to authorize the execution of a contract with Macmillian as a result of the RFP. It is from this recommendation that the protester files its protest.

ARGUMENT

The County Manager's recommendation to award RFP 683 to Macmillan must be upheld because the protester has failed to present any argument other than the fact that the selection committee did not have all the information and that the County Manager simply got the recommendation wrong. In its attack on his proper exercise of discretion BV does what it cannot, it asks the hearing examiner to step into the shoes of the County Manager and become a contracting authority making decisions on the acceptability of a vendor. *See, e.g., Miami-Dade County v. Church and Tower, Inc.*, 715 So. 2d 1084, 1089 (Fla. 3rd DCA 1998) ("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."); *See also Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982). In stating its protest, BV does not allege that the County acted with "illegality, fraud, oppression, or

misconduct” but rather argues that the County Manager simply got it wrong because BV believes that Cason is a bad subcontractor and that Macmillan has insufficient fuel storage space. This violates a core tenet of bid protest hearing where, “the hearing officer’s sole responsibility [in reviewing a protest] is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.” *Dep’t of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 914 (Fla. 1988).

Simply claiming that mistakes were made and the County made an error in evaluation is not the test of a bid protest. Instead, to attack a contracting entity’s decision, “the test is ‘whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a ‘heavy burden’ of showing that the award decision had **no rational basis.**” *Banknote Corporation of America, Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (citing *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001)).

In this case there can be no question that the County Manager acted not only within his authority but with a well reasoned decision. The selection committee evaluating the bids ranked Macmillan higher in every single category of evaluation. More significantly, even if the technical evaluations were slightly skewed, Macmillan received significantly more points than BV as a result of its price proposal which is not at issue in this protest. Nevertheless, BV still argues that the process was flawed because of the potential to use Cason as a subcontractor and the inadequacy of Macmillan’s storage facility.

Initially, BV’s arguments that the County Manager and the selection committee missed the fact that Cason does not have the capacity to haul fuel as a subcontractor for Macmillan is irrelevant to the ultimate decision. Whether or not Cason has sufficient hauling capacity is not an evaluation criteria in the solicitation. As shown on the recommendation to award, Cason is

not the vendor in privity with the County. It is merely a *potential* subcontractor of Macmillan that Macmillan need not use. In its proposal, Macmillan represented that "Macmillan operates its own fleet of tractor/trailers and tank wagons...Macmillan has more than sufficient equipment to deliver all of the fuel needs of Miami-Dade County." See Except from Macmillan Proposal (attached hereto as Exhibit C). It further represented that "If for any reason deliveries cannot be made by Cason Investments Inc., then Macmillan would make the deliveries." *Id.* As the protester has not disputed that Macmillan has the independent capacity to provide all the hauling services required by the County there is simply no dispute here. Should Cason be unable to haul the fuel or should Macmillan not choose to use Cason for hauling, which it is under no contractual obligation to do, Macmillan will haul all of the fuel itself.

Similarly, BV's contention that Macmillan lacks storage capacity is equally without merit. Putting aside the fact that BV has provided absolutely no evidence or documentation to support this contention, Macmillan does have the storage and the proper certifications from the State of Florida. See Florida DERM Certifications (attached hereto as Exhibit D and E). Moreover, Macmillan currently has a contract to improve its storage facilities to perform under this contract. See Letter from Glasgow Equipment Service, Inc. dated December 22, 2009 (Attached hereto as Exhibit F). Finally, County staff has conducted site visits and have determined the availability of storage.

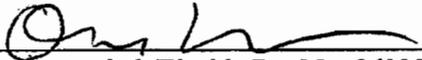
Accordingly, BV's protest has failed to show any reason, let alone met its "heavy burden," of showing why the recommendation should not be sustained.

CONCLUSION

WHEREFORE, for the reasons described above, the County respectfully requests the Hearing Examiner deny the bid protest and affirm the award recommendation to Macmillan.

Respectfully submitted,

R. A. CUEVAS, JR.
MIAMI-DADE COUNTY ATTORNEY

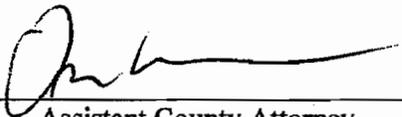
By: 

Oren Rosenthal (Florida Bar No. 86320)
Assistant County Attorney
Miami-Dade County Attorney's Office
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128
Telephone: (305) 375-5744
Facsimile: (305) 375-5611

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered to the Clerk of the Board and mailed this 13th day of January, 2010, to:

Mr. Alejandro A. Varas, President
BV Oil Company
7950 N.W. 58th Street
Doral, FL 33 166


Assistant County Attorney