

# Memorandum

MIAMI-DADE  
COUNTY

**Date:** July 20, 2010

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

Supplement to  
Agenda Item No.  
14(A)26

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



**Subject:** Supplemental Information Subsequent to Bid Protest Filed by Secure Wrap of Miami, Inc., for Luggage Wrap Services at Miami International Airport - RFP No. MDAD 01-09.

This supplemental information is being provided subsequent to the conclusion of the bid protest filed by Secure Wrap of Miami Inc., for Luggage Wrap Services at Miami International Airport (MIA) and the decision of the Hearing Examiner (attached) recorded pursuant to Section 2-8.4 of the Code of Miami-Dade County.

## Background

The incumbent Secure Wrap of Miami, Inc. filed the bid protest pursuant to my duly filed recommendation to award a five (5) year baggage wrapping concession with a two (2) year option to extend to Sinapsis Trading U.S.A., LLC (Sinapsis).

In its protest, Secure Wrap argued that (1) that the Request for Proposals (RFP) that led to my recommendation was flawed as it did not clearly specify the number of wrapping locations for the proposal purposes; (2) that the RFP is flawed because it did not require proposers to demonstrate ability to comply with TSA regulations; (3) that Sinapsis is not a responsible proposer as it is a newly formed company, or alternately, that a newly formed company is not responsive to the proposal requirements; (4) that Sinapsis' proposal was not responsive as it did not include the "major assumptions" behind its revenue projections; (5) that Sinapsis' proposal was not responsive as it did not demonstrate compliance with the RFP's Airport Concession Disadvantaged Business Enterprise (ACDBE) requirements; (6) that Sinapsis' proposal was not responsive because it included a third party certification of its machines, rather than a manufacturer's certification; and (7) that Sinapsis' proposal was not responsive because it failed to disclose certain overseas litigation.

Upon the conclusion of a hearing held on June 23, 2010, before Hearing Examiner Judge Robert H. Newman, in which both Secure Wrap of Miami, Inc. and the County presented evidence and testimony, the Hearing Examiner rejected Secure Wrap's arguments in their entirety and upheld my original recommendation to award the contract to Sinapsis Trading U.S.A.



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

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July 16, 2010

Miguel A. Diaz de la Portilla, Esq.  
BECKER & POLIAKOFF, P.A.  
121 Alhambra Plaza, 10<sup>th</sup> Floor  
Coral Gables, Florida 33134

Re: Bid Protest – RFP No. MDAD-01-09  
Luggage Wrapping Services at Miami International Airport

Dear Mr. Diaz de la Portilla:

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 held on June 23, 2010.

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, Acting Division Chief  
Clerk of the Board Division

DC/fcd  
Attachments

cc: George Burgess, County Manager (via email)  
Ysela Llorc, Assistant County Manager (via email)  
Hugo Benitez, Assistant County Attorney (via email)  
David Murray, Assistant County Attorney (via email)  
Jose Abreu, Director, Miami-Dade County Aviation Dept. (via email)  
Ana Sotorrio, Associate Aviation Director, MDAD (via email)  
Pedro J. Betancourt, Chairperson, Evaluation/Selection Committee, MDAD (via email)  
Marie Vincent-Clark, MDAD (via email)  
Sinapsis Trading WSA, LLC  
Secure Wrap of Miami, Inc.

MIAMI-DADE COUNTY BOARD OF COUNTY COMMISSIONERS

SECURE WRAP OF MIAMI, INC.

Petitioner,

BID PROTEST

RFP NO. MDAD 01-09

v.

MIAMI-DADE COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondent, and

RE: REQUEST FOR PROPOSALS FOR LUGGAGE WRAPPING SERVICES AT MIAMI INTERNATIONAL AIRPORT

SINAPSIS TRADING U.S.A., LLC

Intervenor.

CLERK OF THE BOARD  
2010 JUL 16 PM 3:05  
CLERK, CIRCUIT D. COUNTY COURTS  
MIAMI, FLORIDA

ORDER

A hearing on this matter was conducted on June 23, 2010, in Miami, Florida, before Hearing Examiner Judge Robert H. Newman, who bases his recommendation upon the following findings and conclusions.

**Questions Presented**

1. The County Manager has recommended award of a five (5) year baggage wrapping concession with a two (2) year option to extend to Sinapsis Trading U.S.A., LLC ("Sinapsis") at Miami International Airport ("MIA"). The incumbent vendor, Secure Wrap, has protested this recommendation pursuant to Section 2-8.4 of the Miami-Dade County Code.

2. In its protest, Secure Wrap argues: (1) that the Request for Proposals ("the RFP") that led to this recommendation was flawed as it did not clearly specify the number of wrapping locations for proposal purposes, (2) that the RFP is flawed because it did not require proposers to demonstrate ability to comply with TSA regulations, (3) that Sinapsis is not a responsible

proposer as it is a newly formed company, or alternately, that a newly formed company is not responsive to the proposal requirements, (4) that Sinapsis' proposal was not responsive as it did not include the "major assumptions" behind its revenue projections, (5) that Sinapsis' proposal was not responsive as it did not demonstrate compliance with the RFP's Airport Concession Disadvantaged Business Enterprise ("ACDBE") requirements, (6) that Sinapsis' proposal was not responsive because it included a third party certification of its machines, rather than a manufacturer's certification, and (7) that Sinapsis' proposal was not responsive because it failed to disclose certain overseas litigation.

3. After a review of the materials, and a full hearing on this matter, I reject Secure Wrap's arguments in their entirety and uphold the County Manager's recommendation.

#### **Background and Findings of Fact**

4. The County advertised MDAD RFP 01-09, Luggage Wrapping Services at MIA ("the RFP") on September 15, 2009. See Secure Wrap Bid Protest at 1. The RFP allocated 500 total points to evaluation of the technical proposals, and 500 total points to price. See Exhibit 1 at RFP 43-44.<sup>1</sup>

5. The County received proposals from two entities, Sinapsis and Secure Wrap.

6. After evaluation of the technical portions of each proposal, Secure Wrap had been awarded 3067 points, Sinapsis 2855 points. See Exhibit M.

7. Sinapsis proposed a minimum annual guarantee ("MAG") of \$11,100,000.00 and offered to pay the County 56.50% percent of its gross revenues in excess of that MAG. Secure Wrap proposed a MAG of \$4,100,000.00 and a percentage of 35%. See Exhibit H. The proposed contract term is five (5) years with a two (2) year option to extend; thus, over this

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<sup>1</sup> References to Exhibits are to the Exhibits filed by Secure Wrap with its protest, and use the same number as was provided by Secure Wrap.

contract term, the Sinapsis proposal is worth approximately \$49,000,000.00 more than Secure Wrap's (holding everything else constant).

8. After points were awarded for price, Sinapsis had been awarded 6355 points, and Secure Wrap 4719. *See* Exhibit M.

9. The Selection Committee found both firms to be responsive and responsible. The Committee voted to award the RFP to Sinapsis. *See* Exhibit Y.

#### Facts Relative to Minimum Qualifications

10. The RFP stated that proposers "should have three or more years of experience within the last five years in the majority ownership of an entity that financed, designed, installed, maintained, and operated luggage wrapping services in international airports." Exhibit 1 at RFP-15. The RFP permitted proposers to "proffer the experience of its corporate parent...in meeting these requirements." *Id.* It is common for corporations proposing on airport contracts to form subsidiaries for purposes of proposing on airport contracts. *See* Testimony of Pete Betancourt at T-70.<sup>2</sup>

11. Sinapsis is a subsidiary of Sinapsis L.C., and is related to the TrueStar group of companies. *See* Exhibit E (Sinapsis Proposal) at 17, 19. Sinapsis L.C. and the True Star Group operate luggage wrapping concessions at 26 airports in 13 countries around the world. *See* Exhibit E (Sinapsis Proposal) at 24; T-93. Sinapsis L.C. has provided a guarantee of the performance of Sinapsis. *See* Exhibit E (Sinapsis Proposal) at 19; T-94.

12. Additionally, Fabio Talin is president of both entities. *See* Exhibit E (Sinapsis Proposal), Certificate of Proposers. Mr. Talin has substantial personal experience in baggage wrapping concessions. *See Id.* at 84, 90.

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<sup>2</sup> References to the Transcript of the Hearing held on June 23<sup>rd</sup>, 2010, will be referenced as T-\_\_\_.

13. Sara Abate, Property Manager for Concessions and Business Development for the Miami-Dade Aviation Department ("MDAD") at MIA, believes that Sinapsis is qualified and capable of performing the work of the RFP, based on the representations made by Sinapsis in its proposal. *See* T-95.

#### **Facts Relative to Location of the Machines**

14. The RFP requested bidders to provide a MAG to the airport for the right to operate luggage wrapping concessions. *See* Exhibit 1. For proposal purposes, the RFP stated that proposers should assume operation of the locations specified on Exhibit A. *See Id.* at RFP-9.

15. The RFP also, however, referenced a different number of machines in other sections. *See Id.* at RFP-4, Sec. 1.1.

16. On October 20, 2009, prior to submission of proposals, Secure Wrap asked MDAD to clarify the number of locations included in the proposal. *See* Exhibit Y. MDAD responded via the issuance of Addendum # 2, which specified that "for proposing purposes, the proposer shall refer to Exhibit A" of the RFP. *See* Exhibit C at A1.

17. Secure Wrap did not indicate that it was confused by this response, and did not ask for additional clarification.

#### **Facts Relative to Financial Assumptions**

18. The RFP asked proposers to submit a financial plan. *See* Exhibit A at Exhibit J. As part of that submittal, proposers were told that they "should provide a realistic estimate of the expected annual gross revenues to be derived from the proposed operations. Major assumptions used in developing the sales projections should also be clearly stated." *Id.*

19. As part of its projections, Sinapsis included year by year market penetration-rates for various airports it deemed comparable to MIA, as well as its overall expectations as to wrapping trends. *See Exhibit E (Sinapsis Proposal)* at 15, 44-45. Sinapsis stated that it expected operations at MIA to generate fifteen million dollars annually, based on passenger volume, passenger characteristics, and expected penetration rates. *See Exhibit E (Sinapsis Proposal)* at 195-196. Sinapsis chose not to convey how it weighed those factors, claiming that the formula those facts are fed into is "proprietary." *Id.*

20. Additionally, the MAG proposed by Sinapsis is not conditional, and payment of the MAG is controlled by the Agreement attached to the RFP at Exhibit A. *See Exhibit A, Form of Lease and Concession Agreement* at 3.01, 3.03. None of Sinapsis' assumptions regarding the financial outlook are controlling per the terms of that Agreement, and Sinapsis must pay the MAG barring a force majeure event. Additionally, that Agreement requires Sinapsis to provide a performance bond to guarantee its MAG. *See Id.* at 3.09.

#### **Facts Relative to Equipment Certification**

21. The RFP states that "the manufacturer of the machines must provide a certificate verifying that the transaction counter mechanism is tamperproof. Should the manufacturer of the machine also be the user, an independent certification that the machines are tamperproof must be provided." *See Exhibit A at RFP-14.*

22. Sinapsis' machines are manufactured by Sinapsis Italia SL, a corporate relative of Sinapsis.

23. Sinapsis provided an independent certification from Eurofins that the machines that Sinapsis would use are tamperproof. *See Exhibit E (Sinapsis Proposal)* at 132. Eurofins is a credible international testing laboratory. *See T-98.*

### Facts Relative to ACDBE Certification

24. The RFP requires proposers to either provide an ACDBE with an opportunity to achieve 30 percent of the gross revenues of the concession, or else to demonstrate good faith efforts that it attempted to provide such opportunity. See Exhibit A at RFP-35, Sec. 4.1. Sinapsis could meet this goal by subcontracting with a minority firm.

25. The RFP provides a process to evaluate whether or not Sinapsis has achieved its ACDBE goal. "In order to participate on this contract, an ACDBE must be certified or have applied for certification to the Miami-Dade County Department of Small Business Development or Florida Uniform Certification Program at the time of Proposal submittal, but the ACDBE firm *must be fully certified on or before the award date.*" See Exhibit A, RFP-38, Sec. 4.4 (*emphasis added.*)

26. Sinapsis proposed to utilize a firm known as Crown Global Services ("Crown Global") to meet its ACDBE goal. See Exhibit E (Sinapsis Proposal) at Appx. I, ACDBE Utilization Form. As part of its proposal, Sinapsis agreed to meet the 30 percent goal, indicated that it would utilize Crown Global to achieve this goal, and listed the work it expected Crown Global to perform; this work was related to the work of the RFP. See *Id.* at Appx. I, ACDBE Utilization Form, Schedule of Participation, Letter of Intent.

27. At the time of the proposal submittal, Crown Global was certified as a Disadvantaged Business Enterprise ("DBE"), but not an ACDBE. See Exhibit R. Crown Global was certified as an ACDBE on April 21, 2010. See Letter to Tarik King from Miriam Singer dated April 21, 2010.

28. There is no evidence in the record indicating that Crown Global had not applied for ACDBE certification prior to the date of proposal submittal.

**Facts Relative to TSA Certification**

29. The firm that eventually performs pursuant to this RFP must be able to re-wrap bags which were opened by TSA. TSA has adopted a set of guidelines by which it will determine if a firm will be allowed to re-wrap such bags.

30. TSA was unwilling to pre-screen proposers on the RFP for compliance with these regulations. See T-89. TSA instead asked that the County determine the successful proposer, and at which point TSA would determine if that proposer could comply. See T-89-91.

31. Sinapsis has certified that it can comply with the TSA guidelines.

**Facts Relative to the Office of the Inspector General**

32. The RFP requires that proposers list all active litigation or investigations concerning the firm.

33. Sinapsis listed certain active litigation.

34. The Office of the Inspector General ("OIG") investigated Sinapsis, and determined that Sinapsis had not fully disclosed all of its active litigation. See T-74. However, the undisclosed litigation did not, in the opinion of the OIG, preclude award of a contract to Sinapsis. *Id.*

35. The Selection Committee was advised of the OIG findings and conclusions prior to ranking the proposers.

**Conclusions of Law**

36. The Petitioner bears the evidentiary burden. See *Robinson Electric v. Dade County*, 417 So.2d 1032 (Fla. 3<sup>rd</sup> DCA 1982). In order to meet that burden, Secure Wrap must show that the County's contracting decision is arbitrary and capricious, or is the product of dishonesty, fraud, illegality, oppression, or misconduct. See *Liberty County v. Baxter Asphalt &*

*Concrete, Inc.*, 421 So.2d 505, 507 (Fla. 1982); *City of Cape Coral v. Water Services of American, Inc.*, 567 So.2d 510 (Fla. 2<sup>nd</sup> DCA 1990). An agency's decision is arbitrary if it is not supported by facts or logic. See *Agrico Chemical Company v. State Department of Environmental Regulation*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). An agency's action is capricious if the agency takes the action without thought or reason or with irrationality. *Id.*

37. Thus merely showing that other reasonable alternatives or approaches exist is not sufficient for Secure Wrap to prevail; "a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous or if reasonable persons may disagree." *Baxter Asphalt & Concrete, Inc.*, 421 So.2d at 507 (Fla. 1982); see also *Dept. of Trans. v. Grove-Watkins Constructors*, 530 So.2d 912, 914 (Fla. 1988); *Miami-Dade County v. Church and Tower Inc.*, 715 So.2d 1084, 1089 (Fla. 3<sup>rd</sup> DCA 1998) (where bid award decision is based on facts reasonably tending to support it, courts should not interfere, even if decision may appear incorrect).

38. Additionally, it is not enough for Secure Wrap merely to show that the RFP was not followed in all respects, as the County may waive a defect in a proposal or a requirement in a solicitation that does not grant a bidder a competitive advantage, or where the County is otherwise assured "that the contract will be entered into, performed and guaranteed according to its specified requirements." *Robinson Electric*, 417 So.2d 1032 (Fla. 3<sup>rd</sup> DCA 1982); *Tropabest Foods Inc. v. Dep't of General Services*, 493 So.2d 50 (Fla. 2<sup>nd</sup> DCA 1986)(submittal of price for 3.5 gallon juice mix rather than 1 gallon mix as required by solicitation is a permissible minor deviation where no effect on competition is shown).

### Conclusions Relative to the Location of Machines

39. A specification which is ambiguous, or which does not provide clear guidance to bidders, is legally ineffective. *See Aurora Pump v. Goulds*, 424 So. 2d 70 (Fla. 1<sup>st</sup> DCA 1982)(specification which did not provide clear cut-off date for submission of revisions was defective). Here, however, the County gave clear guidance in the form of Addendum # 2 as to the numbers of machines on which proposers were to base their proposals, the purpose of which was to “clarify and/or modify the previously issued Request for Proposals”. *See Exhibit C.* Addendum # 2 referred proposers to Exhibit A, which contained a discrete and known number of locations. Proposers were at that point on notice to disregard any other portion of the RFP to the contrary. There is additionally no evidence that Addendum # 2 was not clear; certainly Secure Wrap did not ask for additional clarification of terms. *See T-69.*

40. Accordingly, the RFP provided clear guidance to proposers and was not ambiguous. This challenge to the Manager’s recommendation is rejected.

### Conclusions Relative to Minimum Qualifications.

41. The undisputed testimony is that it is common for corporations to form subsidiaries for the purposes of bidding on airport projects. *See T- 70.* The RFP therefore clearly allows such subsidiaries to propose on the RFP, even if that proposing entity (as opposed to its corporate parent) does not have the desired experience. *See Exhibit A at Sec. 1.3, Sec. 2.3(b)(1)2.*

42. Moreover, even in the absence of such explicit language in the RFP, it is permissible to consider experience of a corporate affiliate in determining the responsibility of a proposer. *See e.g. Turor-Saliba Corp. v. U.S. Army Corps of Engineers*, 1995 WL 520765 (D.D.C., 1995.) (“An agency has the discretion to consider the experience of the affiliate of a

prospective contractor in evaluating the bidder's responsibility...[t]his is particularly true where a firm has been recently established."); *Hardie-Tynes Mfg. Co.*, 69 Comp. Gen. 359 (1990)(proper to consider international affiliate's qualifications in evaluating whether U.S. affiliate meets minimum qualifications requested by solicitation).

43. Here, the evidence is that Sinapsis' corporate parent both meets the minimum qualification and is strongly tied to Sinapsis; the parent has guaranteed Sinapsis' performance, and the parent and Sinapsis share the same president and executives.

44. In light of these undisputed facts, it is neither arbitrary nor capricious for Sinapsis to be deemed a responsible proposer. Certainly, facts exist which support a determination that Sinapsis is a responsible proposer. *Cf. Agrico v. State Dept. of Env. Reg.*, 365 So. 2d at 763 ("An arbitrary decision is one not supported by facts or logic, or despotic.") Secure Wrap's challenge to the Manager's recommendation is thus rejected.

#### **Conclusions Relative to Financial Assumptions.**

45. As an initial matter, it is important to note that the RFP does not require submission of Sinapsis' "major assumptions." Proposers are told they "should" reveal such assumptions, but the term "should" implies the existence of discretion on the part of proposers. *Cf. University of South Florida v. Tucker*, 374 So.2d 16 (Fla. 2<sup>nd</sup> DCA 1979)(" Use of the word "should" indicates to us that the procedure for resignations is discretionary rather than mandatory in nature."); *see also Cuevas v. Superior Court*, 58 Cal.App.3d 406, 409, 130; Cal.Rptr. 238, 239 (1976) ("The word 'should' is used in a regular, persuasive sense, as a recommendation, not as a mandate."). Thus Sinapsis had no mandatory obligation to provide its financial assumptions.

46. Second, it is undisputed that Sinapsis proffered certain financial assumptions, namely, its record at what it considered to be similar airports. It is undisputed that Sinapsis

stated that it based its projections on the airport's passenger load, passenger characteristics, and expected market penetration. These assumptions may not be as substantial as Secure Wrap would wish, but they were in fact proffered. It is not arbitrary for the County to accept these financial comparisons as compliance with the RFP.

47. Lastly, even if the specification were to be deemed as mandatory, and even if Sinapsis' proposal were to be deemed insufficient, Sinapsis could still go forward to award; the County can waive non-material defects in a proposal if those defects do not affect the competitive process. *See Robinson Elec. Co. v. Dade County*, 417 So.2d 1032 (Fla. 3d DCA 1982) (irregularities in the bidding process may be waived unless they give bidder a competitive advantage over other bidders) *Harry Pepper & Assocs., Inc. v. City of Cape Coral*, 352 So.2d 1190 (Fla. 4th DCA 1977) (deviation in a bid on a public project is sufficiently material to destroy its competitive character only if the deviation gives one bidder a benefit or advantage not enjoyed by other bidders). Secure Wrap—which received more technical points than did Sinapsis—attempts to argue that this is not a waivable defect, and asserts that Sinapsis' assumptions are critical to determining whether or not the price it proposed is legitimate or illusory.

48. Secure Wrap's theory, however, would only be persuasive if the RFP allowed Sinapsis to escape its bid. Here, it is undisputed that Sinapsis is bound by its MAG irrespective of its own assumptions; it is undisputed that Sinapsis has to bond the MAG. *See Exhibit A, Form of Lease and Concession Agreement*, at 3.01. 3.09. The terms of the Agreement control over the terms of the RFP. *See Id.* at 1.09. It is undisputed that the contract does not allow for renegotiation of the MAG.<sup>3</sup> *See Id.* at 3.03.

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<sup>3</sup> Secure Wrap proffers a previous instance in which the County lowered MAG's for concessionaires at the County's South Terminal. Those concessionaires, however, had potentially viable claims against the County based on the

49. Further, it is undisputed that even if Sinapsis were given zero technical points for its financial projections, it still would have handily won this procurement. *See* Exhibit M. There is in short no impact on competition from Sinapsis' alleged failure, and this failure, to the extent it exists at all, is thus not material.

50. Accordingly, Secure Wrap does not carry its burden to overturn the Manager's recommendation.

#### **Conclusions Relative to Equipment Certification**

51. The RFP clearly requires that an entity such as Sinapsis, which constructs its own machines, provide a certification from a third party. Sinapsis provided such a certification. There is no ground for protest.

#### **Conclusions Relative to ACDBE Certification**

52. The ACDBE program is a creation of Federal law. *See* 49 C.F.R. 23 *et seq.* That program requires the County to maximize the use of ACDBE firms in its concession contracts, but forbids mandatory contract goals. *See* 49 C.F.R. 23.25, 23.61. The Federal rules differentiate between an DBE and an ACDBE. *See* 49 C.F.R. 23 (setting forth requirements for ACDBE program); 49 C.F.R. 26 (setting forth requirements for DBE program). However, an existing DBE can be presumed to qualify as an ACDBE, subject to minor additional investigations. *See* 49 C.F.R. 23.37 ("You must presume that a firm that is certified as a DBE under part 26 is eligible to participate as an ACDBE.") (*emphasis added*).

53. The RFP requires that a firm which intends to participate as an ACDBE be certified not at the time of proposal submittal, but instead prior to award of the contract. *See* Exhibit A at 4.4. This is consistent with the Federal regulations, which allow for pre-award

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County's inability to timely provide finished concession spaces, and based on material changes in the conditions the County represented to the concessionaires as to use of that terminal. I therefore do not find that situation to be comparable to the situation described here.

certification as a matter of bidder responsibility. 49 C.F.R. 26.53 (bidder can present information to airport "at any time before [the airport] commit itself to the performance of the contract by the bidder/offeror, as a matter of responsibility.")<sup>4</sup>

54. It is undisputed that Crown Global, Sinapsis' ACDBE, became certified as an ACDBE prior to award of this contract. Sinapsis and Crown Global have complied with the ultimate intent of the RFP and Federal regulations.

55. To the extent that Secure Wrap argues in the alternative that Crown Global must have applied for certification prior to submittal of the proposal, that requirement would again appear to be a waivable defect in Sinapsis' proposal. Sinapsis identified its proposed ACDBE, identified the work it would perform, and agreed to be bound by the Contract requirements that Crown Global make 30 percent of gross revenues.

56. Moreover, Sinapsis does not gain an ability to escape from its bid that it would not otherwise have; nothing would prevent Crown Global from "gaming" or shopping the certification process if it wanted to escape the bid whether it had applied for certification or whether it had not. The ultimate question in either case remains the same, and thus no competitive advantage is created at the proposal stage.<sup>5</sup>

57. Furthermore, Sinapsis did not identify any potential competitive advantage which would be created by accepting Crown Global's certification.

58. Accordingly, this challenge does not undermine the Manager's recommendation.

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<sup>4</sup> Both the ACDBE and DBE programs use the provisions of 49 C.F.R. 26.53 to evaluate proposer compliance. See 49 C.F.R. 23.25(e)(1) ("The administrative procedures applicable to contract goals in part 26, §26.51-53, apply with respect to concession-specific [ACDBE] goals.")

<sup>5</sup> Presumably, if Crown Global refused to submit an application, or refused to follow a submitted application through to conclusion, the bid security would be forfeit. In this, the certification requirement is a compliance issue that is, as is discussed below in paragraph 59, properly viewed as a condition of award.

### **Conclusions Relative to TSA Certification**

59. It is undisputed that TSA would not pre-screen proposers. *See* T-89. It is undisputed that it is TSA, not the County, who has the ultimate right to determine whether a proposer meets the TSA guidelines. It is therefore neither arbitrary nor capricious for the County to not subjectively evaluate a proposer's ability to comply prior to award.

60. Moreover, the County treats a number of requirements as conditions of award, including insurance, bonding, and provision of ID badges for personnel. *See* T-89-91. Badges are directly comparable to TSA compliance under the RFP, as they are required for security purposes, control which individuals are allowed access to the airport, and are issued or declined only in response to applications by a vendor under contract. *See* T-90. There is thus precedent for treating TSA compliance as a condition of award. Given this precedent, and TSA limitations, the County's decision is not arbitrary or capricious.

### **Conclusions Relative to the OIG**

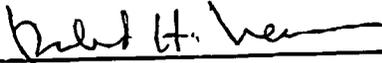
61. Per the OIG, Sinapsis did not list all litigation to which it was a party. The OIG did not, however, deem this undisclosed litigation material, and stated that it felt that the procurement could move forward. It was accordingly not arbitrary for the County Manager to rely on this investigation and conclusion.

### **Conclusion**

62. The County Manager's recommendation is neither arbitrary, capricious, nor the product of illegality. Most of Secure Wrap's arguments are inconsistent with the express terms of the RFP; where the RFP might support Secure Wrap's arguments, the actual facts developed explain the actions of the Selection Committee and/or the County Manager; moreover, to the extent that any minor deviations from the specification exist, these minor deviations did not

create any competitive advantage in favor of Sinapsis. Accordingly, the recommendation of the County Manager is affirmed in all respects.

Dated this 16<sup>th</sup> day of July, 2010.

  
\_\_\_\_\_  
Robert H. Newman  
Hearing Examiner

Copies furnished to:  
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