

# Memorandum



**Date:** March 18, 2014  
**To:** Honorable Chairwoman Rebeca Sosa  
and Members, Board of County Commissioners  
**From:** Carlos A. Gimenez  
Mayor  
**Subject:** Supplement to Recommendation to Reject all Bids Received for Invitation to Bid No. 8214-0/18 and to Extend Contract No. 8214-4/12-2 on a Month-to-Month Basis for Up to One Year: Vending Machine Services

Supplement  
Agenda Item No. 8(F)(2)

This supplement is to inform the Board of County Commissioners (Board) that one bid protest was filed with the Clerk of the Board on February 3, 2014 by Bettoli Trading Corp. dba Bettoli Vending (Bettoli).

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 February 24, 2014. The Hearing Examiner upheld the Mayor's recommendation to reject all bids and re-advertise a new solicitation.

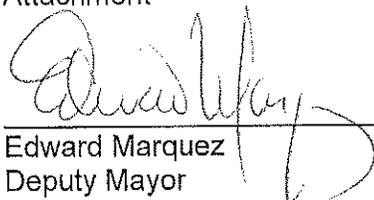
## Background

The invitation to bid was advertised on July 3, 2013 to establish a contract for vending machine services at various County sites. Three bids were received in response to the solicitation. The three firms were notified of the Mayor's recommendation to reject all bids received on January 30, 2014.

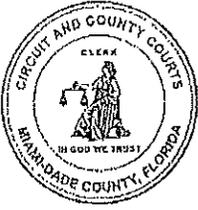
Subsequently, Bettoli filed a bid protest on February 3, 2014 claiming the County acted arbitrarily, and furthermore, requested the Mayor's recommendation to reject all bids be overturned so award of the contract could be made to Bettoli.

The Hearing Examiner, Judge Raphael Steinhardt, concluded that the recommendation to reject all bids was appropriate and should be upheld. There was no evidence the County acted illegally, arbitrarily, dishonestly, or fraudulently. Furthermore, since Bettoli did not establish any illegal conduct, or arbitrary or capricious decision on the part of the County, the bid protest by the firm was denied.

Attachment

  
Edward Marquez  
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. 1<sup>st</sup> Street  
Miami, FL 33128-1983  
Telephone: (305) 375-5126

February 25, 2014

Mr. Maurizio L. Bettoli  
Director of Operations  
Bettoli Vending  
6095 N.W. 167<sup>th</sup> Street, Suite D-4  
Miami, Florida 33015

Re: Bid Protest – Recommendation to reject all bids received for Invitation to Bid  
No. 8214-0/18 and to extend Contract No. 8214-4/12-2 on a month-to-month basis  
for up to a year: Vending Machine Services

Dear Mr. Bettoli:

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 Raphael Steinhardt, Hearing Examiner, in connection with the foregoing bid protest hearing which took place on Monday, February 24, 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

CA/fcd  
Attachment

Mr. Maurizio L. Bettoli  
Director of Operations  
Bettoli Vending  
Page Two  
February 25, 2014

cc: Honorable Chairwoman Rebeca Sosa and  
Members, Miami-Dade County Board of County Commissioners (via email)  
Alina T. Hudak, Deputy Mayor (via email)  
R.A. Cuevas, County Attorney (via email)  
Hugo Benítez, Assistant County Attorney (via email)  
Monica Rizo, Assistant County Attorney (via email)  
Janelle Snyder, County Attorney's Office (via email)  
Rita Gonzalez, County Attorney's Office (via email)  
Ulla Peralta, County Attorney's Office (via email)  
Charles Anderson, Commission Auditor (via email)  
Elizabeth Owens, BCC Legislative Analyst, Commission Auditor's Office (via email)  
Lester Sola, Director, Internal Services Department (via email)  
Miriam Singer, CPPO, Assistant Director, Internal Services Department (via email)  
Amos Roundtree, Director, Purchasing Division, Internal Services Department (via email)  
Walter Fogarty, Manager, Procurement Vendor Services, Internal Services Department (via email)  
Ray Baker, Assistant to the Director, Internal Services Department (via email)  
Mike Ramos, A&E Consultant Selection Coordinator, Internal Services Department (via email)  
Best National Vending, Inc. (via US Mail)  
Gilly Vending, Inc. (via US Mail)  
Bettoli Trading Corp. d/b/a Bettoli Vending (via US Mail)

**MIAMI-DADE COUNTY BOARD OF COUNTY COMMISSIONERS**

BETTOLI TRADING CORP.  
d/b/a BETTOLI VENDING

ITB NO. 8214-0/18  
(Provision of Vending Machine Services)

Petitioner,

v.

MIAMI-DADE COUNTY,

Respondent,

and

GILLY VENDING, INC.,

Intervener.

CLERK OF THE BOARD  
2014 FEB 24 PM 3:35  
COMMUNICATIONS SECTION  
MIAMI-DADE COUNTY, FL  
#1

**FINDINGS AND RECOMMENDATIONS OF HEARING EXAMINER**

Pursuant to Section 2-8.4 Miami-Dade County Code and Implementing Order 3-21

Pursuant to Section 2-8.4 of the Code of Miami-Dade County and Implementing Order No. 3-21, this matter was heard before the undersigned Hearing Examiner on February 24, 2014, in Miami, Florida upon the bid protest filed by Bettoli Trading Corp.'s d/b/a Bettoli Vending's ("Bettoli").<sup>1</sup> Having considered Bettoli's written protest, Bettoli's Memorandum in Support of its bid protest, Miami-Dade County's (the "County") Memorandum in Opposition to the bid protest, Gilly Vending, Inc.'s (the "Gilly") Prehearing Memorandum, and the exhibits; having heard arguments by the parties; having heard the live testimony of witnesses; and being otherwise fully advised, I find that the County did not act fraudulently, illegally, or dishonestly. I further find that the County's recommendation to reject all bids received in response to

<sup>1</sup> Although the Code requires the bid protest hearing to be completed within 10 working days following the Hearing Examiner's appointment, the hearing was continued at the request of Miami-Dade County and the agreement and non-objection of Bettoli.

Invitation to Bid No. 8214-0/18 for vending machine services ("ITB") was not arbitrary and capricious, but rather based upon an honest exercise of discretion arising from ambiguities in the ITB. Accordingly, I recommend denying the bid protest and affirming the County Mayor's recommendation to reject all bids received in response to the ITB and to re-advertise a new solicitation for vending machine services.

### FINDINGS OF FACT

1. On July 3, 2013, the County advertised and issued the ITB. The ITB identified four different "zones" where vending machines would be placed; Zone 1 was the northeast part of the County, Zone 2 was the northwest part of the County, Zone 3 was the south side of the County, and Zone 4 was the Seaport. ITB at § 2.1.

2. The ITB specified that bidders were to provide a price for a Monthly Minimum Guarantee ("MMG") and a price for an Access Fee ("AF"). The MMG was defined as a flat monthly payment to the County for a count of 250 installed vending machines or less in Zones 1, 2 and 3. *Id.* at § 2.1. The AF was defined as a monthly fee charged to the successful bidder for each vending machine installed in Zone 4 and for each vending machine installed in excess of 250 in the aggregate for Zones 1, 2 and 3. *Id.*

3. § 2.4 of the ITB, titled "Method of Award," stated that the award of the contract for vending machines would be made "to the responsive, responsible bidder whose offer represents the highest revenue in the aggregate for all zones." *Id.* at § 2.4. Bidders were told to "provide a MMG for zones 1, 2 and 3 in the aggregate; plus an AF per machine for zone 4" and then included three examples of how to calculate the "total amount due to the County." *Id.*

4. The second and third examples in § 2.4 "Method of Award" indicated that the calculation as to the money owed was to be calculated by adding the MMG for the first 250



vending machines in Zones 1, 2 and 3 plus a sum equal to the AF multiplied by the number of excess machines above 250 in Zones 1, 2 and 3 plus a sum equal to the AF multiplied by the number of machines in Zone 4. *Id.*

5. The bid submittal form requested that bidders provide two prices: one, a price for the MMG at an estimated quantity of 60 months (5 years); and, two, a price for the AF for Zone 4 at an estimated quantity of 43 machines per month. *See* ITB at § 4.

6. The ITB also included an Attachment A with a document titled "sales report Zones 1-3 (12 month period)" with a listing of machine types, locations and total sales, as well as a document titled "Zone 4 (12 month period) Port of Miami -- Revenue Payment Report" with a listing of the location, machine number, machine type, "sales" and monthly rent for each machine at the Port of Miami. *Id.* The report indicates that, at the Port of Miami, for the months of July through December of 2012, there were between 37-39 machines, while for the months of January through May of 2013, there were 43 vending machines. *Id.* Nowhere in the ITB was there a reference to this Attachment A nor what its intended purpose was with respect to the ITB.

7. On July 4, 2013, Bettoli sent an e-mail to the contracting officer for the ITB stating that Bettoli understood § 2.4 of the ITB to "ask [bidders] to submit 3 different number [sic], a.- the MMG for zones 1, 2 and 3, b.- the 'AF' amount per machine on zone 4 plus the machines in addition of the 250 machines in zones 1, 2 and 3, c.- the amount of machines we estimate to be installed in total between Zone 4 and the excess of 250 from Zones 1, 2 and 3." Mr. Bettoli's e-mail stated that "[i]f the above is correct then I believe you should revisit this as this will create problems with the bid result." The County did not issue any addendum or written response clarifying the questions raised by Bettoli.



8. On July 15, 2013, a pre-bid conference was held and was attended by representatives from Bettoli, Gilly, Best National Vending, Inc. ("BNV"), and several other vending machines companies. The pre-bid conference was not recorded, meeting minutes were not taken, and the information stated or provided at the pre-bid meeting was not provided to the bidders via an addendum.

9. § 1.2(D)(2) of the ITB provides that:

Procurement Management may issue an addendum in response to any inquiry received, prior to Bid opening, which changes, adds to or clarifies the terms, provisions or requirements of the solicitation. **The Bidder should not rely on any representation, statement or explanation whether written or verbal, other than those made in this Bid Solicitation document or in any addenda issued.** Where there appears to be a conflict between this Bid Solicitation and any addenda, the last addendum issued shall prevail.

10. On July 17, 2013, the County issued Addendum No. 1 which stated that the ITB was changing to add, "as part of the ITB" an "Attachment B- Vending Equipment List for July 2013 for all zones" and "[a]ll terms, covenants and conditions of the subject solicitation and any addenda issued thereto shall apply except to the extent herein amended." The information in Addendum No. 1 "is and does become a part of the above-mentioned bid."

11. This new Attachment B issued in Addendum No. 1 indicated that there were a total of 252 vending machines in Zones 1, 2 and 3 and 45 vending machines in Zone 4. Like Attachment A to the ITB, there was no indication or statement in the ITB or Addendum 1 as to the relevance, use or application of Attachment B with respect to the ITB.

12. On July 24, 2013, three vendors submitted bids in response to the ITB: Bettoli, Gilly and BNV. Bettoli bid an MMG of \$26,425.00 and an AF of \$105.70. BNV bid an MMG of \$26,262.50 and an AF of \$105.05. Gilly bid an MMG of \$3,500 and an AF of \$625.00.

13. County staff initially ranked Bettoli as the highest ranked vendor, BNV next, and Gilly last based on County staff's interpretation of the ITB to require a sum of the MMG plus the AF multiplied by 43, without taking into account the figures provided in Addendum No. 1.

14. After the bid opening, Gilly sent a letter on July 25, 2013 to the County indicating that it expected to be awarded the ITB as the bidder providing the greatest revenue to the County. Gilly interpreted § 2.4 of the ITB in conjunction with the figures provided in Addendum No. 1 to require the County to determine the winning bidder by taking the sum of MMG plus AF multiplied by 47, not 43, because Addendum No 1 included a total of 297 machines between all Zones, not 293 machines.

15. County staff sought a determination from the County Attorney's Office as to the correct and proper interpretation of the ITB. The County Attorney's Office advised County staff that the ITB, especially § 2.4, was ambiguous and that the County Mayor should not issue an award recommendation for the ITB because of this serious flaw in the process.

16. On January 30, 2014, the County Mayor issued a recommendation to reject all bids received in the ITB. *See* January 30, 2014 Memorandum from the County Mayor.

17. In the ITB, the County expressly "reserves the right to reject any and all Bids, to waive irregularities or technicalities and to re-advertise for all or any part of this Bid Solicitation as deemed in its best interest. The County shall be the sole judge of its best interest." *See* ITB at § 1.5(A); *see also* ITB at § 1.5(C) (Again stating that "[t]he County reserves the right to reject any and all Bids if . . . it is otherwise determined to be in the County's best interest to do so.")

18. In his recommendation to reject all bids, the County Mayor noted that "a listing of the current vending machines countywide was requested by a vendor and issued as an addendum to the solicitation. The original solicitation document also included various examples of how the

County would be calculating revenues. This information may have created conflicts with the actual pricing form included in the solicitation." See January 30, 2014 Memorandum from the County Mayor. The County Mayor recognized that this information resulted in confusion and inconsistent bids and the "rejection of all bids and clarification to all parties regarding the concerns raised is the most equitable option available." *Id.*

#### CONCLUSIONS OF LAW

19. The protester, Bettoli, has not shown that the County acted in an arbitrary, fraudulent, illegal or dishonest manner in recommending a rejection of all bids. *Dept of Transportation v. Grove-Watkins Const.*, 530 So. 2d 912, 913 (Fla. 1988). In fact, Bettoli concedes that the County did nothing fraudulent, illegal or dishonest. Rather, the Bettoli's sole basis for this bid protest is simply that the County acted arbitrarily. Bettoli maintains that: (a) Bettoli provided the best price to the County; (b) the ITB specifications were not ambiguous; (c) even if an ambiguity existed, any ambiguity was clarified at the pre-bid conference. For the reasons set forth below, none of these arguments provide a basis to reject the Mayor's recommendation to reject all bids.

20. In Florida, when a public agency decides to reject all bids, the decision will be upheld absent evidence of fraud, collusion, or as a means to avoid competition. *See Dept of Trans. V. Groves-Watkins Constructors*, 530 So. 2d 912, 914 (Fla. 1988). Neither Hearing Examiners nor Judges are empowered to second guess the judgment of government employees and elected officials as to the wisdom of a procurement decision. *Id.* at 913 ("[S]trong judicial deference [is] accorded an agency's decision in competitive bidding situations.").

21. Indeed, "judicial intervention to prevent the rejection of a bid should occur only when the purpose or effect of the rejection is to defeat the object and integrity of competitive bidding." *Id.*; see also *Baxter Asphalt & Concrete, Inc.*, 421 So. 2d at 507 (Fla. 1982) ("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”).

22. Bettoli cannot succeed in this bid protest simply by convincing the Hearing Examiner that the specifications in the ITB, including Addendum No. 1, were not ambiguous or confusing or that it will provide the best price to the County. “So long as a public agency acts in good faith, even though they may reach a conclusion on facts upon which reasonable men may differ, the courts will not generally interfere with their judgment even though the decision reached may appear to some persons to be erroneous.” *Miami-Dade County v. Church and Tower, Inc.*, 715 So. 2d 1084, 1089 (Fla. 3d DCA 1998) (emphasis added).

23. “In short, the hearing officer’s sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.” *Groves-Watkins Constructors*, 530 So. 2d at 914.

24. 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.*; *see also Marriott Corp. v. Metropolitan Dade County*, 383 So. 2d 662 (Fla. 3d DCA 1980) (County procurement decision need only be reasonably based on facts tending to support the County’s conclusion).

25. Under the arbitrary and capricious standard, “an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency’s empirical conclusions have support in substantial evidence.” *Adam Smith*

*Enterprises, Inc. v. State Dept of Environmental Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989) (emphasis added).

26. The existence of an ambiguity in a solicitation constitutes a rational and therefore non-arbitrary basis upon which a governmental agency can lawfully reject all bids and re-advertise. See *Caber Systems v. Dept of General Serv.*, 530 So. 2d 325 (Fla. 1st DCA 1988); see also 48 C.F.R. § 14.404-1 (an "inadequate or ambiguous specification cited in the invitation" is a "compelling reason to reject all bids and cancel the solicitation.").

27. I find that there is substantial evidence in the record to support the County's decision to reject all bids. The County, by mistake or inadvertence, advertised and issued a solicitation that was ambiguous and confusing and resulted in conflicting bids. As drafted, the ITB was not fair for bidders or potential bidders because the basis upon which the County would select a winning bidder was unclear and was subject to multiple interpretations.

28. Indeed, it was unclear to bidders whether the County sought to award the vending machine services contract based on the monthly revenue figure calculated solely as the MMG plus an AF multiplied by 43, as Bettoli maintains, or calculated as the MMG plus an AF multiplied by the actual number of machines above 250 set forth in Addendum No. 1, as Gilly maintains.

29. Those differing interpretations may have both deterred bidders from bidding on the ITB or failed to result in the highest possible revenues to the County for a bidder who was confused and bid a price based on a misreading of the ITB.

30. Bettoli raised this ambiguity prior to bid opening and the County failed to address it in the addendum issued. Any statements or comments made by County staff at the



pre-bid meeting were not incorporated into any addendum and bidders were not permitted to rely on those oral statements to modify any terms of the ITB. *See* § 1.2(D)(2).

31. The ITB authorizes the County to reject all bids when it deemed this to be in the best interest of the County. County staff consulted with the County Attorney's Office regarding the confusion arising from the ITB and the County Attorney's Office advised that the ITB was indeed ambiguous and confusing and advised staff to reject all bids and correct the solicitation before reissuing it.

### CONCLUSION

Bettoli has not established any illegal conduct, or arbitrary or capricious decisions on the part of the County. I conclude that the County's recommendation to reject all bids in light of the facts of this case was reasonable. As such, I recommend that the bid protest filed by Bettoli be denied and I concur in the County Mayor's recommendation to reject all bids and re-advertise a new solicitation.

  
Hearing Examiner Raphael Steinhardt 2/24/2014