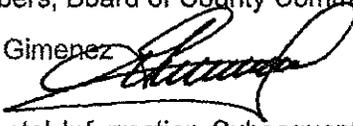


# Memorandum



**Date:** March 18, 2014

**To:** Honorable Chairwoman Rebeca Sosa  
and Members, Board of County Commissioners

**From:** Carlos A. Gimenez  
Mayor 

**Subject:** Supplemental Information Subsequent to Bid Protest Filed by Pasha's Marketplace, LLC for the Non-Exclusive Lease and Concession Agreement for the North Terminal Marketplace Concessions Program at Miami International Airport, RFP No. MDAD-03-11, Package 2

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

This supplemental information is being provided subsequent to the conclusion of the bid protest filed by Pasha's Marketplace, LLC for the Non-Exclusive Lease and Concession Agreement for the North Terminal Marketplace Concessions Program at Miami International Airport, Request for Proposals (RFP) No. MDAD-03-11, Package 2, and the decision of the Hearing Officer (attached) recorded pursuant to Section 2-8.4 of the Code of Miami-Dade County.

The subject RFP was advertised for a Mediterranean food vendor at Miami International Airport. As described in the RFP, this vendor would serve foods such as "moussaka, gourmet wraps, roasted/marinated vegetables, tapas, ratatouille appetizers, spiced olives, regional cheeses, baked items, and desserts." The winning proposer was The Mediterranean Kitchen, LLC (TMK). TMK is a concept created by Icebox Café, which will serve a full Mediterranean menu of such items as falafel, hummus, grape leaves, tabouleh, almond cookies, and apricot bars. The next ranked proposer was Pasha's Marketplace, LLC, (Pasha's). Pasha's filed the attached protest, which was heard by Hearing Examiner Charles D. Edelstein on December 20, 2013. Although the Hearing Examiner ultimately rejected the protest, siding with the County, he did raise questions about the Aviation Department's (MDAD) procurement process. This memorandum clarifies the process behind this RFP.

First, a question was raised concerning whether the RFP's minimum qualifications were mandatory. They were not. MDAD has not issued concession RFPs with mandatory minimum qualifications since at least 2008; instead, proposers are invited to proffer the experience and qualifications they believe are relevant. The Selection Committee then weighs those qualifications against the terms of the RFP. This concept is reflected in the text of the RFP, which specifically allows firms that do not meet the minimum qualifications to proceed to the Selection Committee.

The purpose behind this concept is that it is in best interests of the County, and the public, to have maximally competitive concession solicitations. Therefore, the issuance of RFPs that arbitrarily restrict the ability of proposers to compete limits this competition. This concept prevents MDAD staff from arbitrarily rejecting proposals, and removes the perception of favoritism from the process. The concept allows start-ups, entrepreneurs, and small local firms access to the Selection Committee on equal terms as major international concessionaires. All North Terminal concessions were awarded using RFPs which utilized this concept.

It is thus incorrect to assert that MDAD treated either this RFP or the proposers in this RFP differently than it has in the past. Instead, MDAD applied the same rules to this RFP that it did to prior North Terminal Concession RFPs -rules which have resulted in an award winning North Terminal concession program.

The Hearing Examiner expressly found that TMK has sufficient experience with Mediterranean food and the Mediterranean menu, and sufficient general food and beverage experience to operate a Mediterranean concession at MIA.

Additionally, questions were raised about the viability of the Minimum Annual Guarantee (MAG) proposed by TMK. TMK proposed a MAG of \$320,397. As you are aware, monies raised through concession revenue defray the landing fees paid by airlines; the more concession revenue generated by MIA, the more attractive MIA becomes to airlines. It is therefore never in the interests of the airport to arbitrarily reject aggressive MAGs proposed by concessionaires. By its very definition, an RFP is intentionally designed to spur respondents to propose the highest possible return to MIA, and is in many instances the deciding factor in determining which concessionaire gets an award. MIA often receives what could be construed by other parties as aggressive MAG proposals. However, the RFP requires proposers to provide the forecasted annual Gross Revenues to be derived from the proposed operations, including sales projections. Further, the RFP requires a performance bond and security payment which combined cover 100% of the proposed MAG and annual rent. Moreover, TMK is both providing security for this MAG, and also providing a corporate guarantee of its payment from Icebox Café. The County is therefore protected in the event that the MAG is not met. Additionally, TMK is well aware that the failure to provide this MAG will result in it being placed in default, and the loss of its concession location.



Jack Osterholt, 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 MIAMI-DADE GOVERNMENT CENTER  
SUITE 17-202  
111 N.W. 1st Street  
Miami, FL 33128-1983  
Telephone: (305) 375-5126

January 16, 2014

Lillian A. Ser, Esq.  
Lillian Ser Law PLLC  
4070 Laguna Street  
Coral Gables, Florida 33146

Re: Bid Protest – RFP No. MDAD-03-11 Package 2 to the Mediterranean Kitchen, LLC  
(Protester: Pasha's Miami Marketplace, LLC)

Dear Ms. Ser:

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 Charles D. Edelstein, Hearing Examiner, in connection with the foregoing bid protest hearing which took place on December 20, 2013.

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

CA/fcd  
Attachment

Lillian A. Ser, Esq.  
Lillian Ser Law PLLC  
Page Two  
January 16, 2014

cc: Honorable Carlos A. Gimenez, Mayor, Miami-Dade County (via email)  
Alina T. Hudad, Deputy Mayor (via email)  
Jack Osterholt, Deputy Mayor (via email)  
R.A. Cuevas, County Attorney (via email)  
Hugo Benitez, Assistant County Attorney (via email)  
David Murray, Assistant County Attorney (via email)  
Jenelle Snyder, County Attorney's Office (via email)  
Rita Gonzalez, County Attorney's Office (via email)  
Rosa Martin, County Attorney's Office (via email)  
Charles Anderson, Commission Auditor (via email)  
Elizabeth Owens, BCC Legislative Analyst, Commission Auditor's Office (via email)  
Emilio Gonzalez, Director, Miami-Dade Aviation Department (via email)  
Marie Clark-Vincent, Division Director, Contracts Administration, MDAD (via email)  
Adrian Songer, Chief, Airport Concession Business Development, MDAD (via email)  
Pedro J. Betancourt, Sr. Procurement Contractor, Contracts Adm. MDAD (via email)  
Pasha's Marketplace, LLC  
BMG Branded Foods d/b/a Marhaba Airport Group  
The Mediterranean Kitchen LLC  
HOST International, Inc.  
PREMAIR Hospitality Group, LLC  
100 M. Operator LLC

CLERK OF THE BOARD

2014 JAN 16 PM 2: 21

HARVEY RUVIN, CLERK OF THE BOARD

CLERK, CIRCUIT & COUNTY CTS  
MIAMI-DADE COUNTY, FLA.  
#1

PASHA'S MIAMI MARKETPLACE LLC, BID PROTEST

Petitioner,

MIAMI DADE COUNTY BOARD OF  
COUNTY COMMISSIONERS,

RE: REQUEST FOR PROPOSALS FOR  
NORTH TERMINAL MARKETPLACE  
CONCESSIONS AT MIAMI  
INTERNATIONAL AIRPORT

Respondent,

RFP. NO. MDAD 03-11 PACKAGE 2  
(MEDITERRANEAN)

And

THE MEDITERRANEAN KITCHEN LLC,

Intervener.

**HEARING OFFICER'S FINDINGS & RECOMMENDATION**

A hearing in this matter was conducted on December 20, 2013, in Miami, Florida, before Hearing Examiner Judge Charles Edelstein. This order is in two parts, a summary of the facts and law together with observations of the ordinance mandated process of bid protests. The second part adopts the often-used format in orders stemming from administrative hearings. Since these hearings are less formal than those before a court of record, this order, will in some measure, reflect this level of informality.

An RFP was issued in March 2011 seeking prospective bidders for six concession/concepts, one of which was for Mediterranean food services with square footages ranging from 210 to 340 square feet. The Committee chose a Miami Beach restaurateurs T.M.K. owned by Icebox Café a quick service deli-bakery restaurant and bakery. The loser, Pasha's Miami Markets Place owns several Miami restaurants featuring Mediterranean menus. This bid protest followed.

This is a story of a competent and committed county employee, Adrian Songer, for 24 years an employee of Miami Dade County's Airport Division and for many of them, Chief of Airport Concessions. There are no villains in this situation, just a system gone awry.

Chief Songer, who, for at least three years, oversaw the operations of the winning firm Icebox's operations at the airport gave it the lowest rating of all the competing firms in the bid, subject of this case. He rated it even lower than a firm that did not present but did not withdraw their bid. From the record, it seems he was the most experienced of the panel that awarded the contract, some eight years in duration to a deli/bakery, not exactly a purveyor of the Mediterranean health menu chief Songer had in mind. How this could happen? Simple, as Pasha's lawyer called it, Pay to play. The MAG, minimum annual guarantee from Ice Box was almost double the ones from the other bidders. Icebox went from last (according to the Chief) to the winner. Its projected annual sales were an unrealistic and wildly over stated at almost double of that the other bidders, including Host International. Meanwhile Chief Songer sat in the audience after he testified while he heard the County destroy his vision for a healthy fare made by a firm he had voted for. A little emotional was his reaction to the contract going to Icebox as he said under oath. You do not have to be an aging ex-trial judge to read the signs of a witness in distress. The chief's arms were crossed and a frown was upon his face when the County called his vision "aspirational."

It is hard to determine the credentials of the other panel members. Their affidavits were produced within hours of the hearing and they were not called as witnesses. Still, the Chief's vote counted for no more than the other panel members.

The County argued that the security bond required by the RFP and deep pockets of Icebox would guarantee the County would suffer no harm for awarding the contract to Icebox. No surety, it was argued, would cover Icebox's nonperformance. Moreover, Icebox would perform, else its reputation would be damaged. Speculation yes, fact, who knows? Another take, Icebox could break even or lose some money at the airport but its presence at the airport might help it get contracts at other airports. Speculation yes, fact, who knows?

The challenger, Pasha, argued that the MAG was improperly and illegally disclosed. The testimony of Chief Songer and that of Mr. Betoncourt, Senior Procurement Officer and the

affidavits of three other panelists clearly show that none of them knew what the MAG was during the process. Pasha's argument is without merit.

The challenger also asserts that the Icebox bid was nonresponsive. Chief Songer's testimony and the wording of the RFP shows that there was a change in county policy in this regard. So it is clear that Pasha's argument in this regard fails.

Pasha argues it was misled by statements made by Chief Songer and perhaps others, along with language in the RFP into believing the County required the successful bidder to specialize in Mediterranean food as its core mission. They are right on target here. Well, says the County, the RFP says you cannot rely on statements made by county employees. The RFP 2.4 supports the County's position. 2.5 of the RFP clearly put the proposers on notice that it is their sole responsibility to become fully familiar with the RFP's requirements. Pleas of ignorance by the proposer are not allowed. But Pasha acting reasonably under the circumstances was misled. All in all, this is not one of the County's finest hours.

In the formal part of this order, the law governing bid protests as asserted by the County will be summarized. For the moment, an often repeated quote comes from *Hotel China & Glassware Co. v. Board of Public Instruction*, 130 So.2d 78,81 (Fla. 1<sup>st</sup> DCA 1961):

"Competitive bidding statutes are enacted for the protection of the public. They create a system by which goods or services required by public authorities may be acquired at the lowest possible cost. The system confers upon both the contractor and the public authority reciprocal benefits, and extracts from each of the reciprocal obligations. The bidder is assured fair consideration of his offer, and is guaranteed the contract if his is the lowest and best bid received. ...Under this system, the public authority may not arbitrarily or capriciously discriminate between bidders or make the award on the basis of personal preference." See also *Courtenay v. DHRS*, 581 So.2d 621, 623, (Fla.App. 5 Dist. 1991) as follows:

"Standards of fairness, due consideration, good faith, and accord inherent in the bid process" were found to have been violated by HRS by the court. The court then writes: "A bidder should have the incentive to challenge the bidding procedure in the face of bureaucratic abuse as existed in the instant case. The best that this court can do is to award attorney's fees to the

challenging bidder who must have more courage than a Mississippi riverboat gambler. The bidder must gamble on winning during the original bidding procedure, but if he loses as a result of an unfair bid procedure, must then gamble that he will prevail in a three-stage procedure once before a hearing officer, once before the agency, and finally before an appellate court." The court then held that the bidder was entitled to attorney's fees and costs.

In *School Board v. J. Ruiz School Bus Service*, 874 So.2d 59 (Fla. App. 3 Dist., 2004) the court held profits lost by the unsuccessful bidder were not recoverable, but that most jurisdictions permit the recovery of bid preparation and/or bid protest costs where an injunction or other equitable relief is not longer available.

We turn next to the process of bid protests. They are governed by Sec. 2-8.4 and Implementing Order 3:-21 which became effective on 12/11/2009. These documents provide a very tight timetable to challenge a contract award that might have taken 2 or more years in the making. In our case, around 20 months. In *JCDECAUX AIRPORT, INC.* the original RFP was issued in Nov. 2007. The award was issued in April 2010. Note: according to the Ordinance each side of the bids have 2, that is two hours to present its case. So in *JCDECAUX* which involved up to 10 years of a \$5 million MAG and gross revenues of maybe \$100,000,000.00 the firm had two hours to make its case. In our case, Pasha had two hours with a MAG under \$200,000. a year with anticipated gross revenues of just over a million year to make its case. It's a bit like giving the same time to present a case of aggravated spitting on the sidewalk as first-degree murder. The County is bound to consider only what was presented at the hearing, so says the ordinance. This may keep otherwise important evidence from consideration.

The time frames from filing the protest to final hearing prevent any reasonable attempts at discovery. The clerk must see to it that a hearing examiner will be appointed within 5 working days of the filing of the bid protest and the hearing examiner must have the hearing with in 10 days thereafter. The three normal three-day times for delivery by US mail is not included. Nothing in the rules of civil procedure governing civil law suits require such draconian time frames and results. It is time for the County to revisit the ordinance and implementation rules in a

collaborative process with the lawyers and judges who handle these matters. These cases can be seen to test the integrity of governance.

Next, the Standard of Review. The County is to be sustained unless it has acted in an arbitrary and capricious manner. As Wiki states, "This is an extremely deferential standard". Black's Law Dictionary notes." A willful and unreasonable action without consideration or in disregard of facts or law or without determining principle." Then there is Prof. Louis Verelli III's "Deconstructing Arbitrary and Capricious Review, 92 N.C. L Rev -- forthcoming 2014 which in 52 densely packed pages argues for a multi-pronged test. The standard of review presents a high barrier to those who would challenge the County's actions in bid cases.

This Recommendation is based upon: testimony of the two witnesses for the County, exhibits expressly moved and accepted into evidence by the parties and intervener, all of which were admitted without objection. The exhibits, tapes and transcripts of meetings and supporting documentation are all available to the Commission and/or courts that form conclusions. The Hearing Examiner has expressly found the live witnesses to be credible and bases his decision, in part, on their testimony.

#### STATEMENT OF THE ISSUES

1. Whether The Mediterranean Kitchen LLC's ("TMK") proposal was *responsive* to the specifications contained in the RFP with respect to the Minimum Qualification that it should demonstrate three years experience as its core business (primary menu) within the last five years in the specific concept package for which it proposed?

2. Whether TMK's proposal was *responsive* to the specifications contained in the RFP with respect to the Minimum Qualifications that it demonstrate \$200,000 in annual gross revenues?<sup>1</sup>

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<sup>1</sup> Throughout this process, the parties referred to the RFP as having "Minimum Requirements." However, the RFP refers to "Minimum Qualifications." See RFP at 1.4.

3. Whether TMK's disclosure of its Minimum Annual Guarantee in the CD version of its submission, but not in the paper versions submitted to the Selection Committee, rendered its proposal non-responsive?

4. Whether it was arbitrary and capricious of the County to accept the Minimum Annual Guarantee proffered by TMK?

### FINDINGS OF FACT

#### **I. THE REQUEST FOR PROPOSAL**

5. On March 28, 2012, Request for Proposals MDAD 03-11 (the "RFP") was advertised by the Miami-Dade County Aviation Department ("MDAD") and an email sent to all interested parties and prospective bidders that had registered with MDAD for the RFP ("Prospective Bidders").

6. The RFP included six concessions/concepts: Cigars (retail), Mediterranean, Pizza, Empanadas, Stone Crabs and Caribbean with square footages ranging from 210sf to 340sf.

7. The Minimum Qualifications provided in the RFP, at Section 1.4 on Page 11 stated the following:

*1. Proposer should demonstrate three (3) years experience as its core business (primary menu) within the last five (5) years in the specific concept package for which it is proposing and for this qualifying period demonstrating each of the following capabilities: financing, managing, designing and constructing, operating and maintaining retail or food & beverage locations in an airport, transportation center, retail shopping center or marketplace generating at least an aggregate of \$200,000 in annual Gross Revenues for each location.*

8. The RFP provided menu parameters for all six (6) packages. Specifically, for the Mediterranean package, the RFP stated:

*The use of legumes, are basic to this type of food offering, including lentils, fava, beans and chickpeas. Chicken, seafood, lamb and jasmine rice are also ingredients used in this type of cuisine. The menu can feature grab-"n"-go Mediterranean cuisine such as mousaka, gourmet*

wraps, roasted/marinated vegetables, tapas, ratatouille appetizers, spiced olives, regional cheeses, baked items, and desserts. Menu selections may also include, but are not limited to Mediterranean salads, chopped salads, hummus, tabouli, sandwiches, falafel sandwiches, gyro pita pocket sandwiches and other gourmet wraps such as grape leaf wraps and couscous... (The "RFP Menu Parameters").

9. The RFP additionally stated, in bolded type at Section 2.3(b)(1)(d), what was to happen in the event a proposer was less qualified than specified in Section 1.4:

*Proposers who are less qualified, than is called for in this solicitation, or who are relying on qualifications of separate corporate entities, may receive less, or no points, from the Selection Committee, if such lack of experience would or could suggest that there is an inability to provide the services required in the manner contemplated by this solicitation.*

10. The RFP additionally defined the criteria under which proposals would be evaluated as responsive, and under which proposers would be evaluated as responsible. Specifically, Section 5.2 of the RFP defines a responsive proposal as one that:

*[I]s of timely submission, has the appropriate signatures as required on each document, does not materially alter the terms and conditions of the RFP, includes a completed price form, includes a proposal guarantee, clearly indicates an intent to be bound by the Proposer on the terms and conditions of the RFP, and can otherwise form the basis of a binding agreement. Except as noted previously in this Section, where this RFP states that documents "must" or "shall" be provided, or "must" or "shall" be provided in a specific form, the failure to supply such documentation shall not render a proposal not responsive.*

By contrast, a responsible proposer is one that is "capable of carrying out the work of the RFP in a competent and effective manner." The RFP further stipulates that all questions regarding proposer qualifications are questions of proposer responsibility, as "all questions regarding capacity or ability to perform the work of the RFP shall be deemed to be questions of Proposer responsibility." See RFP Section 5.2.

11. Miami-Dade County Implementing Order 2-13, approved by the Board of County Commissioners pursuant to Resolution R-879-11, further specifies the process under which proposals shall be reviewed for responsiveness, and states that:

*In general, solicitation requirements for information relating to a bidder or proposer's financial condition, capability, experience and past*

*performance pertain to responsibility. The term responsible is not limited in its meaning to financial resources and capabilities but include a bidder or proposer's honesty and integrity, skill and business judgment, experience and capacity for carrying out the proposed work, previous conduct under other contracts and the quality of previous work performed. The terms of a solicitation document cannot ordinarily change an issue of responsibility into one of responsiveness. A bidder or proposer need not demonstrate compliance with solicitation requirements pertaining to its responsibility in order for its bid or proposal to be deemed responsive and evaluated.*

12. MDAD previously issued RFPs with mandatory minimum qualifications, but does not currently issue RFPs with mandatory minimum qualifications. See Testimony of Pedro Betancourt (Transcript at 103); Testimony of Adrian Songer (Transcript at 57-58, 67-68). The RFP also stated, at Section 2.4, that proposers "shall not rely on any representations, statements or explanations...made at pre-bid conferences."

13. A Pre-Proposal Conference was held by MDAD on May 2, 2012. Documentation was provided to the attendees which included the Minimum Qualifications and the RFP Menu Parameters.

14. Pasha's submitted an affidavit at Exhibits 17 alleging that an MDAD representative indicated at the May 2<sup>nd</sup>, 2012 pre-proposal meeting that a proposers were warned by an MDAD representative that if they did not meet this qualification that they should not apply. However, Adrian Songer, who was at these meetings, did not recall making these comments. See Testimony of Adrian Songer (Transcript at 42-44).

15. On June 4, 2013, RFP Addendum #1 was issued, which dealt with numerous questions regarding the specific concept experience qualification and several requests to amend Section 1.4 to include general food and beverage experience. The Minimum Qualifications were not modified and the language requiring specific concept experience remained the same. (See Addendum #1, Q&A #7, 8, 9, 18, 19, 29, 36, 37, 43, 56, 58, 60, 65, 81 and 84). Neither Section 1.4 nor Section 2.(1)(b)(d) was altered in any addendum. In this addendum, the County continued to note that proposers "should" meet these qualifications.

16. RFP Addendum #1 also dealt with numerous questions regarding the language that the entity responsible for meeting the Minimum Qualifications should meet all the Minimum

Qualifications, not just one or two. (See Addendum #1, Q&A 17, 20, 36, 37, 59, 84).

17. Twenty-four (24) proposals were submitted to MDAD on July 27, 2012 in connection with all six packages of the RFP. Package #2 – Mediterranean, which is the subject of this Protest, was bid on by six (6) companies: Pasha's Marketplace, LLC, Premier Hospitality/Daily Bread, Host International, BMG – Marhaba, 100 Montaditos and TMK, The Mediterranean Kitchen, LLC.

## II. EVALUATION OF PROPOSALS AND SELECTION OF TMK

18. As part of its review for responsiveness for all twenty-four (24) proposals, MDAD requested four (4) legal opinions from the County Attorneys' Office as to whether certain proposals were *responsive* to the RFP. Two proposers were disqualified for not meeting the ACDBE requirements; two proposers were permitted to continue on with the process even though they had missed the submission deadline. 100 Montaditos, a bidder for the Mediterranean package, was disqualified for failure to meet ACDBE requirements. No other legal opinions were sought.

19. Pursuant to the TMK Proposal, TMK is owned by Icebox Cafe, L.C., described in the RFP as "a full-service restaurant/bar, bakery (retail and wholesale) and catering Company ("Icebox Cafe") offering foods from the Mediterranean region" "with broad experience in the quick-service deli-bakery restaurant and bakery categories. Icebox Cafe, L.C. also owns and operates Icebox Cafe at MIA LLC – a "quick service" deli-bakery concept located in the North Terminal of MIA, which was proffered by TMK as additional experience.

20. Icebox Cafe has experience in the service of Mediterranean food. The Icebox Cafe parent restaurant has served Mediterranean dishes such as: couscous, Mediterranean style lamb meatballs, traditional moussaka, Mediterranean chicken salad, falafel, falafel wraps (with hummus), Greek salad, Greek style braised ribs, Lamb Kibbeh, and T'Bikhe vegetables, including during the period of time relevant to the RFP. See Affidavit of Robert J. Siegmann and its Exhibits.

21. Pasha's Proposal states that it is a joint venture between Pasha's Franchising Inc., the 51% owner, and Caribbean Airport Cuisine, Inc., the 49% ACDBE partner. Pasha's Proposal

states that it is a Mediterranean concept in operation for over ten (10) years and, on its own. Pasha's Proposal also proffered the experience of its affiliate, Pasha's at the Ft. Lauderdale Airport, which its Proposal states that it is a Mediterranean concept restaurant.

22. To meet the Minimum Qualifications, for both experience and annual gross revenues of \$200,000, TMK proffered the experience of its parent, Icebox Café and provided the following information:

*Open since 1998, Icebox Cafe is a concept with broad experience in the quick-service deli-bakery restaurant and bakery categories with locations in Miami Beach, Miami International Airport, Dallas/Fort Worth.... (See Protest, Exhibit 4, Page F1).*

*Icebox Cafe meets and exceeds all of the minimum qualification requirements in the RFP. It has a 14-year track record in providing quality food and beverage service to the public specializing in healthy, natural foods incorporating the flavors of the Mediterranean region. (See Protest, Exhibit 4, Page F3).*

*As required, Icebox Cafe has over three (3) years of experience within the last five (5) years in the specific concept package for which it is proposing (Package 2 - Mediterranean..." (See Protest, Exhibit 4, Page D2).*

*The Questionnaire and Minimum Qualifications Form has been included in Appendix A, located in Section J91; Required Documentation...The Proposer, The Mediterranean Kitchen, LLC, is an entity created solely for this Proposal. The Mediterranean Kitchen is a wholly owned subsidiary of Icebox Cafe, L.C., which is the owner of a full-service restaurant/bar, bakery (retail and wholesale) and catering Company ("Icebox Cafe") offering foods from the Mediterranean region. (See Protest, Exhibit 4, Proposal Page D1).*

23. In response to the RFP's request that the Proposer provide "previous contract experience for provision of services similar to those proposed, that started within the last five years," TMK proffered the experience of its affiliate, Icebox Cafe at MIA (Airport), which as described by TMK, is a "quick-serve deli-bakery featuring a vast assortment of all natural healthy food and beverage items... as well as a selection of freshly made items from the pantry":

*The most recent project completed was the opening of Icebox Café at MIA, LLC (September 25, 2010), located in the North Terminal of the Miami International Airport. This operation is a quick-serve, deli-bakery featuring a vast assortment of all natural healthy food and*

*beverage items ... as well as a selection of freshly made items from the pantry, including our award winning desserts. (See Exhibit 4, TMK Proposal, Page F3).*

24. To meet the Minimum Qualifications, for both experience and annual gross revenues of \$200,000, Pasha's Proposal proffered the experience of its 51% Joint Venture partner with over 10 years of well-documented experience specializing in Mediterranean cuisine and the required menu. (See Protest, Exhibit 5, Sec 4.2, Sec 5.2, Page 17.) In Section 6.1 of the Pasha Proposal, Pasha's Proposal included information of its experience and noted media, press and awards in providing and promoting a traditional Mediterranean menu. (See Protest, Exhibit 5, Page 25).

25. In response to the RFP's request that the Proposer provide "previous contract experience for provision of services similar to those proposed, that started within the last five years," Pasha's Proposal proffered the experience of Pasha's at Ft. Lauderdale Airport, in operation since 2008, (See Protest, Exhibit 5, Appendix A, Page 9).

26. Pursuant to the RFP, a proposer must offer a Minimum Annual Guaranteed Rent ("MAG"). The MAG is required to be submitted at the same time the RFP Proposal is submitted. However, it must be submitted separately and must be submitted in a sealed envelope. (See Protest, Exhibit 2, RFP, Page 23). The RFP states:

*"The Proposer must submit the executed Price Proposal Form (See Appendix B) ...in a separate sealed envelope or package (separate from the Technical Proposal) clearly marked on the sealed envelope or package "PRICE PROPOSAL FORM" ...The Proposer's price shall be submitted in the manner required herein...There are no exceptions allowed to this requirement. Proposers who do not submit pricing in accordance with this RFP document shall be deemed non-responsive." (RFP, Page 23)*

27. Addendum #1, Q/A #42 confirmed the instructions of the RFP that the Price MAG be submitted in a separate sealed envelope from the Technical Proposal

*Q42. On page 14 of the Marketplace RFP it states that "No price information is to be included with the Technical Proposal". Can you confirm that the intention is for respondents not to include the MAG offer*

*in the Technical Proposal, and is not a reference to the pricing related to the products we will sell?*

**A42. Pricing information as it relates to prices charged to consumers may be included with the Technical Proposal. The MAG shall not be disclosed or included with the Technical Proposal.**

28. In accordance with the RFP Requirements, TMK did not include the MAG pricing information in any of the sealed paper copies of its Technical Proposal. Only the paper copies were provided to the Selection Committee and only the paper copies were reviewed by the Selection Committee. However on the CD copy which was submitted, TMK included its MAG of \$320,397 along with its Technical Proposal on a CD copy which was available to the public and MDAD representatives. The TMK Proposal was not disqualified at the time of submission.

29. This CD was not provided to the Selection Committee. *See* Testimony of Pedro Betancourt (Transcript at 105). The Selection Committee members were unaware of TMK's MAG when they evaluated proposals. *See* Testimony of Adrian Songer (Transcript at 71); Affidavit of Bert Maura; Affidavit of Rolando Aedo; Affidavit of Tyrone Brown.

30. Gross Revenue Projections provided by the top three ranked proposers were as follows:

<b>Proposer</b>	<b>1<sup>st</sup> Yr Gross Rev Projections</b>	<b>Projected Gross Rev Per Square Foot (340sf)</b>
The Mediterranean Kitchen LLC	\$2,002,481.25	\$5,889.65
Pasha's Marketplace, LLC	\$1,200,000.00	\$3,529.41
Host International Inc.	\$1,024,700.00	\$3,013.82

Per TMK's proposal, it based its projections on the uniqueness of the proposed concept, the location of the kiosk, projected passenger increases in the North Terminal, Icebox brand recognition, and marketing efforts. *See* TMK Proposal at J.17.

31. On November 29, 2012, the Pre-Screening Meeting was held for the Selection Committee at which time they were provided with Master Inventories for all of the Proposers. In addition, they were instructed by Pedro Betancourt, the Procurement's Officer, that all proposals before it were *responsive* and that the task of the Committee was to find whether the proposers were responsible. (See Hearing, Exhibit 3 and 4).

32. Oral Presentations before the Selection Committee were conducted on January 11, 2013. In regards to Minimum Qualifications, TMK proffered that TMK was an original, first time concept featuring "an original menu that has been specifically designed for this concept." (See Protest, Exhibit "12").

33. As part of this menu, TMK says it will offer fully Mediterranean menu, featuring items such as couscous salad, Mediterranean meatball pita pocket with tzatziki, moussaka, falafel, falafel wraps (with hummus), tzatziki, hummus, grape leaves, tabouleh, boerek, almond cookies, and apricot bars. See TMK Proposal at E.5.

34. Pasha's Marketplace was ranked in first place after oral presentations with 4072 points; TMK was ranked in third place after oral presentations with 3876 points; this was only seven points less than the second ranked firm. (See Protest, Exhibit 1).

35. After the completion of Oral Presentations, the following MAGs were offered by the bidders:

PROPOSER	MAG
The Mediterranean Kitchen LLC (TMK)	\$ 320,397
Pashas Marketplace, LLC	\$ 180,000
Host International Inc.	\$ 117,000
Premair Hospitality Group LLC	\$ 96,000
BMG Branded Foods - Marhaba	\$ 127,000

(See Protest, Exhibit 1, Page 3)

36. After the Price-Proposals were opened, in accordance with the process specified in the RFP, the bidders were re-ranked. TMK was ranked in first place after opening of the Price Proposal with 4626 points; Pashas was ranked second after opening of the Price Proposals with 4493 points; the prior second firm was ranked fourth. (See Protest, Exhibit 1).

37. The Selection Committee voted all proposals “responsive” and “responsible” with a four to one vote, with Mr. Adrian Songer, Chief of Airport Concessions, opposing. (See Exhibit 1, Scores, Page 3.)

38. The Selection Committee voted to award to “Icebox” (Scores do not refer to TMK as proposer, but rather its parent Icebox) with a four to one vote, with Mr. Adrian Songer, Chief of Operations, opposing. (See Exhibit 13, Scores, Page 3.)

39. Upon award, TMK will be required to provide a performance bond and letters of credit for the entire MAG proposed by TMK. In the event TMK during the life of the contract fails to pay the County the \$320,397 it proposed, TMK will be in default of its contract. See Lease and Concession Agreement at Sections 3.10, 3.25, 12.02).

40. On November 27, 2013, the Mayor issued his Recommendation to Award the concession to TMK (the “Mayor’s Recommendation”).

### CONCLUSIONS OF LAW

#### III. JURISDICTION AND STANDING

41. The Hearing Examiner has jurisdiction over the parties and the subject matter pursuant to Miami-Dade County section 2-8.4(c) and F.S. 120.57.

42. Petitioner has standing to file this Protest because it was the next highest ranked bidder and will be substantially and adversely affected by the Recommendation if adopted by the Board of County Commissioners. See, e.g., *Intercontinental Properties, Inc. v. State Dep’t of Health and Rehabilitative Svs.*, 606 So.2d 380 (Fla. 3d DCA 1992); *Preston Carroll Co. v. Fla. Keys Aqueduct Auth.*, 400 So.2d 524, 525 (Fla. 3d DCA 1981); F.S. §120.57(3)(b).

#### IV. BURDEN OF PROOF

43. The burden of proof is on Pasha's Miami Marketplace LLC (Pasha's), as the Petitioner, 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*.

44. The standard of proof is whether the proposed award to TMK was based upon clearly defined criteria and that the waiver of such criteria did not arbitrarily or capriciously place TMK in a position of advantage over other bidders and/or otherwise altered the common standard of competition. See *City of Sweetwater v. Solo Constr. Corp.*, 823 So. 2d 798 (Fla.3d DCA 2002).

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

45. 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.

46. "Whether the Board acted arbitrarily is generally controlled by a determination of whether the Board complied with its own proposal criteria as outlined in the RFP. *Emerald Correctional Mngt. v. Bay County Bd of County Commissrs.*, 955 So.2d 647, 653 (Fla.1<sup>st</sup> DCA 2007) (holding that the criteria espoused in the published invitation to bidders controlled the analysis of whether the city acted in an arbitrary manner). In *Decarion v. Monroe County*, 853 F. Supp. 1415 (S.D. Fla. 1994), the Court "defined arbitrary and capricious for substantive due process purposes to include acts taken with improper motive, without reason or for a reason which is pre-textual. *Sweetwater v. Solo Constr. Corp.*, 823 So.2d 802. Moreover, "[a] decision

cannot be based upon 'ignorance through lack of inquiry.'" *Marriott Corporation v. Metropolitan Dade County*, 383 So. 2d 662 (Fla. 3d DCA 1980) quoting from *William A. Berbusse, Jr., Inc. v North Broward Hospital District*, 117 So. 2d 550 (Fla. 2d DCA 1960).

## VI. CONCLUSIONS RELATED TO PASHA'S NOTICE OF INTENT TO PROTEST

47. 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.

48. Pasha's Notice of Intent to Protest and its Formal Protest of the Mayor's Recommendation complied with all requirements of section 2-8.4, Miami-Dade County Code.

## VII. CONCLUSIONS RELATED TO TMK'S EXPERIENCE & QUALIFICATIONS

49. Pasha's asserts that based on the RFP, Addendum to the RFP and public admonitions made to Prospective Bidders prior to the submission deadline, the Minimum Qualifications of the RFP were mandatory, and, therefore, any Prospective Bidders for this RFP needed to demonstrate, at minimum, three years out of the last five years experience in the specific concept, primary menu for which it was proposing. As such, Pasha's argues that TMK should have been disqualified upon bid submission since it did not possess the Minimum Qualifications of the RFP of having specific concept or primary menu experience in a Mediterranean cuisine concept and that TMK, itself, confirmed as such at its oral presentation (Protest, Exhibit 12).

50. Pasha's further argues that the TMK proposal was never evaluated for *responsiveness* in connection with the Minimum Qualifications for specific concept experience with a Mediterranean concept since (a) MDAD, according to testimony provided by Mr. Pedro

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Betancourt, Chief Procurements Officer, did not conduct a review of any of the proposals for meeting the Minimum Experience Qualifications; and (b) that the Selection Committee also did not conduct a review of any of the proposals for meeting the Minimum Experience Qualifications since they were instructed by Mr. Betancourt that all proposals before the Selection Committee were *responsive* and that their job was to determine if the proposer was *responsible* (See Protest, Hearings Exhibits 3 and 4).

51. The County argues that the RFP contains no such mandatory Minimum Qualifications. The County's witnesses indicated that the MDAD has stopped using mandatory minimum qualifications, and the County argues that this decision is borne out by the express terms of the RFP. The County noted that the RFP stated that proposer "should", rather than "must", meet these minimum qualifications. The County further noted that the RFP contains an express and specific section detailing what was to happen to proposers who are "less qualified than is called for in this RFP", and that that Section called for those firms to receive less or no points from the Selection Committee.

52. Lastly, the County noted that, per the RFP and Implementing Order 2-13, questions regarding a proposers' qualifications are questions of responsibility, not questions of responsiveness.

Based on the menu information submitted by TMK, the affidavit of Robert Siegmann with its attached exhibits, and the testimony of Adrian Songer, Chief of Concessions for Miami International Airport, that TMK has sufficient experience with Mediterranean food and the Mediterranean menu, and sufficient general food and beverage experience to operate a Mediterranean concession at MIA. Pasha's thus does not meet its burden of establishing that the County acted arbitrarily or capriciously with respect to waiver of Minimum Qualifications and its acceptance of TMK's proposal.

53 A fair reading, of the RFP would suggest to proposers that the minimum qualifications were mandatory.

#### **VIII. CONCLUSIONS RELATED TO TMK'S FINANCIAL QUALIFICATIONS**

53. Based on the discussion above, this issue need no further discussion.

**IX. CONCLUSIONS RELATED TO DISCLOSURE OF TMK'S MINIMUM ANNUAL GUARANTEE**

54. It is undisputed that TMK included its MAG along with its Technical Proposal in direct violation of the RFP. As per the County, the MAG was submitted on a CD that was provided to the County Clerk's Office by TMK. In turn, as per Pedro Betancourt, the Clerk's Office provided the CD to him.

55. Pasha's argues that the TMK proposal should have been immediately rejected as required by the RFP prohibiting such an act and requiring that the proposal be disqualified as *non-responsive* (RFP, P.23).

56. The County provided affidavits from several Selection Committee members and offered the testimony of Adrian Songer, Chief of Airport Concessions, and Pedro Betancourt, Senior Procurement Officer, that the Selection Committee in this matter was unaware of this proposed MAG, as it was not included in the hard copies of TMK's proposal which was provided to the Selection Committee.

57. The test for determining whether a variance in a proposal 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).

58. Here, as there is no evidence that inclusion of the guarantee on the CD influenced the outcome of this process, and appears to be inadvertent,. No facts exist which suggest that this disclosure gave TMK any competitive advantage. Inclusion of TMK's MAG on a CD was a non-material defect, and thus waivable. Moreover, this result appears to be consistent with past bid protests at MDAD which have considered this issue. Pasha's thus does not demonstrate that it was arbitrary or capricious for the County to not disqualify TMK for the submission of an unsealed MAG.

**X. CONCLUSIONS RELATED TO THE ACCEPTANCE OF TMK'S MINIMUM ANNUAL GUARANTEE**

59. TMK offered the County a MAG of \$320,397, which was over \$140,000 higher than the next highest MAG offered and 147% higher than the average MAG of all proposals. Additionally, TMK projected Annual Revenues of over \$2,000,000 or \$5,889.65 per square foot for a 340sf, non-cooking space.

Based on facts in this record, it is highly unlikely that TMK can achieve this promise. The County, however, points out that a proposer does not have to guarantee its revenues, only its MAG, and that the MAG will be secured by both a performance bond and a letter of credit, as well as a corporate guarantee by TMK's parent corporation so the County will be protected in the event of a default. Based upon the record TMK can obtain a surety bond because of their resources.

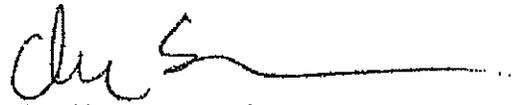
In determining "whether a bidder is responsible the authority may consider financial responsibility, experience...and any other reasonable criteria" *Volume Services Division of Interstate United Corp. v. Canteen Corp*, 369 so. 2d 391 (Fla. App 2 Dist., 1979).

#### RECOMMENDATION

As stated at the top of page two of this Hearing Examiner's Findings and Recommendations "There are no villains in this situation just a system gone awry." On the entire record of this case, the Petitioner has failed to meet its heavy burden to prove the County acted in an arbitrary and capricious manner in this case. With this recommendation, the Petitioner loses and T.M.K. prevails. The parties are foreclosed from arguing their positions before the Commission, even in the 10 minutes that a contrary ruling would allow. The Commission can reject all bids. That is the kind of decision within the discretion of that body and not that of a hearing officer.

In my years on the criminal bench, in the juvenile division terminating parental rights, in the family division dividing families and fortunes, in Miami-Dade County and elsewhere, I like my peers, make decisions we find offensive. This decision in this is, for me, one of the worst of them.

Dated this \_\_13\_\_ day of January 2014.

A handwritten signature in black ink, appearing to read 'Charles Edelstein', with a long horizontal flourish extending to the right.

Judge Charles Edelstein  
Hearing Examiner

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that, on January 13, 2014, a copy of the foregoing was sent via Electronic and/or US Mail to:

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