

Date: July 6, 2023

To: Honorable Chairman Oliver G. Gilbert, III
and Members, Board of County Commissioners

From: Daniella Levine Cava
Mayor



Agenda Item No. 8(P)(7)

Resolution No. R-623-23

Subject: Recommendation for Approval to Reject All Proposals for Haulover Marina Front Restaurant

Summary

This item recommends the rejection of the two proposals received for a Haulover Park marina front restaurant for the Parks, Recreation and Open Spaces Department (PROS). Through this solicitation, PROS sought to retain a proposer for the design, building, financing, operation, management, and maintenance of the new restaurant. Such responsibilities would have included all costs associated with the operation and maintenance of the restaurant including, but not limited to, building and maintenance of public restrooms, full restaurant menu service, pest control, janitorial service, grounds maintenance services, utilities infrastructure such as water, trash disposal, sewage, information technology infrastructure (Wi-Fi), live entertainment, and events.

Staff identified responsiveness issues for both proposing entities, Haulover Bay, LLC and MS Design Consulting, Inc., notifying the County Attorney's Office (CAO) on February 1, 2023. Thereafter, the CAO rendered an opinion deeming both proposers non-responsive. Following the rejection of both proposals, and after performing a thorough review of the scope of work, project requirements, and market conditions, the County will re-advertise a competitive solicitation.

Recommendation

It is recommended that the Board of County Commissioners (Board) approve the rejection of both proposals received under Request for Proposals No. EVN0000117, *Haulover Marina Front Restaurant*, for PROS.

Background

The County issued a request for proposals on September 12, 2022. Five addendums were issued to answer proposer questions, provide clarification, and to extend the solicitation deadline from September 26, 2022 through January 18, 2023. On January 18, 2023, the County received proposals from Haulover Bay, LLC and MS Design Consulting, Inc. The solicitation advised proposers that the County was seeking a revenue structure and payments to the County in accordance with Form 1 - Revenue Schedule. Prior to proceeding with the evaluation process, the County identified potential responsiveness issues from both proposing entities and requested a legal review of the proposals to ascertain whether either was responsive and if the evaluation process could proceed in earnest.

On March 30, 2023, the CAO notified the County that both proposals were deemed non-responsive. Specifically, Haulover Bay LLC failed to provide a percentage of gross revenue over \$999,999, a requirement stipulated within the solicitation, and MS Design Consulting, Inc. failed to submit the required Revenue Schedule. The County intends to revise areas of the solicitation using feedback from the addenda process and conduct a review of the scope of work, project requirements, and market conditions, following which the County will issue a new solicitation.

Scope

Haulover Park is located within District 4, which is represented by Commissioner Micky Steinberg; however, the scope of this item is countywide in nature.

Delegated Authority

There is no delegated authority required or requested for this rejection.

Fiscal Impact/Funding Source

There is no fiscal impact to the County with the rejection of proposals.

Track Record/Monitor

Jessica Tyrrell of the Strategic Procurement Department is the Division Director.

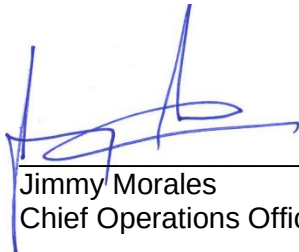
Vendors Not Recommended for Award

Vendor	Local Address	Reason for Rejecting
Haulover Bay, LLC	Yes	Deemed non-responsive by the County Attorney's Office for failure to provide pricing in accordance with the solicitation (opinion attached)
MS Design Consulting, Inc.	No	

Applicable Ordinances and Contract Measures

- The two percent User Access Program provision would not have applied.
- The Small Business Enterprise Selection Factor and Local Preference would have applied.
- The Living Wage Ordinance would not have applied.
- The Responsible Wages Ordinance would have applied.

Attachment



Jimmy Morales
Chief Operations Officer

Memorandum



Date: March 30, 2023

To: Jason Edelstein
Procurement Contracting Officer
Strategic Procurement Department

From: Monica Rizo Perez /s/ *Monica Rizo Perez*
Assistant County Attorney

Subject: Responsiveness Opinion re: Solicitation RFP No. EVN0000117 – Haulover Marina Front Restaurant (the “Solicitation”)

I am in receipt of your memorandum in which you seek a responsiveness determination as to proposals received in response to the Solicitation from Haulover Bay, LLC (“Haulover Bay”) and MS Design Consulting, Inc. (“MS Design”).

In your memorandum, you identify two issues for consideration as responsiveness issues: first, that Haulover Bay failed to provide a percentage amount for the percentage of gross revenues over \$999,999.00; and second, that MS Design altogether failed to submit a Form 1 – Revenue Schedule. Additionally, a review of Haulover Bay’s proposal reflects that Haulover Bay modified the Form 1 – Revenue Schedule to provide a percentage amount for the percentage of gross revenues under up to \$999,999.00 that varied from year-to-year.

In issuing the determination set forth herein, I rely on your memorandum, the Solicitation, all addenda issued thereto, and the proposals submitted by Haulover Bay and MS Design. For the reasons set forth below, I conclude that Haulover Bay’s proposal and MS Design’s proposal are not responsive to the Solicitation for failure to provide revenue proposals as required by the Solicitation.

Background

The Solicitation seeks bids from qualified proposers to develop, finance, design, construct, operate, maintain, and manage a Marina-Front Restaurant at Haulover Park. *See* Solicitation at § 1.1. The initial contract term is for 10 years with two 10-year renewal periods. *Id.* The Solicitation advised Proposers that the County was seeking a revenue structure and payment to the County as set forth in Form 1 – Revenue Schedule (“Form 1”) to consist of certain payments during the development phase (phase I) and certain payments during the operations and management (phase II). *Id.* at § 2.7. During phase II, the successful proposer was to pay the County a set, guaranteed annual rent payable monthly plus a percentage of its gross revenues. *Id.* The Solicitation and Form 1 required that the percentage of monthly gross revenues be broken up into two percentages: one percentage for all gross revenues up to \$999,999.00 and another percentage for all gross revenues that were greater. *Id.*

The Solicitation instructed proposers to complete and return the entire proposal submittal package- inclusive of the Form 1- and to “carefully follow the format and instructions outlined therein” and to complete all documents in the manner therein described. *Id.* at § 3.1. Proposers were advised that if they wished to take exception to any of the terms of the Solicitation, they should clearly indicate same in its proposal but: “No exception shall be taken where the Solicitation specifically states that exceptions may not be taken. Further, no exception shall be allowed that, in the County’s sole discretion, constitutes a material deviation from the requirements of the Solicitation.” *Id.* at § 1.3. At the very top of Form 1, Proposers were instructed that they were to “[s]ubmit the proposed payment to the County using this document, in the manner stated herein; there is no exception to this requirement.” *See* Form 1 (emphasis added). Form 1 required proposers to provide four different revenues: (1) the initial rent payable from the lease effective date until issuance of a certificate of occupancy for the marina restaurant; (2) the guaranteed annual rent from the date of the issuance of the certificate of occupancy until the lease termination date; (3) the percentage of annual gross sales up to \$999,999.00 payable to the County during the term; and (4) the percentage of annual gross sales above \$999,999.00 payable to the County during the term. *Id.*

Your memorandum indicates that MS Design submitted a proposal that did not include a Form 1 and the proposal you provided for my review from MS Design did not include a Form 1. Haulover Bay did submit a Form 1, however, the Form 1: (1) failed to provide one of the four revenues required by the County- the percentage of annual gross sales above \$999,999.00- and instead left the space blank, and (2) modified Form 1 with respect to another of the revenues sought by the County- the percentage of gross sales up to \$999,999.00. Rather than provide a single, percentage to pay the County for gross revenues up to \$999,999.00, Haulover Bay modified Form 1 to offer four separate and different percentages of gross revenues up to \$999,999.00 to pay to the County broken up by years.

Discussion

Based on the facts set forth above, the proposals submitted by MS Design and Haulover Bay are not responsive to the Solicitation and the County does not have the discretion to accept them.

Generally, a proposal may be rejected or disregarded if there is a material variance between the proposal and the solicitation. *Glatstein v. City of Miami*, 399 So. 2d 1005, 1008 (Fla. 3d 1981). Florida courts have used a two-part test to determine whether a variance from the terms of a solicitation is substantial, and hence not waivable, “first, whether the effect of a waiver would be to deprive the [government] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.” *Robinson Elec. Co. v. Dade Cnty.*, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982). The Solicitation in the instant case- a lease for a concession at a park- is subject to the same competitive bidding requirements as purchases for supplies and services. *See Marriott Corp. v. Metro. Dade Cnty.*, 383 So. 2d 662, 667 (Fla. 3d DCA 1980); see also § 125.35, Fla. Stat. (2022).

MS Design

MS Design's proposal fails both prongs of the test. First, MS Design has failed to provide the County with the assurance that the contract will be entered into, performed, and guaranteed according to its specified requirements. The Solicitation requires that the winning proposer provide the County with both a guaranteed and a percentage-based rental for the lease of County land for the operation of a restaurant. MS Design's complete failure to provide a pricing sheet deprives the County of an assurance that it will receive rent in accordance with the requirements of the Solicitation or any rent whatsoever. Second, the County cannot now- after proposals have been turned in- allow MS Design to submit a pricing sheet as this would undermine competitive and put in a competitive advantage over other bidders. Indeed, the County is "not entitled to omit or alter material provisions required by the RFP because in doing so the public body fails to inspire public confidence in the fairness of the RFP process." *Emerald Correctional Management v. Bay Cnty. Bd. Of Cnty. Commissioners*, 955 So. 2d 647, 653 (Fla. 1st DCA 2007) citing *State, Dep't of Lottery v. Gtech Corp.*, 816 So. 2d 648 (Fla. 1st DCA 2001). Accordingly, MS Design's proposal is not responsive to the Solicitation and its proposal cannot be accepted by the County.

Haulover Bay

Like MS Design's proposal, Haulover Bay's proposal also fails both prongs of the *Robinson Electric* test. Haulover Bay did submit a Form 1, however, Haulover Bay failed to complete the pricing as required by the Solicitation and altered the form to provide pricing in a method different than that sought by the Solicitation. The Solicitation expressly stated on the face of the Form 1 that no exceptions to the pricing sought by the County in the Solicitation would be permitted. Yet, Haulover Bay modified the revenues to be paid to the County to be staggered during the term of the contract rather than fixed for all revenues under \$999,999.00 as sought and required by the contract. The law is clear: a governmental entity cannot accept terms from a proposer that were not contemplated by the RFP because then the governmental entity would be engaging in favoritism. *Emerald Correctional Management v. Bay Cnty. Bd. Of Cnty. Commissioners*, 955 So. 2d. at 654. "It is well[] settled that specifications in a[] [request for proposal] are generally mandatory and must be strictly followed." *Reading Blue Mountain & N. R.R. v. Seda-Cog Joint Rail Auth.*, 235 A.3d 438, 460 (Pa. Commw. Ct. 2020). Haulover Bay's failure to provide pricing as sought by the County fails both prongs of the test in *Robinson Electric*: it deprives the County of the assurance that the contract will be entered into and guaranteed according to the terms of the Solicitation as to the pricing requirements and it provides a competitive advantage to Haulover Bay to the extent that it would be permitted to alter its proposal now to conform to the terms of the Solicitation. See *State, Dep't of Lottery v. Gtech Corp.*, 816 So. 2d at 652 (finding that there cannot be material changes to a proposal after it has been submitted; proposal and resulting contract must be in accordance with the provisions of the solicitation). This Haulover Bay cannot do, and no contract can be awarded it.

Please contact me if you have questions or concerns.



MEMORANDUM

(Revised)

TO: Honorable Chairman Oliver G. Gilbert, III
and Members, Board of County Commissioners

DATE: July 6, 2023

FROM: 
Gen Bonzon-Keenan
County Attorney

SUBJECT: Agenda Item No. 8(P)(7)

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
Veto _____
Override _____

Agenda Item No. 8(P)(7)
7-6-23

RESOLUTION NO. _____ R-623-23

RESOLUTION REJECTING ALL PROPOSALS RECEIVED IN
RESPONSE TO REQUEST FOR PROPOSALS NO. EVN0000117
FOR HAULOVER MARINA FRONT RESTAURANT

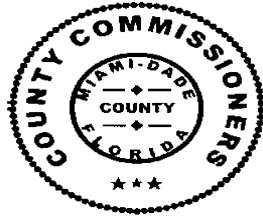
WHEREAS, this Board desires to accomplish the purposes outlined in the accompanying memorandum, a copy of which is incorporated herein by reference,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board rejects all proposals received in response to Request for Proposals No. EVN0000117 for Haulover Marina Front Restaurant. A copy of the solicitation document and the proposals received in response are on file with and available upon request from the Strategic Procurement Department.

The foregoing resolution was offered by Commissioner **Danielle Cohen Higgins** , who moved its adoption. The motion was seconded by Commissioner **Juan Carlos Bermudez** and upon being put to a vote, the vote was as follows:

Oliver G. Gilbert, III, Chairman	aye		
Anthony Rodríguez, Vice Chairman	aye		
Marleine Bastien	aye	Juan Carlos Bermudez	aye
Kevin Marino Cabrera	aye	Sen. René García	absent
Roberto J. Gonzalez	aye	Keon Hardemon	absent
Danielle Cohen Higgins	aye	Eileen Higgins	aye
Kionne L. McGhee	aye	Raquel A. Regalado	absent
Micky Steinberg	aye		

The Chairperson thereupon declared this resolution duly passed and adopted this 6th day of July, 2023. 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

JUAN FERNANDEZ-BARQUIN, CLERK

Basia Pruna

By: _____
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency.

MRP

Monica Rizo Perez