

Date: August 31, 2020

To: Honorable Chairwoman Audrey M. Edmonson
and Members, Board of County Commissioners

From: Carlos A. Gimenez
Mayor

Subject: Recommendation to Ratify Emergency Award: Emergency Janitorial Services for
Downtown ISD Facilities

Amended
Agenda Item No. 8(F)(11)

Resolution No. R-889-20

Recommendation

It is recommended that the Board of County Commissioners (Board) approve this request for a designated purchase pursuant to Section 2-8.1(b)(3) of the County Code by a two-thirds vote of the Board members present and ratify an emergency contract award, *Contract No. E-10048, Emergency Janitorial ISD Downtown* to Vista Building Maintenance Services, Inc. in the amount of \$7,794,650 for eleven months for the Internal Services Department.

The County issued Solicitation No. RFQ9562-45ISD under *Prequalification Pool No. 9562-5/22-1, Janitorial Services*, on May 24, 2019. A protest was filed on November 4, 2019 under *Prequalification Pool No. 9562-5/22-1, Janitorial Services*. An emergency was declared by the Internal Services Department Director after a bid protest was filed that delayed the replacement contract award. The emergency contract was necessary in order to avoid interruption of janitorial services for downtown governmental facilities, including the Stephen P. Clark Center, various courthouses and garages. The emergency contract allowed for the continued health and safety of the public and County employees who utilize these facilities, as well as the additional services required to mitigate the spread of the Coronavirus (COVID-19) throughout these facilities.

The Hearing Examiner for the bid protest hearing upheld the County's recommendation to award on December 2, 2019, confirming that the recommended award is "fair, reasonable, and consistent with the RFQ and Code" (Attached). An agenda item for the contract award is being presented as a separate, companion item for Board approval.

Scope

The impact of this item affects facilities located in Commission Districts 3 and 5, which are represented by Commissioner Audrey M. Edmonson and Commissioner Eileen Higgins, respectively.

Fiscal Impact/Funding Source

The fiscal impact of this emergency purchase is \$7,794,650. The current contract expires September 30, 2020, and as directed by the Board at the September 3, 2020 meeting, authorizes the extension of this contract on a month-to-month basis until a new contract is awarded, to allow for uninterrupted janitorial services with required funding.

Department	Allocation	Funding Source	Contract Manager
Internal Services	\$7,794,650	Internal Service Funds	Jennyfer Calderon
Total:	\$7,794,650		

Track Record/Monitor

Jessica Tyrrell of the Internal Services Department is the Procurement Contracting Manager.

Delegated Authority

The County Mayor or County Mayor's designee will have the authority to exercise all provisions of the contract, including any cancellation provisions, pursuant to Section 2-8.1 of the County Code and Implementing Order 3-38.

Awarded Vendor

Vendor	Principal Address	Local Address*	Number of Employee Residents	Principal
			1) Miami-Dade 2) Percentage*	
Vista Building Maintenance Services, Inc.	8200 Coral Way Miami, FL	Same	245	Maria M. Haley
			98%	

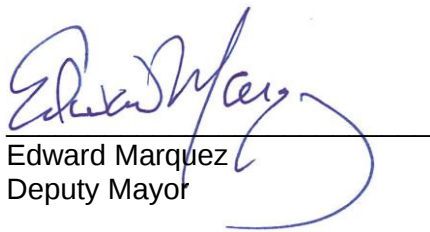
*Provided pursuant to Resolution No. R-1011-15. Percentage of employee residents is the percentage of vendor's employees who reside in Miami-Dade County as compared to the vendor's total workforce.

Due Diligence

Pursuant to Resolution No. R-187-12, due diligence was conducted in accordance with the Internal Services Department's Procurement Guidelines to determine vendor responsibility, including verifying corporate status and that there are no performance and compliance issues through various vendor responsibility lists and a keyword internet search. The lists that were referenced included convicted vendors, debarred vendors, delinquent contractors, suspended vendors, and federal excluded parties.

Applicable Ordinances and Contract Measures

- The User Access Program provision applies.
- The Small Business Enterprise contract measures and Local Preference do not apply.
- The Living Wage applies.



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. 1st Street
Miami, FL 33128-1983
Telephone: (305) 375-5126

December 4, 2019

Ms. Diana C. Mendez
LLORENTE & HECKLER P.A.
801 Arthur Godfrey Road, Suite 401
Miami Beach, Florida 33140

Re: Bid Protest – Contract No. RFQ9562-45ISD – Janitorial Services Downtown Facilities

Dear Ms. Mendez:

Forwarded for your information is a copy of the Findings and Recommendation filed by Judge William Johnson, Hearing Examiner, in connection with the bid protest hearings, held on Thursday, November 21, 2019.

Should you have any questions regarding this matter, please do not hesitate to contact Daysha McBride at 305-375-1293.

Sincerely,

HARVEY RUVIN, Clerk
Circuit and County Courts

By Linda L. Cave

Linda L. Cave, Director
Clerk of the Board Division

LLC:dmcb

CC: Honorable Chairwoman Audrey M. Edmonson and Members, Board of County Commissioners (via email)
Honorable Carlos A. Gimenez, Mayor, Miami-Dade County (via email)
Edward Marquez, Deputy Mayor, Miami-Dade County (via email)
Abigail Price-Williams, County Attorney (via email)
Geri Bonzon-Keenan, First Assistant County Attorney (via email)
Hugo Benitez, Assistant County Attorney (via email)

David Hope, Assistant County Attorney (via email)
Jenelle Snyder, County Attorney's Office (via email)
Yolanda Negrin, County Attorney's Office (via email)
Elizabeth Alfonso Ruiz, County Attorney's Office (via email)
Lourdes Suarez, County Attorney's Office (via email)
Adeyinka Majekodunmi, Commission Auditor (via email)
Tara C. Smith, Director, Internal Services Department (via email)
Namita Uppal, Chief Procurement Officer, Internal Services Department (via email)
Rita A. Silva, Procurement Management Chief, Policy and Legislation, Internal Services Department (via email)
Lydia Osborne, Strategic Procurement Division Director, Internal Services Department (via email)
Jeanise Cummings-Labossiere, Vendor Services Manager, Internal Services Department (via email)
Reginald L. Hires, Procurement Quality Control Specialist, Internal Services Department (via email)
Rene Guerrero, Procurement Vendor Service Specialist, Internal Services Department (via email)
Jessica Tyrrell, Procurement Contracting Manager, Internal Services Department (via email)
Alejandro Garcia, Procurement Contracting Officer 1 (via email)
ASchwartz@shutts.com, Shutts & Bowen
JGoldstein@shutts.com, Shutts & Bowen
bokoro@chiada.com, Chi-ada Corporation
Clnfante@sfinsservices.com, SFM Services, Inc.
vistabrns@bellsouth.net, Vista Building Maintenance Services, Inc.

MIAMI-DADE COUNTY BOARD OF COUNTY COMMISSIONERS

RFQ9562-451SD Janitorial Service Downtown Facilities

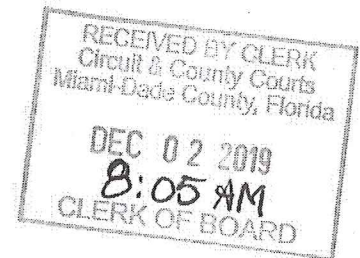
SFM SERVICES INC.,

Petitioner

v.

MIAMI-DADE COUNTY, FLORIDA

Respondent.



**MIAMI-DADE COUNTY AND CHI-ADA CORPORATION'S
PROPOSED RECOMMENDED ORDER**

This matter is a bid protest brought by SFM Services, Inc. challenging Miami-Dade County, Florida's (the "County") recommended award to Chi-Ada Corporation ("Chi-Ada"), pursuant to RFQ9562-451SD, for janitorial services at County downtown facilities. This matter was heard by the undersigned Hearing Examiner on November 21, 2019. The undersigned has considered the oral and written arguments of counsel, the testimony given by the witnesses at the hearing, and the documents entered into evidence. Having considered the record, the undersigned Hearing Examiner denies SFM's protest in part and dismisses the protest in part for lack of jurisdiction, and recommends the Miami-Dade County Board of County Commissioners move forward with the recommended award to Chi-Ada. The findings of fact and conclusions of law on which my recommendation is based are set forth below.¹

¹ My findings of fact are in the "Background" section. My conclusions of law are in the "Standard of Review" and "Discussion" sections. To the extent any of my findings of fact have been erroneously labelled conclusions of law, they are adopted as findings of fact. To the extent any of my conclusions of law have been erroneously labelled findings of fact, they are adopted as conclusions of law. Finally, many of my findings are by necessity mixed findings of fact and law. *J.D. v. Fla. Dep't of Children & Family Servs.*, 114 So. 3d 1127, 1133 (Fla. 1st DCA 2013) ("The [hearing examiner's] determinations were labeled as conclusions of law, but they are actually

BACKGROUND

I. The County's Small Business Enterprise Services Program

The County's Small Business Enterprise Services Program ("SBE Services Program"), codified at Section 2-8.1.1.1.1 of the Code of Miami-Dade County, Fla. (the "Code"), is enforced by the Division of Small Business Development ("SBD").² Code § 2-8.1.1.1(2)18. A Small Business Enterprise ("SBE"), is "a business entity certified by SBD, providing services, which has a valid business tax receipt issued by Miami-Dade County at least one (1) year prior to certification, an actual place of business in Miami-Dade County, not a Virtual Office, and whose three year average gross revenues does not exceed" certain contracting participation levels. Code § 2-8.1.1.1(2)(21). The SBE Services Program has three (3) levels of participation: (i) Micro Tier 1 (\$0 to \$750,000); (ii) Micro Tier 2 (\$750,000.01 to \$2,000,000); and Tier 3 (2,000,000.01 to \$5,000,000). *Id.* Chi-Ada, at all times relevant to the award of RFQ9562-451SD was a Tier 3 firm. Certified SBEs will graduate from the SBE Services Program when the SBE either exceeds: (i) the personal net worth limit of any of its owners (\$1,500,000 exclusive of the value of the primary residence, value of the business, and funds invested in retirement accounts); or (ii) the Tier 3 size limits. *See* Code §§ 2-8.1.1.1(2)(10), (21). Under the Code, SBEs are entitled to a bid price preference. Code § 2-8.1.1.1(3)(c)(3) As relevant here, when the value of the contract being awarded is greater than \$1,000,000, SBEs are entitled to a five percent (5%) bid preference.

findings of fact. *See Battaglia Props. v. Fla. Land & Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1993) ("[N]either the agency nor the court is bound by the labels affixed to findings of fact and conclusions of law. If a conclusion is improperly labeled as a finding of fact, the label is disregarded and the item is treated as though it were properly labeled.") (citation omitted).

² Small Business Development is a division within the County's Internal Services Department. As made clear through testimony, SBD is separate from the County's Strategic Procurement Division.

Code § 2-8.1.1.1(3)(c)(3)(b). When a firm is entitled to the bid preference, five percent (5%) is deducted from its price provided at bid submittal, and the reduced price is used when offers are evaluated and compared for the purpose of making an award recommendation.

The Code makes clear that SBD “shall implement eligibility criteria and administrative procedures for entities to be certified as SBEs.” Code § 2-8.1.1.1(3)(h)(1). In turn, SBD’s administrative procedures make clear “SBD is the County agency responsible for certifying, decertifying and recertifying applicants for the SBE Program.” Implementing Order No. 3-41 (“IO”), Small Business Enterprise Program for the Purchase of Goods and Services, § IV(A)(1). The Code provides that “Any SBE that exceeds the personal net worth or size limits shall immediately be graduated from the program **after formal written notification**. Such SBE shall be allowed to remain through the contract period **on awarded contracts** and any options to renew on the contract.” Code § 2-8.1.1.1(3)(h)(2). In other words, under the Code, once the SBD certifies a firm as an SBE, it is and remains an SBE **for all purposes** until SBD sends it formal written notice of graduation or decertification. *E.g.*, IO 3-41, § IV(C)(4) (“SBD shall give written notice, including the reasons for its decision, ... to SBEs who are decertified, or denied continuing eligibility recertification, or have graduated.”). Under the County’s administrative procedures, “[c]ertification for a SBE firm is valid for a three (3) year period.” IO 3-41, § IV(B)(1). The IO has other requirements firms must meet to maintain their certification during the three-year period, such as a requirement to submit documents annually, but none of these continuing requirements are relevant here.

II. SBD Certified Chi-Ada as a Small Business Enterprise

On February 3, 2017, the SBD certified Chi-Ada as an SBE effective December 19, 2016 through December 19, 2019. County/Chi-Ada Exhibit 2, February 3, 2017 Letter from Claudius Thompson to Bartholomew Okoro.³ Chi-Ada certificate number was 12407.

The certification letter states:

If at any time there is a material change in the firm including, but not limited to, ownership, officers, director, scope of work being performed, daily operations, affiliation(s) with other businesses or the physical location of the firm, you must notify this office in writing within (30) days. Notification should include supporting documentation. You will receive timely instructions from this office as to how you should proceed, if necessary. **This letter will be the only approval notification issued for the duration of your firm's three years certification. If the firm attains graduation or becomes ineligible during the three year certification period, you will be properly notified following an administrative process that your firm's certification has been removed pursuant to the code.**

(emphasis in original).

III. The ISD Issues the RFQ and Awards to Chi-Ada, then SBD Graduates Chi-Ada

On May 24, 2019, the Strategic Procurement Division of the County's Internal Services Department ("ISD"), issued RFQ9562-451SD (the "RFQ"), which sought quotes from pre-qualified firms for janitorial services for nineteen (19) County downtown facilities. The RFQ provided for award to the lowest responsive and responsible bidder that was pre-qualified under Pool No. ITQ9562-5/22-1, Group 3. Therefore, firms were only eligible to bid if they were pre-qualified by ISD. *See* SFM Protest Exhibit C, at 6 (Article 2.4 – Method of Award). As required by the Code, the RFQ provided for the five percent (5%) bid preference for SBEs. *See* November 7, 2019 SFM Formal Protest Letter, at 3. To obtain the five percent (5%) bid preference, the RFQ

³ All exhibits cited herein were entered into evidence at the November 21, 2019 hearing.

instructed bidders to indicate whether the “firm [is] a Miami-Dade County Certified Small Business Enterprise[.]” The RFQ also instructed bidders “[i]f yes, please provide Certification Number.” SFM Protest Exhibit C, RFQ Submittal Form.

Chi-Ada submitted a bid in response to the RFQ. Because Chi-Ada was certified, and had neither graduated nor been decertified from the SBE Services Program by SBD at time of bid submittal, it correctly stated in its bid submittal that it was a County Certified SBE and provided its Certification Number:

SMALL BUSINESS ENTERPRISE CONTRACT MEASURES (If Applicable)

A Small Business Enterprise (SBE) must be certified by Small Business Development for the type of goods and/or services the Bidder provides in

accordance with the applicable Commodity Code(s) for this Solicitation. For certification information contact Small Business Development at (305) 375-3111 or access <http://www.miamidade.gov/smallbusiness/certification-programs.asp>. The SBE must be certified by the solicitation's submission deadline, at contract award, and for the duration of the contract to remain eligible for the preference. Firms that graduate from the SBE program during the contract may remain on the contract.

Is Bidder's firm a Miami-Dade County Certified Small Business Enterprise?

Yes ☒

No ☐

If yes, please provide Certification Number: **12407**

SFM Protest Exhibit D, Excerpt from Chi-Ada's Bid (highlighting added).

ISD applied the bid preference to Chi-Ada's bid when evaluating and comparing the three (3) offers submitted. Because of the bid preference, Chi-Ada was recommended for award on October 30, 2019 at approximately 4:20 pm, as the lowest responsive and responsible bidder. *See* November 7, 2019 SFM Formal Protest Letter, at 4-5 (“On September 24, 2019, during a responsibility review hearing, the County informed SFM that while SFM was the lowest bidder responding to the RFQ, Chi-Ada's bid was lower than SFM's bid after applying the SBE Bid Preference.”); *see id.* at 6.

On October 30, 2019, approximately two and one-half (2.5) hours after ISD awarded the RFQ contract to Chi-Ada, ISD emailed a letter from SBD to Chi-Ada's counsel notifying it that it had been graduated from the SBE Services Program, since its three (3) year average revenues for 2016, 2017, and 2018 exceeded the \$5,000,000 program limit. *See id.* at 6-7; SFM Protest Exhibits J & K. Based on the receipt of formal written notice on October 30, 2019 at 6:44 pm, Chi-Ada does not dispute SBD's decision to graduate it from the SBE Services Program.

SFM's protest followed.

IV. SFM's Protest, and the County and Chi-Ada's Response in Opposition

SFM's formal protest, as clarified at the hearing, boils down to two (2) issues.

First, SFM alleges ISD unlawfully applied the five percent (5%) bid preference to Chi-Ada's bid in this procurement because Chi-Ada will not be a certified SBE at the time of contract execution and the term "awarded contracts" as used in Section 2-8.1.1.1.1(3)(h)(2) of the Code means "contract execution." The County and Chi-Ada contend that the term "awarded contracts" means "award recommendation". The County and Chi-Ada contend their reading of the Code is reasonable and SFM's is absurd.

Second, SFM alleges it was arbitrary and capricious, and hence clearly erroneous for SBD to not graduate Chi-Ada from the SBE Services Program prior to the award recommendation in this procurement. SFM alleges that in December 2018, Chi-Ada failed to provide SBD with information it was required to provide on an annual basis to maintain its certification. SFM further alleges that SBD arbitrarily failed to realize sooner than it actually did that Chi-Ada had not provided this information in December 2018, and that it also arbitrarily failed to determine sooner than it actually did that Chi-Ada's average annual revenues for 2016, 2017, and 2018 exceeded the \$5,000,000 program limit. SFM contends that SBD's arbitrary and capricious actions are the

result of the SBD's general failure to properly oversee and enforce the Small Business Enterprise Services Program. In the exact words of SFM's counsel at the hearing, SBD's failure to oversee the program and ISD's application of the bid preference is the result of the County's "incompetence." The County and Chi-Ada contend the undersigned Hearing Examiner only has jurisdiction to consider challenges taken in connection with specific procurements, and SBD's handling of Chi-Ada's SBE certification was part of a separate process not connected to the RFQ. The County and Chi-Ada therefore contend the undersigned Hearing Examiner lacks jurisdiction over this issue. However, the County and Chi-Ada also contend that SBD and ISD followed the Code, and the recommendation of award and hence said award to Chi-Ada was proper and correct.

V. The Hearing

At the hearing, Mr. Christian Infante of SFM, testified that on September 30, 2019, during the procurement, he emailed Alejandro Garcia of ISD, documents he believed showed Chi-Ada should be graduated from the SBE Services Program and considered ineligible for the five percent (5%) bid preference in this procurement. Based on all the evidence, Mr. Infante's demeanor, and the undersigned's experience as a former trial judge, while Mr. Infante's testimony is truthful it is not relevant.⁴

At the hearing, Jessica Tyrrell, the ISD Procurement Contract Manager who oversaw this procurement, testified that when bidders such as Chi-Ada stated they were a certified SBE in their bids, ISD verified the claim by checking the SBD SBE certification directory. If the bidder actually had the claimed SBE certification at the time of bid submittal, the bid preference if applicable (here five percent (5%)), was deducted from the bidder's price for evaluation, comparison, and award

⁴ See *Nateman v. Greenbaum*, 582 So. 2d 643, 644 (Fla. 3d DCA 1991) (judges conducting bench trials should rely on their real life experience when weighing the evidence and determining witness credibility).

purposes, at the point in time when ISD tallies the various bid submissions. Here, the tally for the RFQ was done in August 2019. Ms. Tyrrell explained this is ISD's standard practice for applying the bid preference, and that this is what ISD did with respect to Chi-Ada in this procurement. Ms. Tyrrell explained that ISD is obligated to give full effect to every SBE certification issued by SBD. She explained that even if ISD receives information from a bidder in a specific procurement that alleges one of its competitors should be graduated or decertified from an SBE program, ISD must give full effect to the certification until SBD makes a determination, and formally gives proper notice of graduation or decertification to the certified firm, if applicable. Ms. Tyrrell explained that ISD plays no role in SBD's certification decisions, including decisions to graduate or decertify firms from the SBE Services Program. Ms. Tyrrell explained that ISD's handling of the RFQ was conducted entirely independent of SBD's review of Chi-Ada's continued SBE status, and SBD's ultimate decision to graduate Chi-Ada. Ms. Tyrrell also explained that ISD must apply the bid preference at the time the bids are being tallied, because that is the point in a procurement where ISD calculates and finalizes its evaluation and comparison of offers, including compliance and responsibility checks, to select an awardee. Ms. Tyrrell persuasively explained that, on a systemic level, it would be both highly disruptive to the County's procurement operations and essentially unworkable, if not impossible, for the bid preference (or any of the other County preferences), to be applied at the time of contract execution, as the preference must be applied after bid submittal and during bid evaluation in order to reach an award recommendation. Based on all the evidence presented, Ms. Tyrrell's demeanor, and the undersigned's experience as a former trial judge, the undersigned finds Ms. Tyrrell's testimony to be truthful and persuasive.

At the hearing, Gary Hartfield, Director of SBD, testified regarding the graduation limits of the various County SBE programs, the specifics of the SBE Services Program and SBD's

oversight of it, and Chi-Ada's SBE certification and ultimate graduation from the SBE Services Program. Mr. Hartfield explained that once SBD certifies a firm as an SBE, during the applicable three (3) year certification period the firm is a certified SBE for all purposes, unless and until SBD gives the firm formal written notice of graduation or decertification. Mr. Hartfield explained that SBD's certification of Chi-Ada in February 2017, was independent of and had no connection with the RFQ, which was issued in mid-2019. Mr. Hartfield explained that ISD has no role in the certification of a firm as an SBE. Mr. Hartfield explained that only SBD can certify, decertify, or graduate a firm from participation in the various County SBE programs, and Chi-Ada's graduation from the SBE Services Program was the result of a process entirely separate from the RFQ. Mr. Hartfield explained that ISD had no role in the continuing-certification oversight process that ultimately resulted in Chi-Ada's graduation from the SBE Services Program. Finally, Mr. Hartfield explained the term "award" as used in Section 2-8.1.1.1(3)(h)(2) of the Code, means award recommendation because the bid preference must be applied before such award recommendation for the purpose of evaluating, comparing offers, and determining the ultimate awardee. Based on all the evidence presented, Mr. Hartfield's demeanor, and the undersigned's experience as a former trial judge, the undersigned finds Mr. Hartfield's testimony to be truthful and persuasive.

Finally, SFM's counsel argued at the hearing, that the RFQ and the continuing-certification that resulted in Chi-Ada's graduation were part of the same process. SFM's counsel insinuated the ISD and SBD coordinated the procurement and Chi-Ada's graduation, to ensure an award to Chi-Ada. SFM's counsel claims that the timing of the events of award and notification of graduation approximately 2.5 hours later that same day is suspicious. In fact, SFM's counsel also insinuated Ms. Tyrrell and Mr. Hartfield were not telling the truth regarding the independent and

separate nature of the procurement and the SBE certification processes that resulted in Chi-Ada's graduation. SFM's counsel asks the undersigned to make this conclusion based on two (2) facts. First, shortly after ISD recommended Chi-Ada for award Ms. Tyrrell sent Stacy Louis in SBD, an email with the subject line "Chi-Ada Corporation Update" that said "Hi Stacy - can you please call me on the subject vendor? This is an emergency. Thank you, Jessica." See SFM Protest Exhibit J. Second, Chi-Ada was graduated approximately two and one-half (2.5) hours after recommended for award.

STANDARD OF REVIEW

A procurement decision may be set aside only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *City of Pensacola v. Kirby*, 47 So. 2d 533, 535-36 (Fla. 1950); *Wester v. Belote*, 138 So. 721, 724 (Fla. 1931). In other words, a reviewing authority may only overturn a procurement decision if it lacks a rational basis or is otherwise unlawful. This is a highly deferential standard. A protester seeking to overturn a decision under the first "rational basis" prong bears the heavy burden of showing no reasonable person could agree with the decision. *Liberty Cty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 506-07 (Fla. 1982); *Culpepper v. Moore*, 40 So. 2d 366, 369-70 (Fla. 1949). Cf. *Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1987); *Sunshine Towing @ Broward, Inc. v. Dep't of Transp.*, DOAH No. 10-0134BID, ¶¶ 43-45, 2010 WL 1417770, at *10-11 (Fla. Div. Admin. Hrgs. Apr. 6, 2010) (RO).

Under the second "otherwise unlawful" prong, a protester must show the agency clearly and prejudicially violated controlling law or procedure. *Baxter's Asphalt & Concrete*, 421 So. 2d at 507 (quashing and reinstating procurement decision where "there was substantial compliance with the bidding statute."). Mere disagreement with the government's actions, no matter how vigorous, falls far short of showing those actions are irrational or otherwise unlawful. *Miami-*

Dade Cty. v. Church & Tower, Inc., 715 So. 2d 1084, 1089-90 (Fla. 3d DCA 1998) (“in the light of the [controlling] standard[of review], we conclude that while C & T’s bid protest shows substantial disagreement with the action of the commission, it falls far short of a showing of arbitrary or capricious action, much less illegality”).

Moreover, in Florida public officials are presumed to act properly, in good faith, and in accordance with the law. A protester attempting to show a procurement was tainted by bad faith, or by improper personal bias for or against a bidder must overcome the presumption of good faith with “hard facts” or strong evidence. Suspicion, innuendo, and argument of counsel will not suffice. *State ex rel. W.R. Clark Printing & Binding Co. v. Lee*, 163 So. 702, 703 (Fla. 1935); *Barton Protective Servs., LLC v. Dep’t of Transp.*, DOAH No. 06-1541BID, ¶¶ 213-15, 2006 WL 2056535, at *57 (Fla. Div. Admin. Hrgs. July 20, 2006) (RO). *Cf. Bath Club, Inc. v. Dade Cty.*, 394 So. 2d 110, 113 (Fla. 1981) (“Public officials are presumed to perform their duties in a proper and lawful manner.”); *Fla. Nat’l Bank of Jacksonville v. Simpson*, 59 So. 2d 751, 760 (Fla. 1952) (“[T]here is a well-established presumption of law that every [public] officer has properly performed his duty and the record in this case does not convince us that such presumption was overcome by **proof** to the contrary.”) (emphasis in original).

DISCUSSION

I. Under Section 2-8.1.1.1.1 of the Code of Miami-Dade County, Fla., Chi-Ada was a Certified SBE at the Time of Award

As noted, the Code states “Any SBE that exceeds the personal net worth or size limits shall immediately be graduated from the program **after formal written notification**. Such SBE shall be allowed to remain through the contract period **on awarded contracts** and any options to renew on the contract.” Code § 2-8.1.1.1.1(3)(h)(2) (emphases added). There is no dispute Chi-Ada was a certified SBE at the time it submitted its bid and at the time ISD made its award recommendation.

There is also no dispute Chi-Ada received formal written notice of graduation about two and one-half (2.5) hours later. SFM argues the term “awarded contract” (or “award”) in Section 2-8.1.1.1.1(3)(h)(2) of the Code means “contract execution” and not “award recommendation”. SFM therefore contends ISD’s actions violated Section 2-8.1.1.1.1(3)(h)(2) of the Code because when the contract is executed, Chi-Ada will not be eligible for the five percent (5%) bid preference that caused it be the lowest, responsive and responsible bidder.

SFM’s contentions are without merit. The undersigned must reasonably read the plain language of the Code, using common sense to reach a reasonable result. *License Acquisitions, LLC v. Debarry Real Estate Holdings, LLC*, 155 So. 3d 1137, 1144 (Fla. 2014); *Sch. Bd. of Palm Beach Cty. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1235 (Fla. 2009); *Fla. Dep’t of Env’tl Protection v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1270 (Fla. 2008).

Section 2-8.1.1.1.1 of the Code does not define the term “awarded contract” or “award”. Nonetheless, the undersigned finds the term “award” as used Section 2-8.1.1.1.1(3)(h)(2), has only one reasonable meaning: award recommendation. The Code neither makes any distinction between a “recommendation of award” and an “award”, nor equates an “award” with “contract execution” like SFM argues. Moreover, SBD and ISD’s reading is reasonable and SFM’s is not. The Code requires a department conducting a procurement to apply a five percent (5%) bid preference when “awarding” contracts. This bid preference is obviously applied when the procuring department is evaluating and comparing offers to recommend an award, and not at the time of contract execution. It would be absurd and unworkable for a bid preference used for the evaluation and comparison of offers to be valid at the time of award recommendation, but invalid at the time of contract execution due to the passage of time. The undersigned’s finding that SFM’s reading of the Code is unworkable and hence absurd, is supported not only by the plain language

of the Code and common sense, but also by the competent, substantial testimony from ISD and SBD. *Murciano v. State*, 208 So. 3d 130, 136 n.5 (Fla. 3d DCA 2016) (“although the courts are the final authority on the interpretation of a statute, courts can benefit from an agency’s unique combination of technical knowledge and practical experience”) (quotations omitted).

Reading the term “award” to mean “recommendation of award” also results in finality in procurements, whereas SFM’s reading absurdly causes potentially endless rounds of protests and analysis, resulting in costly delays and expense to the County. For example, a firm may be eligible for the bid preference when it is recommended for award. Another firm may protest on unrelated grounds. If the Hearing Examiner denies the protest but SBD graduates the awardee in the interim, the erstwhile unsuccessful protester could then file another protest challenging said awardee’s SBE status notwithstanding the fact the procuring department properly applied the bid preference when it made the award recommendation. Of course, if the protester is successful a third firm could then file similar sequential protests, and so on. In sum, SBD’s reading of the term “award” is reasonable because it is consistent with the requirement to apply the bid preference prior to the time of award recommendation and ensures the efficient and continuous procurement of goods and services.

Finally, the undersigned notes SFM’s reading of the Code is based not on reasonableness, but on language from a 2013 pre-qualification solicitation document that reminds departments of steps that occur in between an award recommendation and contract execution such as the three-day bid protest filing period. SFM contends that because this 2013 solicitation document indicates an award recommendation is made “prior to award”, the term “award” in Section 2-8.1.1.1.1 must mean “contract execution.” However, this 2013 solicitation document is not part of the Code. It is extrinsic evidence the undersigned finds unpersuasive when reading the Code. The undersigned Hearing Examiner must **reasonably** read the plain language **of the Code**. *License Acquisitions*,

155 So. 3d at 1144; *Johnson v. Presbyterian Homes of Synod of Fla., Inc.*, 239 So. 2d 256, 262 (Fla. 1970) (“A fair and reasonable interpretation must be made of all laws, with due regard for the ordinary acceptance of the language employed and the object sought to be accomplished thereby.”). SFM’s only argument in support of the reasonableness of its position is that reading “award” to mean “award recommendation” leads to the absurd result of Chi-Ada winning this competition even though it graduated two and one-half (2.5) hours after it was recommended for award. But this is not an absurd result. Whether “award” means “award recommendation” or “contract execution,” there can always be temporally close calls like the one here (e.g., SBD can just as readily graduate an awardee from the SBE Services Program two and one-half (2.5) hours after contract execution). Such close calls will always be called unfair by a losing firm. By focusing solely on why it thinks it is unfair for Chi-Ada to win this particular competition, SFM fails to show its reading of “award” is actually reasonable in the overall context of the County’s greater procurement system, which it must be for the undersigned to accept. Based on the foregoing, this ground of protest is denied.

II. The SBD’s Handling of Chi-Ada’s SBE Certification is Outside the Hearing Examiner’s Jurisdiction

The undersigned Hearing Examiner must dismiss SFM’s remaining protest alleging SBD arbitrarily failed to graduate Chi-Ada from the SBE Services Program sooner. The Code’s bid protest procedures “govern any protest made by a participant **in any competitive process** utilized for selection of a person or other entity to construct any public improvement, to provide any supplies, materials or services (including professional or management services other than professional services whose acquisition procedure is governed by the Consultant’s Competitive Negotiation Act, F.S. Section 287.055 et seq.), or to lease any county property” above the County Mayor’s delegated award authority. Code § 2-8.4 (emphasis added).

The Code further provides:

If the hearing examiner concurs in the County Manager's recommendation, a two-thirds (2/3) vote of the Commission members present shall be required to take other than the recommended action. Provided however, a two-thirds (2/3) vote shall not be required to reject all bids. **If the hearing examiner concurs in the County Manager's recommendation**, the Commission shall not allow presentations by any participants in the competitive process or their representatives at the time the matter is presented to the Commission. **If the hearing examiner does not concur in the County Manager's recommendation**, the participants in the competitive process and their representatives may make presentations to the Commission and the Commission shall decide the matter by majority vote.

Code § 2-8.4(h) (emphases added).

The County's bid protest Implementing Order, IO 3-21, mirrors the Code and provides:

This Implementing Order ("IO") establishes the requirements and procedures governing a bid protest brought by a participant **in any competitive process** utilized for selection of a person or other entity to construct any public improvement, to provide any supplies, materials or services (including professional or management services other than professional services whose acquisition procedure is governed by the Consultants' Competitive Negotiation Act, Section 287.055, Florida Statutes), or to lease any County property. This IO covers those professional services selections funded by the Federal Transit Administration.

....

The hearing examiner shall consider the written protest and supporting documents and evidence appended thereto, **the County Mayor's or issuing department Director's recommendation**, and supporting documentation, and all evidence presented at the hearing.

....

When a formal protest involves the expenditure of an amount that exceeds the County Mayor's delegated authority to award under Section 2-8.1(b) of the Code, as set forth in Section 2-8.4 of the Code of Miami-Dade County, **the following shall apply: ... If the hearing examiner concurs in the County Mayor's recommendation**, the Commission shall not allow presentations by any participants in the competitive process or their representatives

at the time the matter is presented to the Commission. A two-thirds (2/3) vote of the Commission members present shall be required to take other than the recommended action. Provided, however, that a two-thirds (2/3) vote shall not be required to reject all bids. **If the hearing examiner does not concur in the County Mayor's recommendation**, the participants in the competitive process and their representatives may make presentations to the Commission and the Commission shall decide the matter by majority vote.

(emphases added).

In sum, the Hearing Examiner's role in bid protests is limited to "concurring" or "not concurring" with the "recommendations" made in specific procurements. Hence the bid protest Hearing Examiner's jurisdiction is limited to challenges to specific procurements. Moreover, the Code provides a separate process for appealing SBE certification status decisions before hearing officers. But, only firms who have been denied certification, or decertified, or issued a notice of noncompliance, may file such appeals. *See* Code § 2-8.1.1.1(1)(1) ("Any **firm** that is **denied** certification, decertified, or issued a determination of noncompliance with the requirements of this ordinance or its implementing order **may appeal such action**....") (emphases added). Because only denials of certification or decertifications may be appealed, third parties may not challenge a decision to certify or decertify a firm as an SBE, which is what SFM is trying to indirectly do here. *Headley v. City of Miami*, 215 So. 3d 1, 9 (Fla. 2017) ("legislative direction as to how a thing shall be done is, in effect, a prohibition against it being done any other way"). In fact, SFM's counsel argued that Chi-Ada's graduation was tantamount to a decertification at the November 21, 2019 hearing.

SBD certified Chi-Ada on February 3, 2017, effective December 19, 2016 – several years before the instant RFQ was issued. Hence the SBD certification of Chi-Ada clearly did not occur in connection this procurement. Similarly, SBD's alleged failure to enforce the continuing certification requirements with respect to Chi-Ada occurred in December 2018 – well before ISD

issued the RFQ in May 2019.⁵ Finally, SBD's ultimate decision to graduate Chi-Ada was not made in connection with the RFQ, which was handled entirely by ISD. Rather, Chi-Ada's graduation was the result of an entirely separate SBE certification process that was handled exclusively by SBD. This is because the Code states that "SBD shall implement eligibility criteria and administrative procedures for entities to be certified as SBEs." Code § 2-8.1.1.1.1(3)(h)(1). SBD's handling of Chi-Ada's SBE Services Program status is therefore not connected to this procurement and outside the undersigned Hearing Examiner's jurisdiction.

SFM nonetheless insinuates based on what it deems the suspicious timing of events that SBD's handling of Chi-Ada's SBE status was part of this procurement because SBD and ISD were coordinating their actions to ensure an award to Chi-Ada.⁶ SFM's argument is not supported by evidence, but just the innuendo of SFM counsel, and it is not well taken. Because of the "strong presumption that government officials act correctly, honestly, and in good faith when considering bids[.]" *Barton Protective Servs.*, DOAH No. 06-1541BID, ¶ 215, 2006 WL 2056535, at *57, "a finding of bias must be based upon 'hard facts,' not mere 'suspicion or innuendo.'" *Logisticare Sols., LLC v. Comm'n for the Transp. Disadvantaged*, DOAH No. 06-2393BID, ¶ 102, 2006 WL 2826970, at *13 (Fla. Div. Admin. Hrgs. Sept. 29, 2006) (RO) ((quoting *Barton Protective Servs.*,

⁵ Upon examination on this subject, the SBD Director testified that a number of the over 1800 certified firms had not complied with the submission of an Affidavit of Continuing Eligibility requirement under IO 3-41, due to SBD's migration from the old Oracle database to new Business 2 Government platform. A software glitch discovered by SBD, which it is still resolving with the software vendor, prevents the system from issuing the necessary continuing eligibility notices to various certified firms, in addition to not allowing SBD to know which certified firms either received or did not receive said notices.

⁶ The undersigned acknowledges that SBD and the Strategic Procurement Division ("SPD") are separate divisions within the Internal Services Department. But, just as the County and Chi-Ada have done throughout these proceedings, to avoid confusion between the terms "SBD" and "SPD", the undersigned has referred to the Strategic Procurement Division as "ISD". Thus, to the extent that SFM contends that SBD and ISD are the same thing, it misconstrues the facts.

DOAH No. 06-1541BID, ¶ 213, 2006 WL 2056535, at *57)). *See also Pridgen v. Sweat*, 170 So. 653, 655 (Fla. 1936) (“The presumption is that public officers will do their duty, and there being no showing here of any discrimination or wrongful conduct on the part of the board, such presumption, in the absence of such showing, would obtain.”); *Hillsborough Cty. Aviation Auth. v. Taller*, 245 So. 2d 100, 102-03 (Fla. 2d DCA 1971) (reversing order setting aside award because “In Florida there is a presumption that public officials properly perform their duties in accordance with the law and it is incumbent upon those challenging such performance to overcome the presumption.”). Based on the foregoing, this ground of protest is dismissed.

Finally, even if the undersigned had jurisdiction over this ground of protest, the undersigned would deny it on the merits. There is no evidence anyone at SBD or ISD was motivated by improper bias for Chi-Ada or against SFM, or of any other improper conduct. As to SFM’s allegations that SBD has been arbitrarily overseeing the SBE Services Program because of staff “incompetence”, the undersigned finds these allegations completely unfounded. At the hearing, Mr. Hartfield explained there are approximately 1,800 firms in the SBE program. Mr. Hartfield also explained that over the last year or so the software platform SBD used to use to manage the SBE program was retired by the developer, and that the records were being transitioned to a new software platform. Because of the software transition process, SBD may have not given notifications to SBE firms like Chi-Ada, that they needed to submit their annual certification documents. SBD did not treat Chi-Ada differently from the nearly 1,800 other SBE firms. Similarly, because of these software issues, SBD had trouble keeping track of the documents that may or not have been submitted by SBEs, and with overseeing the continuing certification requirement pursuant to IO 3-41. The undersigned notes that Section 2-8.1.1.1.1 of the Code has no such continuing certification requirement, and finds Mr. Hartfield’s testimony truthful and

persuasive. Moreover, the evidence does not show these software issues are the result of arbitrary oversight of the SBE Services Program or, as SFM labels it, "incompetence". They are the sort of real-world issues that may be found in any reasonably run, modern organization. The Third District Court of Appeal has expressly acknowledged the occurrence of such issues at an organizational level is the rule, not the exception, and does not typically provide a basis to overturn a procurement decision:

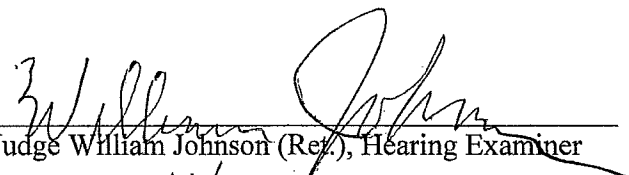
Finally, we observe that with any human activity, especially a large construction project involving a great contribution of labor, capital and material, a certain level of errors and omissions requiring adjustment or correction is highly likely to occur. At a certain level, these problems can be and usually are tolerated and satisfactorily managed by the parties.

Church & Tower, 715 So. 2d at 1091.

In sum, the SBD properly reviewed Chi-Ada's SBE Services Program status and graduated it from the SBE program. SFM merely alleges SBD should have prioritized Chi-Ada's file when it demanded Chi-Ada's graduation from the program on September 30, 2019. But, SBD had no obligation to drop whatever other matters it was working on or to otherwise prioritize Chi-Ada's file just because SFM was demanding it. Therefore, assuming *arguendo* the undersigned has jurisdiction, this protest is denied.

RECOMMENDATION

The recommended award to Chi-Ada Corporation is fair, reasonable, and consistent with the RFQ and the Code. The undersigned Hearing Examiner therefore recommends the Miami-Dade County Board of County Commissioners move forward with the recommended award to Chi-Ada Corporation, the lowest, responsive and responsible bidder in this procurement.


 Judge William Johnson (Ret.), Hearing Examiner
 11/27/2019

19

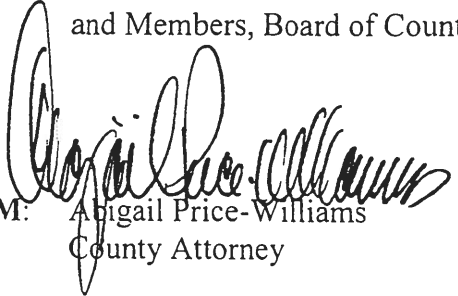


MEMORANDUM

(Revised)

TO: Honorable Chairwoman Audrey M. Edmonson
and Members, Board of County Commissioners

DATE: August 31, 2020

FROM: 
Abigail Price-Williams
County Attorney

SUBJECT: Amended
Agenda Item No. 8(F)(11)

Please note any items checked.

- ☐ "3-Day Rule" for committees applicable if raised
- ☐ 6 weeks required between first reading and public hearing
- ☐ 4 weeks notification to municipal officials required prior to public hearing
- ☐ Decreases revenues or increases expenditures without balancing budget
- ☐ Budget required
- ☐ Statement of fiscal impact required
- ☐ Statement of social equity required
- ☐ Ordinance creating a new board requires detailed County Mayor's report for public hearing
- ☒ No committee review
- ☒ Applicable legislation requires more than a majority vote (i.e., 2/3's present ☒, 2/3 membership ☐, 3/5's ☐, unanimous ☐, CDMP 7 vote requirement per 2-116.1(3)(h) or (4)(c) ☐, CDMP 2/3 vote requirement per 2-116.1(3)(h) or (4)(c) ☐, or CDMP 9 vote requirement per 2-116.1(4)(c)(2) ☐ to approve
- ☐ Current information regarding funding source, index code and available balance, and available capacity (if debt is contemplated) required

Approved	_____	Mayor	Amended
Veto	_____		Agenda Item No. 8(F)(11)
Override	_____		8-31-20

RESOLUTION NO. **R-889-20**

RESOLUTION AUTHORIZING A DESIGNATED PURCHASE PURSUANT TO SECTION 2-8.1(B)(3) OF THE COUNTY CODE BY A TWO-THIRDS VOTE OF THE BOARD MEMBERS PRESENT; RATIFYING AN EMERGENCY PURCHASE FOR THE INTERNAL SERVICES DEPARTMENT IN AN AMOUNT NOT TO EXCEED \$7,794,650.00 FOR EMERGENCY JANITORIAL ISD DOWNTOWN, EMERGENCY CONTRACT NO. E-10048, EXTENDING THE CONTRACT ON A MONTH-TO-MONTH BASIS OR UNTIL A NEW CONTRACT IS ESTABLISHED; AND AUTHORIZING THE COUNTY MAYOR OR COUNTY MAYOR'S DESIGNEE TO EXERCISE ALL PROVISIONS OF THE CONTRACT, INCLUDING ANY CANCELLATION PROVISION, PURSUANT TO SECTION 2-8.1 OF THE COUNTY CODE AND IMPLEMENTING ORDER 3-38

WHEREAS, this Board desires to accomplish the purposes outlined in the accompanying memorandum, a copy of which is incorporated herein by reference,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that:

Section 1. This Board finds it is in the best interest of Miami-Dade County to award Contract No. E-10048, Emergency Janitorial ISD Downtown, as a designated purchase in an amount not to exceed \$7,794,650.00 for the Internal Services Department, pursuant to Section 2-8.1(b)(3) of the Code of Miami-Dade County, by a two-thirds (2/3) vote of the Board members present.

Section 2. This Board ratifies an emergency purchase authority in an amount not to exceed \$7,794,650.00 for the Internal Services Department for the Emergency Janitorial ISD Downtown, Contract No. E-10048, and authorizes the extension of the contract on a month-to-month basis until a new contract is awarded as set forth in the incorporated memorandum.

Section 3. This Board authorizes the County Mayor or County Mayor's designee to exercise all provisions of the contract, including any cancellation provision, pursuant to Section 2-8.1 of the County Code and Implementing Order 3-38. Copies of the contract document are on file with and available upon request from the Internal Services Department, Strategic Procurement Division.

The foregoing resolution was offered by Commissioner **Barbara J. Jordan** , who moved its adoption. The motion was seconded by Commissioner **Audrey M. Edmonson** and upon being put to a vote, the vote was as follows:

Audrey M. Edmonson, Chairwoman	aye		
Rebeca Sosa, Vice Chairwoman	aye		
Esteban L. Bovo, Jr.	absent	Daniella Levine Cava	aye
Jose "Pepe" Diaz	aye	Sally A. Heyman	aye
Eileen Higgins	aye	Barbara J. Jordan	aye
Joe A. Martinez	aye	Jean Monestime	aye
Dennis C. Moss	aye	Sen. Javier D. Souto	aye
Xavier L. Suarez	aye		

The Chairperson thereupon declared this resolution duly passed and adopted this 31st day of August, 2020. This resolution shall become effective upon the earlier of (1) 10 days after the date of its adoption unless vetoed by the County Mayor, and if vetoed, shall become effective only upon an override by this Board, or (2) approval by the County Mayor of this resolution and the filing of this approval with the Clerk of the Board.



MIAMI-DADE COUNTY, FLORIDA
BY ITS BOARD OF
COUNTY COMMISSIONERS

HARVEY RUVIN, CLERK

By: **Melissa Adames**
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency.

dsh

David Stephen Hope