

Memorandum



Date: February 19, 2014
To: Honorable Chairwoman Rebeca Sosa and Members, Board of County Commissioners
From: Carlos A. Gimenez Mayor
Subject: Supplement to Contract Award Recommendation for Project No. S-852: Proposed Master Pump Station No. 3

Supplement to:
Agenda Item No. 8(0)(1)

This supplement is presented to report that a bid protest was filed with the Clerk of the Board on December 27, 2013 by Munilla Construction Management LLC. In accordance with the bid protest procedures, as set forth in Section 2-8.4 of the Code of Miami-Dade County and Implementing Order 3-21, a Hearing Examiner was appointed and a hearing was conducted on January 21, 2014. The Hearing Examiner upheld the Mayor's contract award recommendation to Poole & Kent Company of Florida, Inc. as the responsive, responsible bidder.

Background

The solicitation was advertised on June 26, 2013. On September 5, 2013, WASD received three (3) bids for this project from Munilla Construction Management, LLC, Central Intercounty, Joint Venture and Poole & Kent Company of Florida, Inc. The recommendation to award is being made to the lowest responsive, responsive bidder, Poole & Kent Company of Florida, Inc. whose evaluated bid is \$21,976,500.00.

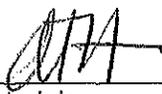
Munilla Construction Management, LLC, the second low bidder, argues that the bid submitted by Poole & Kent Company of Florida, Inc. was neither responsive nor responsible. Munilla Construction Management, LLC asserts that the only pump station approved in the specifications of the Invitation to Bid issued by the County was the Morris Pump, and that Poole & Kent Company of Florida, Inc. deviated from the specifications in that the pump submitted by Poole & Kent Company of Florida, Inc. contained a non-conforming pump. Poole & Kent Company of Florida, Inc. identified the Flygt Pump as its proposed equipment in the bid documents submitted to the County.

The County opposes Munilla Construction Management, LLC's protest on various grounds. The County argues that Munilla Construction Management, LLC misinterprets the bid documents (as alternate pumps could be proposed) and has no standing to challenge the Mayor's recommendation to award as its response does not meet the minimum experience qualifications set forth in the Invitation to Bid, and therefore, in any event, could not be awarded the contract. Moreover, the bid documents require Poole & Kent Company of Florida, Inc. to provide a conforming pump at its sole cost, if the proposed pump is not compliant.

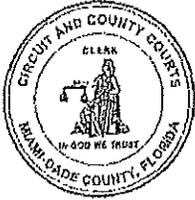
The Hearing Examiner, Judge Eugene J. Fierro, concluded that the award recommendation was appropriate and should be upheld. There was no evidence that the County acted illegally, arbitrarily, or fraudulently. For these reasons, the bid protest filed by Munilla Construction Management, LLC was denied. The Mayor's recommendation to award to Poole & Kent Company of Florida, Inc., the lowest responsive, responsible bidder, was upheld.

Copies of the *Findings and Recommendations* filed by the Hearing Examiner are attached.

Attachment


Alina T. Hudak
Deputy Mayor

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



CLERK OF THE BOARD OF COUNTY COMMISSIONERS
STEPHEN P. CLARK CENTER
SUITE 17-202
111 N.W. 1st Street
Miami, FL 33128-1983
Telephone: (305) 375-5126

January 28, 2014

Daniel F. Munilla, Esq.
Peterson & Espino, P.A.
10631 S.W. 88th Street, Suite 220
Miami, Florida 33176

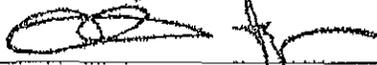
Re: Bid Protest – Project No. S-852
Proposed Master Pump Station No. 3
(Protester: Munilla Construction Management LLC (“MCM”))

Dear Mr. Munilla:

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 Honorable Judge Eugene J. Fierro, Hearing Examiner, in connection with the foregoing bid protest hearing which took place on January 21, 2014.

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 
Christopher Agrippa, Director
Clerk of the Board Division

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Attachment

Daniel F. Munilla, Esq.
Peterson & Espino, P.A.
Page Two
January 28, 2014

cc: Honorable Chairwoman Rebeca Sosa, and
Members, Board of County Commissioners (via email)
Honorable Carlos A. Gimenez, Mayor, Miami-Dade County (via email)
Aljina T. Hudak, Deputy Mayor (via email)
R.A. Cuevas, Jr., County Attorney (via email)
Hugo Benitez, Assistant County Attorney (via email)
Oren Rosenfhal, Assistant County Attorney (via email)
Henry N. Gillman, Assistant County Attorney (via email)
Jenelle Snyder, County Attorney's Office (via email)
Rita Gonzalez, County Attorney's Office (via email)
Ginny Bass, County Attorney's Office (via email)
Charles Anderson, Commission Auditor (via email)
Elizabeth Owens, Commission Auditor's Office (via email)
John Renfrow, Director, Water & Sewer Department (via email)
Isaac Smith, Manager, Construction Contracts Section, Water & Sewer Dept. (via email)
Jean-Marie Rodriguez, Water & Sewer Dept. (via email)
Central Intercounty, Joint Venture
Munilla Construction Management LLC ("MCM")
Poole & Kent Co. of Florida

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

In re: Bid Protest Munilla Construction :
Management LLC : Hearing Officer: Judge Eugene J. Fiero
Proposed Master Pump Station No. 3 :
Project Number S-852 :
Water and Sewer Department :
:

REPORT AND RECOMMENDATION OF THE HEARING OFFICER

I. Preliminary Statement

This Report and Recommendation is issued pursuant to Section 2-8.4 of the Code of Miami Dade County in connection with the protest of Munilla Construction Management, LLC ("MCM") in the referenced matter. MCM protests the Miami-Dade County (the "County") Mayor's recommendation to award a contract for Master Pump Station Number 3, Project #E.R. SO48740/Contract No. S-852 Project (the "Project") to Poole & Kant Company of Florida ("P&K") as the "responsive, responsible Bidder whose evaluated bid totals the lowest number of dollars." (Invitation to Bid for the Project, referred to in this opinion as the "ITB", Section 17, Award of Contract.

MCM argues that P&K was neither responsive nor responsible. MCM asserts that the only pump approved was the Morris Pump and that P&K materially deviated from the ITB in that P&K's bid contained a non conforming pump. It further asserts that P&K did not satisfy the experience requirements set forth in the ITB. MCM alleges that the process was arbitrary, capricious and not transparent, insofar as the County approved the alternate pump offered by P&K in contravention of the ITB. MCM argues that the ITB identified the Morris Pump or "approved equals" as suitable but the County never approved an equal in advance of the bid opening; relying on *Harry Pepper & Associates, Inc. v. Cape Coral*, 352 So.2d 1190 (Fla. 2nd DCA 1977) for the proposition MCM protest recommendation that the County was compelled to reject P&K's bid. MCM also takes issue with the post bid communications between the County and P&K.

The County opposes MCM's protest on various grounds. The County argues that MCM misinterprets the bid documents and that MCM has no standing to challenge the proceedings, as it does not meet the minimum experience qualifications set forth in the ITB, could not be awarded the contract in any event, and has no financial interest at stake. The County relies on *Sterra Club v. Morton*, 405 U.S. 727 (1972) and *Preston Carroll Company v. Florida Keys Aqueduct Authority*, 400 So.2d 524 (Fla. 3d DCA 1981) for the proposition that one without a substantial interest in the outcome has no standing to challenge a proceeding.

P&K as Intervenor and recommended bidder argues that MCM's bid is neither responsive nor responsible. P&K argues that MCM does not have standing because Florida law limits standing to challenge the award of government contracts to qualified contractors or vendors eligible to receive contracts. Florida Statute 255.20(4) limits standing to challenge a local government only to "qualified contractors or vendors who could have been awarded the project had the project been competitively bid." P&K asserts that MCM sought to establish its experience through two subcontractors, Garney Construction and Southeast Engineering while the bid specifically required the prime, and not its subs, to have the requisite experience. P & K argues that the bid

recommendation may not be overturned unless it is arbitrary, capricious, or the product of dishonesty, fraud, illegality, oppression or misconduct, *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So.2d 505 (Fla. 1982) and that a hearing examiner may not, absent those factors, substitute his judgment for that of the contracting authority. *City of Sweetwater v. Solo Construction, Corp.*, 823 So.2d. 798 (Fla. 3rd DCA 2002). P&K further argues that in the absence of sole source specification, the law permits a bidder to propose an equal if there is an "or equal" or "Material and Workmanship" Clause in the contract, *Florida Board of Regents v. Mycon Corp.*, 651 So.2d 149 (Fla. 1st DCA 1995) and that, contrary to the assertions of MCM, the bid form in the ITB specifically invited bidders to identify alternate pumps.

II. Findings of Fact

A hearing was conducted on January 21, 2014 in accordance with Section 2-8.4 of the Code of Miami-Dade County and County Implementing Order 3-21 governing bid protests. Appearing as counsel were Daniel Munilla, Esquire, and Alfredo de Armas, Esquire, for MCM, Assistant County Attorneys Hugo Benitez and Henry Gillman for the County, and Stuart Sakwa, Esquire, for P&K. Testifying at the hearing were Juan Munilla and Ana DePriest for MCM, Isaac Smith for the County and Patrick Carr for P&K.

The undersigned hearing officer considered all documentary evidence submitted prior to the hearing including MCM's protest, as supplemented, the County's response, and P&K's response, and the documents introduced during the course of the hearing. Although this report and recommendation does not recite every fact, the undersigned hearing officer has considered the entirety of the testimony, determined its probative value, and resolved conflicts in the evidence.

On December 23, 2013, the County Mayor recommended the award of a construction contract to Poole & Kent of Florida, Inc. for the construction of Master Pump Station Number 3. The work was to be performed at 1110 S.W. 3rd Avenue and adjacent addresses to serve the needs of the Brickell Basin II area, an area generally confined by I-95 on the West, the Miami River on the North, Biscayne Bay on the east, and S.W. 21st Street on the South.

On September 5, 2013, the County received three bids for the Project. The Mayor's recommendation was to award to P & K, the lowest responsive and responsible bidder in the amount of \$21,976,500.¹ P&K identified the Flygt Pump as its proposed equipment in the bid form; MCM the Morris Pump.

On October 15, 2013 the Water and Sewer Department issued a memorandum confirming that it had investigated P&K's qualifications, and P&K was determined to be a responsible bidder. On December 5, 2013, the County Attorney's Office issued a memorandum determining P&K's bid to be responsive. Notably, the County Attorney's Office determined that P&K was authorized to propose an equal to the named Morris Pump, and that MCM's bid was two million dollars more expensive than the P&K bid.

On January 10, 2014 the Water and Sewer Department determined that MCM was not a responsible bidder because it did not meet the minimum qualification requirements set forth in the ITB. The ITB allowed bidders to propose alternate equipment and specifically provided the bidders with an opportunity to propose an alternate pump. The bid was specifically designed to

The other two bids were from MCM in the amount of \$24,070,880 and Central Intercounty Joint Venture in the amount of \$24, 953,860.

allow for an evaluation of life-cycle costing, the cost of performance of the proposed equipment over a twenty year period. The bid provided for the proposal of an alternate pump, and for the bidders to complete a bid form which calculated the cost of operating the proposed equipment over a period of use. The bid was unequivocally to be awarded to "that responsive, responsible Bidder whose evaluated bid totals the lowest number of dollars." ITB, Section 17, Award of Contract.

MCM argues that Morris Pump was the only equipment that could be bid because it was the only approved pump at the time of bidding. The County acknowledges that the final suitability of any pump is to be determined only after contract award. The County did not determine the suitability of the alternate pump, and was not required to do so under the ITB. Instead, the ITB places the risk that the pump will not comply with the bidders, in this instance P&K. The ITB obligates the bidder to certify that the proposed pump is equal, and requires the bidder to provide a conforming pump at the bidder's sole cost, in the event the proposed pump does not comply.

III. Standard of Review

A recommendation of the County Mayor in bid protest pursuant to Section 2-8.4 of the Code of Miami-Dade County and Miami-Dade Implementing Order 3-21 may only be overturned if the recommendation is arbitrary, capricious or the product of dishonesty, fraud, illegality, oppression or misconduct. *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So.2d 505 (Fla. 1982). The hearing officer's sole responsibility in reviewing a protest is to ascertain whether the agency acted fraudulently, arbitrarily, illegally or dishonestly. *Dep't of Transportation v. Groves-Walkins Constructors*, 530 So.2d 912, 914 (Fla. 1988). Neither hearing examiners nor judges may overturn or second-guess the judgment of government employees or elected officials as to the merits or wisdom of a procurement decision. *Miami-Dade County v. Church & Tower, Inc.*, 715 So.2d 1084, 1089 (Fla.3rd DCA 1998); *Marrlott Corp. v. Metro Dade County*, 383 So.2d 662 (Fla. 3rd DCA 1980).

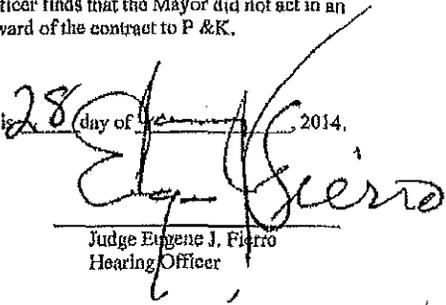
A bid protestor must establish a substantial interest in being awarded a bid as a condition of standing to challenge it. *Preston Carroll Company v. Florida Keys Aqueduct Authority*, 400 So.2d 524, 525 (Fla. 3rd DCA 1981).

IV. Recommendation

For the foregoing reasons, the undersigned Hearing Officer finds that the Mayor did not act in an arbitrary or capricious manner in recommending the award of the contract to P & K.

Protest denied.

This report and recommendation is hereby issued on this 28 day of June, 2014.


Judge Eugene J. Fierro
Hearing Officer