# Memorandum

MIAMI-DADE COUNTY

Date: July 20, 2010

Supplement to
Agenda Item No. 8A1B

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

From: George M. Burgess
County Manager

Subject: Supplemental Information Subsequent to Bid Protest Filed by JCDecaux Airport, Inc., for Advertising Display Program - RFP No. MDAD-05-06

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This supplemental information is being provided subsequent to the conclusion of the bid protest filed by JCDecaux Airport, Inc. (JCDecaux), for the Advertising Display Program at Miami International Airport (MIA) and the decision of the Hearing Examiner recorded pursuant to Section 2-8.4 of the Code of Miami-Dade County. The incumbent JCDecaux filed the bid protest after the Negotiation Committee and County Manager recommended that the contract be awarded to Clear Channel Outdoor, Inc., d/b/a Clear Channel Airports (Clear Channel).

## Ranking by Selection Committee

The Request for Proposals (RFP) was advertised on November 06, 2007, with a minimum MAG of $3 million. The term of the new agreement would be 10 years with one 2-year extension at the discretion of MDAD; essentially a 12-year contract including the extension.

By the proposal due date of January 31, 2008, the County had received proposals from three entities – Clear Channel, Eye Fly and JCDecaux. The ranking by the Selection Committee was as follows:

| Proposer | Technical Points | Price % of Gross/MAG | Total Points |
|---|---|---|---|
| JCDecaux | 3975 | 375/375 (65%/$5.1M) | 4725 |
| Clear Channel | 3950 | 375/285 (65%/$3.9M) | 4610 |
| Eye Fly | 3840 | 345/260 (60%/$3.5M) | 4445 |

## The HSBC Contract

On April 1, 2008, JCDecaux presented to MDAD a program and contract with HSBC, the major banking conglomerate that places large ads on the jet bridges of "gateway" airports in major cities around the world. The HSBC 5-year contract, which grosses approximately $2.75 million annually, would later figure prominently in the negotiations between JCDecaux and MDAD.

## The Negotiation Committee

The Negotiation Committee was comprised of Miguel Southwell, Assistant Director of MDAD and Chair of the Committee; Ray Diaz, MDAD's Division Chief – Commercial Operations; Rolando Aedo, Sr. VP. Marketing & Tourism – The Greater Miami Convention & Visitors Bureau; and Richard Etienne, MDAD's Supervisor - Creative (Advertising) Services. Also present at the negotiating sessions were Margaret Hawkins Moss, MDAD Contracting Officer; Roy Wood, Assistant County Attorney; and Aaron Hathaway of the Office of the Inspector General who was invited by MDAD as a result of the aforementioned objection by JCDecaux to the issuing of the RFP.

The key point of negotiation for MDAD was the MAG. MDAD explained to JCDecaux that the MAG served two crucial purposes:

1) Protects MDAD from the risk of future economic downturns.
2) Incentivizes the vendor to work diligently to build advertising revenue, given MDAD's need to increase non-aeronautical, commercial revenue.

MDAD's negotiation benchmark was Los Angeles, where JCDecaux had contracted to pay a MAG of $10 million, spread across Los Angeles International Airport - LAX (MAG of $9 million) and Ontario (California) International Airport (MAG of $1 million). Both major international-gateway airports, LAX has 57 million passengers annually, compared to MIA's 34 million.

**First of Three Negotiations with JCDecaux – Both Parties Quickly Reach Agreement**

On September 9, 2008, MDAD reached agreement with JCDecaux after only two meetings. Key financial terms were that JCDecaux would pay MDAD:

1) The greater of 65 percent of gross revenue or its MAG of $5.1 million.
2) MAG would be adjusted by CPI each year. However, MAG could never be lower than 75 percent of the previous year's payments to MDAD; a provision designed to further prevent the MAG from lagging behind the 65% requirement over the possible 12-years of the agreement.
3) If HSBC did not renew its contract with JCDecaux at the end of its 5-year term, the MAG would be reduced by up to $1.5 million, but could never be less than the $5.1 million MAG (plus any growth resulting from CPI adjustments) bid by JCDecaux.

The Negotiating Committee voted to recommend to the County Manager, the award of the contract to JCDecaux. At this point, Committee members assumed the process had been concluded.

On November 7, 2008, JCDecaux asserts that it did not agree to item #3 above. More specifically, JCDecaux claimed that its agreement was that if the HSBC contract was lost at the end of the HSBC 5-year term, MDAD would suffer a $1.5 million loss to the MAG – even if that loss cut into the JCDecaux bid of $5.1 million. In effect, the MAG could drop from $5.1 million to $3.6 million. In response, MDAD sent JCDecaux a copy of the videotape of the negotiations that clearly refuted this claim, and the matter appeared settled.

On November 14, 2008, citing a dramatic decline in the economy, JCDecaux requested that the MAG be cut from $5.1 to $4 million- only $100,000 more than the second ranked company, Clear Channel.

**Second Negotiation with JCDecaux – Parties Reach an Impasse**

As a courtesy to JCDecaux, the Negotiation Committee on December 22, 2008 reopened the negotiations for a second time with JCDecaux. JCDecaux painted a very negative and pessimistic view of the future of airport advertising. The Negotiation Committee:

1) Presented and cited arguments asserting that contrary to other airports/markets, the future for MIA and Latin America was bright, not only in terms of passenger traffic, but specifically in the very narrow areas of airport and billboard advertising.
2) Urged JCDecaux to examine the positive growth and commitment to MIA by American Airlines and other key Latin carriers.
3) Emphasized new untapped advertising opportunities at the County's general aviation airports and at the new car rental facility.

4) Brought to the attention of JCDecaux that its new proposed MAG of $4 million was unjustifiable, as the advertising revenue (65% of gross) it would pay to MDAD that year in 2008 -presumably the worst of times- would be about $4.8 million.
5) In a move that was unprecedented, the Negotiation Committee offered to JCDecaux to include language in the Agreement that would permit the company to, under certain pre-established economic conditions, ask for MAG relief. This offer was made as a good faith gesture to respond to JCDecaux's concerns and conclude the RFP process despite the evidence for strong market potential cited above.

In the end, after a number of communications through January 8, 2009, JCDecaux remained unmoved and continued to emphasize a very negative outlook for airports, including MIA, and repeated the great potential danger to the financial viability of their company if JCDecaux kept it $5.1 million MAG commitment to the County. As a result, the Negotiation Committee rejected the request to cut the MAG to $4.0 million.

The Negotiating Committee invited second-ranked Clear Channel and subsequently third-ranked Eye Fly, to negotiate with MDAD. The invitations emphasized that the Negotiation Committee was seeking a $5.1 million MAG from the companies. By May 12, 2009, after a number of communications with the Contracting Officer and meetings of the Negotiation Committee, both Clear Channel and Eye Fly respectfully declined to negotiate a MAG of $5.1 and the Committee voted to recommend to the County Manager to reject all bids. MDAD planned to re-advertise the subject RFP.

On June 26, 2009, as the paperwork was being processed to reject all bids, Clear Channel, citing a change in management and company strategy, made a request to return to the negotiations. The County Attorney's office advised the Negotiation Committee that it could resume negotiating with the companies as if the process was started over, including negotiating with JCDecaux first. The Negotiating Committee proceeded accordingly as:

1) Issuing a new RFP would inevitably result in the same companies, competing for the contract.
2) Both Clear Channel and JCDecaux had made it clear that neither would pay a MAG of even $4.8 million. In fact, at this point, the Negotiation Committee had no idea what the MAG threshold point was for either company; JCDecaux had categorically stated that it would not agree to a MAG of more than $4 million, while Clear Channel, had rejected to pay $5.1 million but had given no indication how much, if any, it was willing to pay over its $3.9 million MAG bid. This is noteworthy in light of the Hearing Examiner's recommendation that a "Best and Final Offer" (BAFO) should have been done at this point. Continuing the RFP negotiation process preserved the County's ability to negotiate to a higher amount rather than bind MIA to the lower MAG figures at play at this juncture. The only effective means of having established a BAFO process at this time would have been for the BAFO to include a minimum threshold equivalent to current receipts.

**Third Negotiations with JCDecaux –Effective MAG Dropped Even Lower from $5.1 M to $2.5 M**

The Negotiation Committee met with JCDecaux on September 2, 2009, to again give the company an opportunity to offer a MAG to the County more consistent with MIA's market forecast. The Committee was very hopeful as MDAD's positive advertising-revenue outlook had proved accurate and advertising revenue had climbed 4 percent. At its percent-of-gross payment obligation to MDAD, JCDecaux was well on its way to paying the County over $5 million in revenue that year (see table below). Despite this fact, JCDecaux continued instead to forecast an even gloomier outlook, further dropping its effective MAG to $2.5 million if the existing HSBC contract was not renewed. Additionally, JCDecaux insisted that the 12-year agreement be bifurcated into two periods – 4 year and 8 years. At the end of the first

four years, JCDecaux wanted the right to exit the contract at its discretion and to not be subject to any CPI adjustments during that 4-year period.

**History - MIA Advertising Sales and JCDecaux's Payments to MDAD**

| Date | Fiscal Year Sales | Annualized Payment to MDAD | Effective JCDecaux (MAG) Bid |
|---|---|---|---|
| May 2010 | $9,303,644 | $5,974,666 [3] | N/A |
| Sept 2009 | $7,809,271 | $5,135,563 [2] | $2.5 million |
| Sept 2008 | $7,119,021 | $4,715,812 [1] | $4.0 million |
| Sept 2007 | $5,921,075 | $4,002,645 | $5.1 million |

[1] First negotiation sessions with JCDecaux.
[2] Third negotiation sessions with JCDecaux.
[3] Forecast based upon 8 months of actual data.

**Negotiation with Clear Channel – MAG rose from $3.9M to $4.5M**

On September 17, 2009 and October 8, 2009, the Negotiation Committee met with Clear Channel. Clear Channel first increased its MAG from $3.9 to $4.2, then to $4.5. The Committee subsequently voted to recommend to the County Manager the award of the contract to Clear Channel. The contract also contained the aforementioned HSBC provision earlier offered to JCDecaux by MDAD.

**JCDecaux Submits Unsolicited Proposal to MDAD and Files Bid Protest**

After the Negotiating Committee recommended the award to Clear Channel, on November 19, 2009, MDAD received from JCDecaux a signed, proposed agreement. Ostensibly, JCDecaux had requested a copy of the agreement reached between MDAD and Clear Channel, and had reproduced the Agreement except for two changes. The first replaced in the Agreement, the name of Clear Channel with that of JCDecaux. Second, exactly as JCDecaux had done nearly a year earlier, it presented a bid $100,000 more than the $4.5 million MAG agreed upon between MDAD and Clear Channel.

JCDecaux's legal representative also began to promote a new approach and concept – Best and Final Offer (BAFO). However, given that the Committee had negotiated in good faith under an equitable and open process on more than one occasion with both JCDecaux and Clear Channel, I proceeded with the recommendation to award to Clear Channel. This recommendation was subsequently submitted for consideration at the April 15, 2010 agenda of the Airport and Seaport Committee, but was not considered due to the filing of a bid protest by JCDecaux with the Clerk of the Board on April 7, 2010.

**Ruling by the Hearing Examiner**

On May 28, 2010, the bid protest hearing was held before Hearing Examiner Judge Charles D. Edelstein. Judge Edelstein issued his ruling on June 9, 2010, to the Clerk of the Board (attached), upholding the award of this contract to Clear Channel, and finding that JCDecaux did not meet its burden to prove that the County Manager abused his broad discretion in procurement matters. He also found that the negotiations did not intentionally, arbitrarily or capriciously discriminate against JCDecaux.

Judge Edelstein however, also opined that, irrespective of its legality, the procurement process used was "ill-guided", as (1) the process, which began in 2007 took too long to complete, (2) the financial disruptions of 2008 changed the material assumptions on which proposals were made, and (3) that more guidance as to the process to be used in negotiating the contract was necessary. The Hearing Examiner also urged the County to utilize the "Best and Final Offer" (BAFO) process proffered by

JCDecaux in its petition. This Hearing Examiner's opinion is separate from his legal conclusion upholding the legality of the decision to award to Clear Channel and does not preclude the Board of County Commissioners from awarding this contract to Clear Channel.

I offer the following comments regarding the Hearing Examiner's administrative concerns:

1) The delays that occurred since the November 6, 2007 advertisement of the contract were substantially due to JCDecaux' actions since that date.
2) Central to JCDecaux not signing the contract it and MDAD had agreed upon on September 9, 2008 for a $5.1 million MAG was JCDecaux's lack of confidence in the ability of MIA to retain and attract advertisers. By December 2008, JCDecaux dropped its MAG to $4 million. One year later, in September 2009, when MDAD's positive outlook proved accurate and advertising revenue climbed 4 percent, JCDecaux continued instead to forecast an even gloomier outlook, further dropping its effective MAG to $2.5 million. It is important to note that MDAD's unique passenger mix and market, relative to the rest of the airport industry, remains strong in 2010, and advertising revenue is anticipated to jump approximately 18 percent over last year.
3) MDAD stated and repeated to JCDecaux (and Clear Channel) in its third round negotiations with the company that the process would mirror the first round, including that the negotiation would be held first with JCDecaux. Any implication that JCDecaux did not know it could bid below its original MAG of $5.1 million is clearly contradicted by its final effective bid of $2.5 million during that same meeting. Furthermore, a BAFO was not in the County's best interest. Even JCDecaux, in presenting its case to the Hearing Examiner, cited a number of cases related to scenarios where the municipality was expending money to purchase a service - not receiving revenue from a vendor as is the case with this advertising concession. As noted above, the only effective means of having established a BAFO process at the time the Hearing Examiner suggested it should have been done would have been for the BAFO to include a minimum threshold equivalent to current receipts.

Because airport advertising is dominated worldwide by these two companies - Clear Channel and JCDecaux - I firmly believe that any additional or revised process would likely only have resulted in negotiations with these same two firms. I therefore stand by my recommendation to award to Clear Channel.

Nevertheless, while I do not agree with all of the Hearing Examiner's observations, I do understand that the situation around this solicitation has evolved as a consequence of the complexities of this negotiation process. If it is the will of the Board to reopen this solicitation under a BAFO process as suggested by the Hearing Examiner, the Administration could be supportive of such a scenario under the following conditions:

1) That a $5 million minimum MAG be included.
2) That the bid protest procedure be waived in connection with the BAFO in order to bring this solicitation process to a speedy and final conclusion.

While it remains uncertain how high a MAG either company is now willing to propose, both companies were provided ample and fair opportunity to negotiate during an open competitive process, resulting in the award before you today.

Assistant County Manager

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

**CLERK OF THE BOARD OF COUNTY COMMISSIONERS**
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June 15, 2010

John K. Shubin, Esq.
Shubin & Bass Law Offices
46 S.W. 1st Street, 3rd Floor
Miami, Florida 33130

Re: Bid Protest – RFP No. MDAD-05-06
Advertising Display Program at Miami International Airport

Dear Mr. Shubin:

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 May 28, 2010.

Should you have any questions regarding this matter, please do not hesitate to contact Fara C. Diaz at (305) 375-1293.

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: George Burgess, County Manager (via email)
Ysela Llort, Assistant County Manager (via email)
Hugo Benitez, Assistant County Attorney (via email)
David Murray, Assistant County Attorney (via email)
Jose Abreu, Director, Miami-Dade Aviation Dept. (via email)
Ana Sotorrio, Associate Aviation Director, MDAD (via email)
Miguel Southwell, MDAD Chairperson Negotiation Committee (via email)
Margaret Hawkins-Moss, Contracting Officer, MDAD (via email)
Marie Clark-Vincent, Division Manager, MDAD (via email)
Joseph M. Goldstein, Esq., Shutts & Bowen (via fax)
Clifford A. Schulman, Esq., Greenberg Traurig (via fax)
Alexander P. Heckler, Esq. (via fax)
Clear Channel Airports (via US mail)
JCDecaux, Inc. (via US mail)
Eye Fly Miami, LLC (via US mail)

MIAMI-DADE COUNTY BOARD OF COUNTY COMMISSIONERS

JCDECAUX AIRPORT, INC.,

Petitioner,

v.

MIAMI DADE COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondent,

And

CLEAR CHANNEL AIRPORTS,

Intervenor.

_____/

BID PROTEST

RE: REQUEST FOR PROPOSALS FOR ADVERTISING DISPLAY PROGRAM AT MIAMI INTERNATIONAL AIRPORT

RFP NO. MDAD-05-06

CLERK OF THE BOARD
2010 JUN 14 PM 3:59
CLERK, CIRCUIT & COUNTY COURTS
DADE COUNTY, FLA.

**RECOMMENDED FINAL ORDER**

A hearing in this matter was conducted on May 28, 2010, in Miami, Florida, before Hearing Examiner Judge Charles Edelstein. This order is in two parts, a narrative summary of the facts and law together with observations regarding prospective reviews of this order. The second part follows the format often used in administrative hearings. Since these hearings are less formal than those before a court, this order will, in some measure, reflect this level of informality.

A. Observations regarding prospective reviews of this order.

This order is based upon: testimony of the two witnesses for the County, exhibits expressly moved and accepted into evidence, Hearing Examiners watching video recordings of the August 19, 2009 Committee meeting and the negotiating sessions of September 2, 17 and October 19, 2009, and supporting documents provided by the parties. The exhibits, tapes of the meeting and negotiation sessions and supporting documentation are all available to the reviewers of this order by the Commission and/or courts who are free to reach their own conclusions. The Hearing Examiner has expressly found the live witnesses to be credible and bases his decision, in part, on their testimony. Absent obvious error, the reviewers are bound to that finding but can reach their own conclusions as to the relevance to the findings and conclusions of this order.

The video recordings of the September negotiation sessions were very poor, required listening to portions over many times, and were in some instances, inaudible. The purely video aspect of the negotiations used a camera at the head of the table making it difficult and often impossible to see the face of the participants clearly, especially those of the bidders. The

problems with the audio were not detected until after the sessions were concluded. The standard practice of having a monitor with at least a headset to monitor sound quality was not followed. Given the millions involved, the length of the contract and the public interest at stake, the failure to provide a clear, intelligible, record of the sessions is remarkable.

B. Narrative Summary

This is a bid protest challenging the award of a contract to develop and implement an advertising display program at Miami International Airport ("MIA"). The RFP was issued in November, 2007. The then current vendor, JC Decaux, Clear Channel Airports ("Clear Channel") and Eye Fly Miami LLC ("Eye Fly") submitted bids. The Evaluation Selection Committee (Committee") met initially in July, 2008 and ranked the proposals. What came to be called the first round of negotiations with JCDecaux, culminated in an agreement which included a $5.1 million minimum annual guarantee (MAG"), in September, 2008.

In the fall of 2008 the Dow dropped 25%, AIG and investment banks began failing, the housing market suffered and there was unprecedented fear of a deep recession or depression. It would not be unreasonable to characterize the mood of the nation as panic stricken. In November, 2008 JCDecaux reduced its MAG to $4,000,000, which the County rejected. There were further negotiations that ultimately led to the Miami Dade Aviation Department ("MDAD") to declare an impasse, on January 14, 2009.

In March, 2009 Clear Channel turned down the MDAD's request to meet the $5.1 million MAG setting the stage for a declared impasse. On May 12, 2009 Eye Fly declined an invitation to negotiate. In an undated and unsigned draft, MDAD recommended rejection of all proposals. It was apparently not sent to the County Manager.

Shortly prior to a second round of negotiations, on August 19, 2009 a 13 minute meeting of the Committee was held with the attendance of an assistant county attorney. The Committee wanted to know if negotiations failed with JCDecaux and Clear Channel, would Eye Fly have to be offered an opportunity to negotiate. Counsel answered in the affirmative and said the Committee would go forward with the original RFP. Despite the unusual nature of a rejection of bids and a second round of negotiations, and the request of JCDecaux for clarification of the process, there was no detailed discussion of the process to be used in the second round.

At line 23. page 4 of the Excerpt the Hearing Examiner's Ruling the Examiner said:

"In watching the tapes of the August and two September sessions and the October session, I was missing some context, which I got today. And the context that I have today explains why, when I saw the tape of the September 2nd, I didn't see any negotiation but what I didn't realize was that - -and it was clearly a disagreement throughout the discussions between Petitioner and the County. And the County kept saying we see a more rosy scenario that you do. And the Petitioner kept saying, no, this is a disaster; we're afraid to be bound by anywhere near the terms, I mean, of the agreement, where there was a 5.1 million MAG.

And so, in effect, what happened was, my sense of it was, the County had made up its mind after about the first maybe X period of time into the negotiations. I can't tell you where exactly because there wasn't any counter there... So at some point the County made a decision that the Petitioner was stonewalling it, that they (the County) had evidence that the revenues that had been coming in, even since the crash, were significantly higher than the four million dollars and basically said we're not getting anywhere with Petitioner and so we're going to impasse. And Counsel for the Petitioner made a last ditch effort at the end and try to head it off, but it was too late."

Mr. Southwell, the Committee chair, stressed that agreements such as this involve a continuing and cooperative relationship between the vendor and MDAD. It appears that he was open to a continuing relationship with JCDecaux but was deeply trouble by its conduct during negotiations. In hard bid situations in which the undersigned has participate directly as Director of Facilities for the Courts of the 11th Judicial Circuit and as Construction Oversight Coordinator for the Dade County Inspector General's Office, the theory is that all the terms are clearly specified in the bid document and negotiations revolve around change orders. Would it be that that simple. But certainly in long agreements in which service delivery is at the core, the RFP process is more flexible and the relationships are the parties while still arms length, are more like a marriage.

The declaration of an impasse at this point was clearly justified. It appears the Petitioner was not responding to the MDAD demand in the 4.8 million dollar range. Declaring the impasse required negotiating with Clear Channel. At the September 17 session, during a break, the Committee held an informal, on the record discussion in which its bottom line, $4.5 million was discussed. When the session resumed, the contract officer went on the record saying "we had not stopped running the tape and any time when Clear Channel left room". The Petitioner views this a deliberate move to help Clear Channel. When seen in context, this is more properly characterized as a county employee who has been trained to follow the rules about public meetings.

At page 6, line 6 of the excerpt appears:

"What happened thereafter was unplanned. It was not planned that there would be a bifurcated meeting with Clear Channel, not that I could see...The second thing is, no one, I think, anticipated that there was going to be a break in which the County's bottom line was going to be spread out on the public record...So I don't think necessarily that the committee thought about that carefully, and realized that they may be giving Clear Channel an edge...I don't find that was done maliciously, or with any intent to give Clear Channel a leg up."

The RFP was very specific that the MAG and the CPI adjustments were the key parts of the RFP.

"Proposers who do not submit pricing in accordance with this RFP document shall be deemed non-responsive... Proposers cannot quality, place conditions or additional terms with the Price Proposal Schedule. Proposers who place qualifications, conditions or additional term with the Price Proposal Schedule may be found non-responsive."

On several occasions, the Committee was concerned about the degree to which the key terms of the RFP could be changed. County counsel recognized that the line was unclear, even opining that a court could find the proposed variations a departure from the explicit terms of the RFP but if the County profited from the departures, it would be acceptable.

On Page 8, line 1 line 10 of the excerpt appears:

"I'm finding that the terms were changed. They were material changes in the terms, because there had to be, and everybody understood that."

The Committee was concerned with the first round negotiations which seemed to have departures from the terms of the RFP. It recommended declaring an impasse and rebidding the project. Some how it apparently never reached the County Manager's desk. JCDcaux was also concerned and agreed to go forward with a second round of negotiations reserving its rights. This could be characterized as a win-win strategy. If an agreement was reached at the September 2 session then JCDecaux would have not objected to the deviations but if the session went to impasse, it would, and did argue the process was void. Clear Channel and the County argued the changes were not material deviations and the undersigned found to the contrary. The County did, however, get some benefit from the final agreement.

Hopefully what happened in the bid process will be unique. Between the issuing of the RFP, the initial bidder's responses, the world turned upside down. MDAD, JCDcaux and Clear Channel essentially backed out given the uncertainty. The second round went forward with the parties dancing around the departure issue.

The ACBDE Requirements

The ACBDE requirements are not an after thought but an attempt to right past wrongs. In a simple, short term project, a bidder could be reasonably be expected to name a specific ACDBE qualified company but in a contract with at least a 10 year life, it would be impractical if not impossible. As the Examiner heard from County's ACBDE administrator, the key requirement is meeting the goal and the County monitors compliance monthly. There was no violation of the ACDBE requirements by Clear Channel.

The Bidders Financial Capacity to Perform

The record is clear, the County, exercising its "wide discretion" (See Liberty County, infra as quoted in D.O.T. Groves-Watkins Constructors, 530 So.2d 912,13) found these two giants in their industry were both were financially capable to perform.

PART TWO – THE TRADITIONAL FORMAT

**STATEMENT OF THE ISSUES**

1. Whether the County Manager's proposed award of an Advertising Display Program contract to Clear Channel is void as being contrary to the legal requirements and mandated procedures for the selection and award of public contracts contained in the County's Charter, Code, Administrative Orders, and RFP for this procurement?

2. Whether Clear Channel's proposal was responsive to the specifications contained in the Commission-approved RFP with respect to minority hiring?

3. Whether the County Manager's proposed award of an Advertising Display Program contract to Clear Channel is void as being arbitrary and capricious because the process used by the allegedly County discriminated against JCDecaux and was allegedly based on the County's giving Clear Channel an unfair advantage?

4. Whether the contract with Clear Channel as recommended by the Manager is void because it materially and substantially deviates from the terms of the RFP?

## FINDINGS OF FACT

### The Request for Proposal

5. On October 16, 2007, the Board of County Commissioners for Miami-Dade County ("Board") passed Resolution No. R-1167-07 and authorized the Mayor, or his designee, to issue and advertise a Request for Proposals (No. MDAD-05-06), which was attached to the Resolution and which sought to select a qualified firm to develop advertising display program at Miami International Airport ("MIA"). The Resolution provided that the selection process "shall be undertaken as provided in the [attached] Request for Proposals" and also provided that "[u]pon such selection, the County Manager, or his designee, shall negotiate a contract with the selected proposer" for its approval by the County Commission.

6. On November 6, 2007, the County advertised Request for Proposal No. MDAD-05-06 ("RFP") for an Advertising Display Program. (Tab 3.)[1] Through the RFP the County sought proposals from firms qualified to undertake financing, design, development, furnishing, installation, management and operation of an advertising display program, i.e., posting commercial advertising in terminals at Miami International Airport ("MIA").

7. Prior to the time of the RFP, a contract had been in place between Miami-Dade County and JCDecaux Airport, Inc. ("JCDecaux"), which had acquired the contract when it acquired the original vendor company, which had operated an advertising display program at MIA since 1994. The contract has expired, but JCDecaux continues to provide these services after the expiration of the contract term. (Am. Stip. at 2, ¶ 3.)

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[1] Tabbed references herein refer to documents or videos included in the six tabbed notebooks filed with JCDecaux's Bid Protest and cited in the parties' Amended Stipulation of Undisputed Facts.

8. The RFP required, among other things, that:

- The successful proposer pays a minimum annual guaranty (or "MAG") of $3,000,000 or a percentage of revenues no less than 50%, whichever was greater. *See* §§ 1.2.12, 1.2.13, and App. B RFP (Tab 3).

- The MAG be adjusted annually by the Consumer Price Index. *See* § 1.2.12, RFP-17.

- A term of 10 years with a discretionary extension of one two-year term. (Tab 133 at 5.)

- Proposers not qualify, place conditions or additional terms on the price proposal. *See* Appendix B to RFP (Tab 3).

- "It is the policy of the County that the [Airport Concession Disadvantaged Business Enterprise ("ACDBE")] shall have the maximum practical opportunity to participate in the performance of County Agreements. The County has established an ACDBE concession specific goal of eleven percent (11%) of gross revenues." *See* § 4.1 RFP-40 (Tab 3).

- If the County and the selected proposer(s) cannot negotiate a successful agreement, the County may terminate said negotiations and begin negotiations with the next ranked responsive/responsible Proposer. This process may continue until an Agreement is executed, or the County may reject all Proposers and re-advertise. § 5.7, RFP-51-52 (Tab 3).

- The Contract award, if any, shall be made to the Proposer(s) whose proposal shall be deemed by the Board to be in the best interest of the County. § 5.8, RFP-52.

- A recommendation for contract award may be protested by a proposer in accordance with the procedures provided in Sections 2-8.3 and 2-8.4 of the County Code. § 5.10, RFP-52 (Tab 3).

9. The County received proposals from three firms: JCDecaux, Clear Channel Outdoor, Inc. d/b/a Clear Channel Airports ("Clear Channel"), and Eye Fly Miami LLC ("Eye Fly").

**Evaluation of Proposals and Selection of JCDecaux**

10. An Evaluation Selection Committee ("Selection Committee") comprising the following five voting members was formed to review the three companies' proposals: two Miami Dade Aviation Department ("MDAD") staff members; one Small Business Development Department staff member; one Government Information Center staff member; and the Vice

President of Marketing & Tourism of the Greater Miami Convention & Visitors Bureau. (Tab 13.)

11. The Selection Committee met on July 2, 2008, in a public meeting, to review the three proposals and hear presentations from the submitting firms. (Tab 43.) Pursuant to the terms of the RFP, the selection committee considered two criteria: (1) satisfaction of the RFP's technical requirements and (2) price.[2]

12. The firms' July 2, 2008 presentations addressed the technical aspects of their proposals. The technical criteria and maximum points that could be given by each voting member were: (1) marketing and sales plan (200 points); (2) design and implementation (150 points); (3) management and operation plan (100 point); (4) experience and qualifications (150 points); (5) financial capacity to perform/financing (150 points); and (6) ACDBE participation (100 points). (Tab 45.)

13. Following these presentations, the Selection Committee ranked the firms based on the technical criteria as follows: (1) JCDecaux with 3975 points; (2) Clear Channel with 3950 points; and (3) Eye Fly with 3840 points. (Tab 45.)

14. After the technical ranking, the Committee opened the sealed price envelopes and read aloud the proposed prices. MDAD's Senior Procurement Contract Officer ("Contracting Officer") then calculated the price score by applying the formula set forth in the RFP. The price component was made up of two parts: a Minimum Annual Guarantee ("MAG") and a fee based on a percentage of revenues ("Percentage Fee").

15. The Selection Committee determined that all three vendors were both responsive and responsible. The MDAD Contracting Officer then determined an overall ranking based on the combined technical and price criteria. (Tab 45.)

16. As the following chart reflects, JCDecaux was the overall highest-ranked proposer:

| Proposer | Price (MAG) | Percentage Fee | Adjusted Score | Overall Committee Ranking |
|---|---|---|---|---|
| JCDECAUX | $5,100,000 | 65% | 4725 | 1 |
| CLEAR CHANNEL | $3,900,000 | 65% | 4610 | 2 |

[2] The term "price" is the term used by MDAD in the RFP, but it denotes the "payment" the firm offers to pay annually to MDAD.

| | | | | |
|---|---|---|---|---|
| EYE FLY | $3,500,000 | 60% (average) | 4445 | 3 |

(Tab 45.)

17. At the conclusion of the public meeting, the Selection Committee recommended that the proposal from the highest-ranked responsive and responsible firm, JCDecaux, be forwarded to the County Manager for approval and negotiation of an agreement. (Tab 47.)

**Negotiations with JCDecaux ("First Round")**

18. On August 4, 2008, the County Manager appointed a Negotiation Committee and authorized it to negotiate a contract with JCDecaux. The Committee included the following voting members: three MDAD staff members and the Vice President of Marketing & Tourism at the Greater Miami Convention & Visitors Bureau. (Tab 47.)

19. On August 14, 2008, the Negotiation Committee met with JCDecaux, and on September 9, 2008, they reached an agreement, in principle, which included a MAG of $5,100,000 with a 65% fee. (Am. Stip. at 6, ¶ 17.)

20. In the fall of 2008, the Dow Jones Average dropped approximately 25%. (Tr. at 4, in 1.)

21. On November 14, 2008, JCDecaux informed the MDAD contracting officer that, because then-current economic conditions had altered its short- and long-term prospects for revenue growth at MIA, it needed to lower its initially offered MAG from $5,100,000 to $4,000,000. (Tab 70.)

22. The Negotiation Committee responded that a 20% reduction of the MAG could not be accepted because, unlike JCDecaux, it believed that the airport advertising sector would not be down considerably during the year 2009-2010. Thus, on December 3, 2008, the Contracting Officer wrote JCDecaux advising it that MDAD was ready to move forward with the agreement reached on September 9, 2008 without any reduction in the MAG. (Tabs 74, 132.)

23. On December 12, 2008, JCDecaux requested further negotiations and modifications due to the changed economic conditions. (Tab 76.) Thus, on December 22, 2008, MDAD and JCDecaux participated in another negotiation meeting.

24. On December 29, 2008, JCDecaux provided revised language regarding the MAG and MMG payments, including a provision that called for negotiations to adjust the MAG/MMG if gross revenues declined by more than 5% due to a major economic downturn or catastrophic event. (Tab 78.)

25. On January 8, 2009, MDAD advised JCDecaux that it was prepared to move forward with the recommended award to JCDecaux based on the Agreement with the revisions negotiated at the December 22, 2008 meeting, giving JCDecaux a deadline of January 12, 2009

to sign the Agreement. (Tab 80.) JCDecaux did not return the signed Agreement by January 12, 2009 and wrote the County to offer additional language that it believed was consistent with the parties' December 22 negotiation meeting. (Tab 81.)

26. On January 14, 2009, MDAD advised JCDecaux in writing that it would not be accepting the proposed changes and declared an impasse with JCDecaux. (Tab 82.)

27. Thus, on March 18, 2009, the Negotiation Committee met with Clear Channel. When asked whether it would meet JCDecaux's original proposal of $5.1 million Minimum Annual Guarantee, Clear Channel stated that it could not. (*See* Tabs 88, 90, 91, 92, and 93.)

**The Negotiation Committee Votes to Reject All Proposals and Re-Advertise**

28. On April 27, 2009, the Committee declared an impasse with Clear Channel and adopted three motions to:

1) terminate negotiations with Clear Channel Airports;

2) invite the third firm (Eye Fly Miami (MIA) LLC) to negotiate with a letter of invitation that contained MDAD's goals (a $5.1 million MAG with a 65 percent gross revenue share to MDAD), and,

3) prepare the report for the County Manager and the Board of County Commissioners to reject and re-advertise the project, if Eye Fly Miami (MIA) LLC declined to negotiate.

(Tabs 94, 101.)

29. On May 12, 2009, Eye Fly declined MDAD's request to negotiate. (Tab 97.)

30. MDAD then prepared a draft recommendation for the County Manager recommending the rejection of all proposals based on the impasses with all three vendors. (Tab 117.) The memorandum, however, was not dated and never signed, and there is no evidence that the memorandum was transmitted to the Manager and no evidence explaining what happened to the memorandum.

**The County Manager "Re-Opens" Negotiations for a "Second Round"**

31. In June 2009,[3] Clear Channel requested that negotiations be reopened due to internal management changes that purportedly allowed it to reconsider terms to which it could not previously agree. (Tab 98.)

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[3] Clear Channel's letter request to renegotiate was undated and is assumed to have been transmitted in June of 2009.

32. On June 26, 2009, the Negotiation Committee voted to reopen negotiations. (Tabs 40, 100.) No updated proposal was requested from any proposer.

33. On July 24, 2009, the County Manager reopened negotiations, stating in his memorandum to the Contracting Officer that Negotiation Committee

> is authorized to re-open negotiations . . . with all three (3) firms upon receiving the letter of interest. Furthermore, the Negotiation Committee is authorized to formulate a method acceptable to the County Attorney to determine the order or ranking MDAD should proceed to negotiate, if more than one firm expresses interest in re-negotiating.

(Tab 101.)

34. On August 3, 2009, MDAD wrote to the three original proposing firms seeking to determine whether they would participate in a second round of negotiations and advising them that their negotiations would occur in the order as ranked by the Selection Committee, subject to terms, conditions, and requirements of the original RFP. (Tab 102.) Eye Fly declined to renegotiate. Clear Channel agreed to renegotiate.

35. On August 3 and 4, 2009, JCDecaux agreed to remain in the RFP negotiation process. (Tab 104.) And on August 7, 2009, JCDecaux submitted another response, stating in its cover letter that its "participation in this process is not intended to waive or impair any rights JCDecaux may have within the RFP process, all of which are expressly reserved." (Tab 105.) In that same letter, JCDecaux raised questions regarding the propriety of the renegotiation process and sought to determine what guidelines, procedures, and format would be applied to the renegotiation process.

36. At its August 19, 2009 meeting, the Negotiation Committee briefly considered JCDecaux's letter and its requests. (Tab 109.) The committee then adopted a motion to proceed according to the original RFP process and ranking. (Tab 137.)

37. On September 2, 2009, the Negotiation Committee met with JCDecaux. (Tab 112.) At this meeting JCDecaux offered a $4,000,000 MAG payment for the first four (4) years and requested that the CPI increase be omitted. JCDecaux also requested that the term of the agreement be bifurcated into two periods: 4 years, followed by 8 years. JCDecaux further proposed that the terms for the latter period (8 years) be negotiated at the end of the initial 4-year term. (Tab 138.)

38. At the end of the session and, the Committee responded that a reasonable MAG offer would need to be "at least" $4,800,000. (Tab 138.) The Committee adopted a motion to reject JCDecaux's offer. (Tab 138.)

39. On September 17, 2009, the Negotiation Committee met with Clear Channel, which then offered to increase its original MAG of $3,900,000 to $4,200,000, while leaving the percentage fee at the original 65%. In consideration of its voluntary MAG increase, Clear

Channel requested that MDAD consider delaying or deferring the CPI increase of the MAG. (Tab 131.)

40. The chairperson counter offered a $4,700,000 MAG, with a cap or deferral of the CPI for the first two years. (Tab 131.) Clear Channel further proposed relief from the MAG if airline traffic declined for various reasons. Based on these negotiations, an agreement was prepared.

41. During this meeting, when Clear Channel left the meeting room to caucus, the committee continued its public deliberations, which were required to be recorded by the Sunshine Law and County policy. (Tab 131.) While Clear Channel was absent, the Committee reached an informal consensus, recorded by the videographer, that an offer of $4,500,000 MAG from Clear Channel would be accepted. (Tab 131.) When Clear Channel returned to the meeting, the committee agreed to allow it to review the issues and prepare additional terms to be negotiated at a future meeting. (Tab 131.)

42. Almost immediately after this meeting, Clear Channel's legal representatives requested the tape of the September 17th meeting from the County under Florida's Public Records Act.

43. On October 8, 2009, the Negotiation Committee met a second time with Clear Channel. (Tab 121.) At this meeting, Clear Channel and the Committee went through the proposed agreement, page by page and discussed it, asked questions, and made proposed modifications. At this time, Clear Channel increased its MAG proposal from $4,200,000 to $4,500,000 – the amount stated by the Negotiation Committee at the previous meeting and subject to certain conditions. The Committee then adopted two motions: (1) to accept the proposal from Clear Channel including the $4,500,000 MAG and (2) to recommend awarding the contract to Clear Channel. (Tab 121.)

**The Agreement With Clear Channel**

44. On or about October 26, 2009, Clear Channel executed and produced to the County for its counter-execution an agreement between it and the County that contained provisions that:

- Permitted Clear Channel to lower the MAG if there is a drop in revenue exceeding 15% of the gross annual revenue caused: (1) twelve months after a 9/11-type event; (2) twelve months after an "officially recognized U.S. recession;" (3) a realignment of a major carrier "hub."

- Provided that the MAG will not be imposed for the full life of the Agreement (ten years plus a possible two year extension) but rather be recalculated upon the expiration of the HSBC contract in 2013.

- Eliminated the CPI increase was deferred to the fourth year.

- Conditioned the CPI so that it may not exceed three percent (3%) in any one year.

- Provided that the minimum MAG that would be paid to the County would be $3,900,000, irrespective of any provision found elsewhere in the Agreement providing for recalculation.

(Tab 133.)

45. On November 18, 2009, JCDecaux wrote the Contracting Officer, offering a MAG of $4,600,000 and substituting the same terms agreed to by Clear Channel. (Tab 127.) The County has never responded to this offer. (Am. Stip. at 11, ¶ 44.)

46. On April 5, 2010, the County sent its Notice of Contract Award Recommendation to all three proposers. (Tab 134.) The recommendation was to award the contract for the Advertising Display Program to Clear Channel. (Tab 132.)

47. On April 7, 2010, JCDecaux filed its Notice of Intent to file this Bid Protest.

48. On May 21, 2010, the parties filed a Joint Stipulation of Undisputed Facts and on May 25, 2010, they filed an Amended Stipulation.

49. On May 21, 2010, Clear Channel filed a motion to dismiss the Bid Protest on the ground that JCDecaux lacked standing to challenge the recommended award to Clear Channel.

50. The Hearing Examiner conducted a hearing on JCDecaux's Bid Protest on May 28, 2010.

51. The County offered testimony from two witnesses, Miguel Southwell, Assistant Director for Business Retention & Development and chair of the Negotiations Committee, and Milton Collins, the Associate Director of the Minority Affairs Division, Miami-Dade Aviation Department. Both witnesses were found to be credible. (Tr. at 7, in 3.)

52. Petitioner JCDecaux entered into evidence the six binders that it had submitted with its Bid Protest and one composite document: a transmittal email dated March 18, 2010 from Maria Vincent-Clark to Margaret Hawkins Moss, and an undated memorandum to Dennis C. Moss, Chairman and Members of the Board of County Commissioners from the County Mayor Carlos Alvarez. (Pl.'s Ex. 1.)

## CONCLUSIONS OF LAW

### I. JURISDICTION AND STANDING

53. The Hearing Examiner has jurisdiction over the parties and the subject matter pursuant to Miami-Dade County Code section 2-8.4(c).

54. Clear Channel moved to dismiss based on JCDecaux's alleged lack of standing. Assuming the Hearing Examiner has jurisdiction to address Clear Channel's motion to dismiss, Petitioner JCDecaux has standing to file this protest because it was a participant in the RFP process and has challenged the validity and fundamental fairness of the selection and negotiation process and was adversely affected by the Manager's proposed contract award to Clear Channel because it was the first-ranked proposer. Therefore, JCDecaux has a substantial interest to be determined. *See Accela, Inc. v. Sarasota County*, 901 So. 2d 237 (Fla. 2d DCA 2005) (reversing dismissal for lack of standing because petitioners were potential bidders ready, willing, and able to bid).

## II. BURDEN OF PROOF

55. The burden of proof is on JCDecaux, as the protester, to establish a ground for invalidating the award. *See State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607 (Fla. 1st DCA 1998). See also Liberty County supra, as quoted in D.O.T. vs. Groves-Watkins, supra.

56. The standard of proof is whether the proposed award to Clear Channel was based upon clearly defined criteria and did not arbitrarily or capriciously discriminate against JCDecaux. *See City of Sweetwater v. Solo Constr. Corp.*, 823 So. 2d 798 (Fla. 3d DCA 2002).

## III. THE ISSUES

57. As outlined above, the ultimate issues in this proceeding involve the following:

(1) Whether the County Manager's proposed award of an Advertising Display Program contract to Clear Channel is void as being contrary to the legal requirements and mandated procedures for the selection and award of public contracts contained in the County's Charter, Code, Administrative Orders and RFP for this procurement?

(2) Whether Clear Channel's proposal was responsive to the specifications contained in the Commission-approved RFP specifically with respect to minority hiring?

(3) Whether the County Manager's proposed award of an Advertising Display Program contract to Clear Channel is void as being arbitrary and capricious because the process used by the County allegedly discriminated against JCDecaux and was allegedly based on the County's giving Clear Channel an unfair advantage?

(4) Whether the contract with Clear Channel as recommended by the Manager is void because it materially and substantially deviates from the terms of the RFP?

## IV. PUBLIC POLICY REGARDING THE AWARD OF GOVERNMENT CONTRACTS

58. The purpose of the competitive bidding process is to ensure that public entities do not arbitrarily or capriciously discriminate between bidders or make an award of a public contract or expend public funds on the basis of personal preference. *See Eng'g Contractors Ass'n of S. Fla., Inc. v. Broward County*, 789 So. 2d 445, 450 (Fla. 4th DCA 2001). As the Florida Supreme Court explained in *Wester v. Belote*, 138 So. 721 (Fla. 1931):

> The object and purpose of competitive bidding statutes [are] to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove, not only collusion, but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the public authorities, by providing an opportunity for an exact comparison of bids.

*Id.* at 722.

## V. CONCLUSIONS RELATED TO JCDECAUX'S NOTICE OF INTENT TO PROTEST

59. Section 2-8.4 of the Miami-Dade County Code provides the procedural requirements for a notice of intent to protest an intended contract award. Section 2-8.4(b) provides, in pertinent part, that

> "[a] written intent to protest shall be filed with the Clerk of the Board and mailed to all participants in the competitive process and to the County Attorney within three (3) working days of the filing of the Manager's recommendation. . . . Such written intent to protest shall state the particular grounds on which it is based and shall be accompanied by a filing fee. 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.

60. JCDecaux's Notice of Intent to Protest the intended award to Clear Channel complied with all requirements of section 2-8.4, Miami-Dade County Code.

## VI. CONCLUSIONS RELATED TO THE JOINT STIPULATION OF UNDISPUTED FACTS

61. JCDecaux, the County, and Clear Channel are bound by the Amended Joint Stipulation of Undisputed Facts submitted by the parties. *See, e.g., Doyle v. Dep't of Business Regulation*, 794 So. 2d 686 (Fla. 1st DCA 2001) ("Florida courts look favorably upon stipulations because they shorten litigation time and lower litigation costs. . . . Such stipulations should be enforced if entered into with good faith and not obtained by fraud, misrepresentations, or mistake, and not against public policy."); *Turner v. Miami-Dade County Sch. Bd.*, 941 So. 2d 508, 509-10 (Fla. 1st DCA 2006) (As a general rule, "a stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the Court.").

## VII. CONCLUSION RELATED TO THE APPLICABLE PROVISIONS OF THE MIAMI-DADE COUNTY CHARTER & CODE

62. Under the Home Rule Charter of Miami-Dade County, "[t]he Board of County Commissioners shall be the legislative and governing body of the county." Moreover, the Charter notes the Board's powers include, but are not limited to, the power to "[p]rovide and operate air . . . terminals" and "expend money . . . as may be provided by law."

63. With specific reference to the issue of the County's procurement of goods and services, Section 5.03 (D) of the Charter, which governs all actions of the County Commission and its designees, states as follows:

> Contracts for public improvements and purchases of supplies, materials, and services other than professional shall be made whenever practicable on the basis of specifications and competitive bids. Formal sealed bids shall be secured for all such contracts and purchases when the transaction involves more than the minimum amount established by the Board of County Commissioners by ordinance. The transaction shall be evidenced by written contract submitted and approved by the Board. The Board, upon written recommendation of the Mayor, may by resolution adopted by two-thirds vote of the members present waive competitive bidding when it finds this to be in the best interest of the county.

64. Through its Code, at Section 2-8.1, the County Commission has reiterated the requirement that competitive bidding be conducted as it relates to contracts involving certain types of goods and services (excluding "professional services"):

> (b) *Bid requirement for certain purchases; delegation of authority to advertise, award and reject bids or proposals for certain purchases.* Formal sealed bids shall be secured for all contracts and purchases within the scope of this section when the transaction involves the expenditure of two hundred fifty thousand dollars ($250,000.00) or more, except that the Board of County Commissioners, upon written recommendation of the County Manager, may, by resolution adopted by two-thirds (2/3) vote of the members present, waive competitive bidding when it finds this is to be in the best interest of the County. . . . The County Manager is hereby delegated the authority to award and reject bids or proposals for contracts for public improvements (construction), and purchases of supplies, materials and services (including professional services, other than professional architectural, engineering and other services . . .) costing one million dollars ($1,000,000.00) or less . . . .

65. Although the County Commission, through Section 2-8.1, has delegated certain authority with respect to procurement to the County Manager, this authority is limited to contracts "costing $1,000,000.00 or less." As more particularly set forth in an Administrative Order addressing the County's procurement requirements, ". . . the Board of County Commissioners shall award all contracts greater than $1,000,000. . . ." In this instance, the

County Manager, or his designee(s), is responsible for administering the selection and negotiation process and making a recommendation to the Board of County Commissioners.

66. The proposed contract in this matter exceeds $1,000,000.00.

## VIII. CONCLUSIONS RELATED TO THE RFP SELECTION AND NEGOTIATION PROCESS

67. In instances where an ordinance, or statute, delegates powers to an administrative body or official, "there must be sufficient standards to guide the agency in the administration of the law." *Metropolitan Dade County v. P.J. Birds, Inc.*, 654 So. 2d 170, 175 (Fla. 3d DCA 1995), (citing *City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764, 765 (Fla. 1974); *North Bay Village v. Blackwell*, 88 So. 2d 524, 526 (Fla. 1956)).

68. In the specific context of competitive procurement, the requirement that procurement occur pursuant to clear and uniform standards is "central to the integrity and reciprocity of the . . . process." *Deloitte & Touche LLP v. Dept. of Health & Rehabilitative Servs.*, 12 F.A.L.R. 2226 (1990); *accord, Wester*, 138 So. 724; *Advocacy Center For Persons With Disabilities v. State Dep't of Children & Family Servs.*, 721 So. 2d 753, 755 (Fla. 1st DCA 1998) (uncertainty of the terms of the specifications will render award of contract void).

## IX. CONCLUSIONS RELATED TO ALLEGED DEFICIENCIES IN THE CONTENT OF CLEAR CHANNEL'S PROPOSAL

69. The test for determining whether a variance in a bid for a public contract is a "material" one, thereby requiring rejection, is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders. *See, e.g., Robinson Elec. Co. v. Dade County*, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982). As noted in the summary above, under the unusual circumstances of this case, there was no impermissible advantage given to either party.

70. The financial aspects of the RFP were critical to MDAD in the second round of negotiations[4] and were "material" aspects of the Proposers' submissions.

71. As concluded above, although these changes are deemed "material," they were the result of the uncertainty of economic conditions at the time of the negotiation, (Tr. 8, ln 10-15) and thus MDAD and the County Manager did not abuse their broad discretion in recommending that the advertising program contract be awarded to Clear Channel.

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[4] Notwithstanding the fact that the MAG in the initial selection process only accounted for 7.5% of the awarded points.

## I. CONCLUSIONS RELATED TO THE VALIDITY OF THE RESULTS OF THE SECOND ROUND OF NEGOTIATIONS

72. As concluded above, however, the seemingly more favorable treatment of Clear Channel was not the product of intentional favoritism or bias. It was the result of uncertainty and the fact that the bid process had already become overly drawn out and unproductive. (Tr. 8, Ln. 18-21.)

73. The assignment, as this Hearing Examiner understands it, is to provide to the Board of County Commissioners a recommendation, based on the evidence presented and the applicable law, as to whether the Petitioner carried its burden of proving that the County Manager, through the Negotiation Committee, acted arbitrarily or capriciously. (Tr. 3, in 20.) Because this Hearing Officer is constrained by this charge, he does not recommend what he believes to be the appropriate resolution of the Petitioner's Bid Protest. (Tr. 10, in 10-20.) An appropriate resolution would be for the County to conduct a "Best and Final Offer" ("BAFO") bid. (Tr. 3, in 16-20.)

74. Given that both JCDecaux and Clear Channel are financially qualified and technically competent and because selection of a vendor has already been unduly delayed, it would be reasonable – and preferable, under these circumstances – to conduct a "Best and Final Offer" ("BAFO") bid, whereby the company with the highest MAG and Percentage Fee is awarded the contract with the terms as negotiated with Clear Channel. (Tr. 9, in 12-22; Tr. 10.)

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is reluctantly RECOMMENDED that a final order be entered denying the protest of JCDecaux and determining that:

(a) JCDecaux did not meet its burden to prove that the County Manager abused his broad discretion in procurement matters (Tr. 8, in 22-24); and that

(b) The "second round" of negotiations, while unprecedented and ill-guided (Tr. 10, in 25; Tr. 9, in 1-11.), did not intentionally, arbitrarily or capriciously discriminates against JCDecaux.

IT IS FURTHER RECOMMENDED that:

(c) Given that both JCDecaux and Clear Channel are financially qualified and technically competent and because selection of a vendor has already been unduly delayed, it would be reasonable – and preferable, under these circumstances – to conduct a "Best and Final Offer" ("BAFO") bid, whereby the company with the highest MAG and Percentage Fee is awarded the contract with the terms as negotiated with Clear Channel. (Tr. 9, in 12 22.)

Accordingly, it is reluctantly RECOMMENDED that the Board of County Commissioners deny JCDecaux's Bid Protest.

Judge Charles Edelstein
Hearing Examiner

## CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that, on June 9, 2010, a copy of the foregoing was sent via US mail to: John K. Shubin, Attorneys for JCDecaux Airport, Inc. 46 S.W, First Street, Third Floor, Miami, FL 33130, Joseph Goldstein, Esq., Shutts & Bowen LLP, *Counsel for Intervenor Clear Channel Airports*, 201 East Broward Boulevard, Suite 2100, Fort Lauderdale, Florida 33301; David Murray, Esq., Assistant County Attorney, Miami-Dade Aviation Department, Concourse "A", 4th Floor, Miami, Florida 33128; Clifford A. Schulman, Esq., Weiss Serota Helfman & Pastoriza, P.A., *Co-counsel for JCDecaux*, 200 E. Broward Blvd., Suite 1900, Fort Lauderdale, Florida 33301; Iris Escarra, Esq., Greenberg, Traurig, P.A., *Co Counsel for JCDecaux*, 1221 Brickell Avenue, Miami, Florida 33131; Simon Ferro, Esq., Genovese, Joblove & Batista, P.A., *Co-counsel for JCDecaux*, 9780 S.W. 118th Street, Miami, Florida 33176; Ms. Fara Diaz, Administrative Assistant, Clerk of the Board Division, Stephen P. Clark Center, 111 N.W. 1st Street, Suite 17-202, Miami, Florida 33126.

Charles D. Edelstein

Hearing Examiner