Brevard COUNTY

AGENDA REPORT
April 24, 2018

SUBJECT:
Permission to Reject Proposals in Response to Sykes Creek Ecosystem Restoration Dredging Project, Request for Proposal (RFP) #P-3-18-04

FISCAL IMPACT:
Fiscal Impact: Funding in the amount of $10,000,000 is budgeted in Natural Resources CIP Save Our Indian River Lagoon (SOIRL) Project 10 Year Plan. An additional $9,340,000 is funded through a state grant from the FL Legislature.

DEPT/OFFICE:
Central Services

REQUESTED ACTION:
The Board of County Commissioners is requested to reject all proposals submitted for this project and authorize staff to revise the project scope, re-solicit and award competitive bids for the Sykes Creek Ecosystem Restoration Dredging Project.

SUMMARY EXPLANATION and BACKGROUND:
Brevard County advertised RFP-3-18-04 on October 12, 2017 for the Sykes Creek Dredging Muck Removal Project. Three (3) responses were received and opened on December 20, 2017.

On January 17, 2018, a selection committee consisting of Matt Culver, Walker Dawson, and Mike McGarry, of the Natural Resources Management Department, Mark Reagan of Utilities Services Department, and Bruce Black of the Public Works Department met with the proposers to review the responses and conduct a question and answer session. The committee scored and ranked the proposals selecting the number one ranked proposer, Florida Dredge and Dock (FDD).

The County received a protest of the award from Mr. Michael Sjuggerud, of Cantwell & Goldman, PA, on behalf of Central Sand, Sand Incorporated (CSI), on January 23, 2018. Among other objections, Mr. Sjuggerud contends FDD is not a responsive bidder because they submitted a conditional proposal and do not own a permanent disposal facility to accept dredged material.

On February 20, 2018 the County received a notice of protest intervention from John H. Rains III, PA, on behalf of FDD. Copies of the protest and notice of intervention letters are attached and they may wish to speak during this Board meeting.

The County formed a Bid Protest Committee consisting of Jim Liesenfelt, Interim Assistant County Manager, Jeff McKnight, Information and Technology Director, Don Walker, Space Coast Government Television Director. Shannon Wilson, Deputy County Attorney, was legal advisor to the committee. In a public meeting held February 26, 2018, the

protest committee met with all parties and voted unanimously to reject the protest of CSI and proceed with the RFP process. Mr. John H. Rains III, PA, withdrew the notice of intervention on behalf of FDD. In attendance at the meeting were citizens of North Merritt Island who spoke to their objections associated with the pipeline path and disposal site location as proposed by FDD.

During the selection committee meetings, concerns regarding each proposal were discussed. Despite the FDD proposal being ranked highest by the selection committee, there are serious unresolved concerns with the proposal as submitted. The site FDD proposed for dewatering and disposal of the dredge material is located on private property not currently owned or controlled by FDD, it is zoned AU (agricultural use) and located within the FEMA floodplain of North Merritt Island. The proposed use of this site will require zoning and permitting actions that may significantly delay the project and/or may not be approved as envisioned by FDD. In addition, the pathway for pipeline corridor and associated booster pumps includes areas outside of the public right-of-way that could also pose insurmountable challenges to FDD being able to deliver the project as proposed. The other proposals would also be subject to timing, muck processing and or disposal concerns.

Each proposer included elements which were contrary to the RFP scope description. Due to these changes to the original scope of work solicited in the RFP, staff recommends rejecting all proposals. Further, staff recommends Board authorization to work with the engineer of record to revise the scope of the project to include specific additional/alternate spoil management and appropriate offload sites and re-advertise to solicit bids and award a contract to the lowest, responsive bidder.

For the information of the Board, staff is currently working with Florida Inland Navigation District to secure access to their existing spoil site for use as a muck dewatering site. At such time as staff has negotiated a potential agreement with Florida Inland Navigation District in this regards, staff will bring it to the Board for consideration prior to going to bid with a revised scope for this project.

ATTACHMENTS:

Description

- **Engineering Technical Review**
- **CSI Protest**
- **FDD Protest Rebuttal**

BREVARD County
BOARD OF COUNTY COMMISSIONERS

FLORIDA'S SPACE COAST

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April 25, 2018

MEMORANDUM

TO: Theresa Camarata, Central Services Director Attn: Leslie Rothering

RE: Item II.C.1., Permission to Reject Proposal in Response to Sykes Creek Ecosystem Restoration Dredging Project, Request for Proposal (RFP) #P-3-18-04

The Board of County Commissioners, in regular session on April 24, 2018, rejected all proposals submitted for Sykes Creek Ecosystem Restoration Dredging Project, #P-3-18-04 and, subject to below, re-advertise to solicit bids and award a contract to the lowest, responsive bidder.

Staff represented it will work with the engineer of record to revise the scope of the Project to include specific additional/alternate spoil management and appropriate offload sites; work with Florida Inland Navigation District (FIND) to secure access to their existing spoil site for use as a muck, dewatering site; and at such time as staff has negotiated a potential agreement with FIND in this regard, staff will bring it to the Board for its consideration prior to going to bid with a revised scope for this Project.

Your continued cooperation is always appreciated.

Sincerely,

BOARD OF COUNTY COMMISSIONERS
SCOTT ELLIS, CLERK

Tammy Rowe

Tammy Rowe, Deputy Clerk

cc: Natural Resources Management Director
County Manager
County Attorney

SYKES CREEK MUCK DREDGING PROJECT

Qualification Package Evaluation

Taylor Engineering's Technical Review Comments

January 11, 2018

General Comments: All Respondents

- All 3 respondents propose the use of flocculants, either at the temporary DMMA or at the final disposal site, to aid in dewatering material via gravity settling and to clean dredged material effluent water to levels meeting state water quality standards.
- All 3 respondents indicate that gravity settling with the use of flocculants will remove phosphorous to minimum levels required. This is a reasonable assumption, supported by the Turkey Creek project results
- None of the 3 respondents have provided sufficient documentation on nitrogen removal to assure the reviewer of a reasonable likelihood of success.
- The successful respondent will have to address the need to modify the required storage capacity due to material bulking or over-dredging. None of the 3 respondents presented consideration of these issues.
- Reviewer estimates some quantity of salt water effluent will discharge from all 3 proposed permanent disposal sites, i.e. that groundwater infiltration will not keep up with production rates. None of the 3 respondents have addressed dredged material effluent handling at the chosen permanent disposal site. It's not clear how the clarified effluent water will be returned to the nearest receiving water body.
- None of the 3 respondents addressed the permitting challenge of disposing of salt-water muck material and subsequent leaching of salt-water into the groundwater table at their chosen permanent disposal site. None of the respondents specifically indicated that the level of pre-treatment and dewatering sufficiently address this risk. Alternatively, none of submittals mention the use of a membraned lined site to prevent salt-water contamination of the groundwater, use of monitoring wells, interdiction ditches, or any other means typically applied to control or monitor salt-water intrusion into the groundwater.
- While each respondent offered limited discussion on potential wetland and seagrass impacts resulting from their proposed DMMA and/or disposal site; there was no mention of potential natural resource impacts and subsequent mitigation related to transport pipeline placement in any proposal. It is unclear if mitigation credit purchase costs are included in any of the bids, but no mention is made of this mitigation method, only on-site mitigation is discussed.

Review Comments: Central Sand Response

Summary

- Hydraulic dredge and pump material via pipeline to DMMA on Kiwanis spoil Island. Total dredge volume of 552,800 cy proposed.
- Allow sand to settle at one end of treatment area and treat remaining dredged slurry with polymer flocculent and allow solids to settle out in water column. Flocculant laden muck material to be pumped into tanker trucks in a semi-liquid state on Kiwanis Island and then transported to permanent disposal site.
- Nutrient removal treatment for Phosphorus is associated with flocculants; proprietary treatment method "NutriGone" will remove the nitrogen in decanted water prior to discharge.
- Sand and treated muck material will be transported via tanker truck across a segmented floating barge bridge from the island to Kiwanis Park. Respondent states that they will not need a temporary staging area at park, only a thru-route for truck traffic.
- Tanker trucks (estimated 100 tanker truck hauls / day) will transport material about 10 miles to a permanent 186-acre disposal site owned by Contractor's sister company.
- Respondent indicated production rate of 3,000 cy/day placed in final disposal area.
- Proposal claims Sister company of Central Sand Inc. — Space Coast Airport Business Center— has purchased 186 ac site, of which about 48 ac has been set aside for permanent disposal of 727,567 cy of sediment. The purchased site also includes "64 acres for mitigating wetland impacts…"

Dewatering

- Contractor states that they have successfully dewatered muck material using this method for 3 other projects – over 200,000 cy of muck.
- Demonstrated via picture of previous Cocoa Beach project that successfully met turbidity requirements using what appears to be a very small DMMA site (smaller than Kiwanis Island).
- No plan view of proposed Kiwanis DMMA plan was provided, only schematic cross-section of a typical design detail. Although one sketch shows a DMMA, this appears to be DMMA used on another project and does not include dimensions or other relevant information. We assume contractor will use Taylor Engineering's Kiwanis Island DMMA layout or similar. Contractor claims they will not need the total area currently permitted on Kiwanis Island. However, Contractor also mentions 117,000 cy capacity of Kiwanis Island as shown on bid plans. The Contractor's intention for Kiwanis Island is not clear.
- No details, other than to dose with polymers, were provided to address how the Contractor will meet water quality standards for effluent before discharging from the site. There was no information regarding estimated settling rates and retention time, etc.
- Respondent does not provide assurance via calculations or other means that Kiwanis Island can provide sufficient room to maintain production rates for material dewatering and

provide adequate retention time for effluent cleanup and nitrogen removal. Reviewer notes that Kiwanis Island is very small for such an operation.

- No Engineer of Record (EOR) is identified for design tasks.
- Team appears to be competent at dredging and dewatering muck.
- Dewatering method identified with chemically aided settling. Proposal claims 30 cy dried sediment in each 10,000-gallon tanker truck at about 60% solids. This solid content seems infeasible for a pumped liquid slurry.
- Contractor provided capacity of final disposal area but no clear plan for spoil island facility.
- Dewatering rate was not clearly defined.
- Use of Kiwanis Island and offloading over a barge bridge likely means significant impacts and disruption to the Park. This will likely disrupt traffic and may not fit the County's criteria that park use be "temporary" only. No clear site plan (drawing) for the use of the park area was provided
- No wetland impacts were identified, or mitigation plan presented.
- No details or dimensions provided in cross section sketches

Effluent Nutrient Removal

- 3-stage plan proposed – but not clearly described. Reviewer estimates 2 stages of a flocculent dosing followed by filter media process.
- Proposes use of "NutriGone filter media bed" to remove nitrogen from dredged effluent.
- No specific information on NutriGone performance or how it works.
- No calculations given that Kiwanis Island has enough area to accommodate nitrogen removal process. Sketch by EcoSense International provided in the qualifications statement shows nitrogen removal bed as about 110 x110 ft area.
- No nutrient removal project examples were presented.
- Effluent treatment to be performed on island; cross section of proposed DMMA not clear; not clear how much area or volume would be necessary to achieve functional design.
- Little information provided on treatment rates.
- Respondent has not performed TN removal, resumes of nutrient removal experts not provided, no EOR or engineering designs referenced for nutrient removal component.
- No indication that proposed chemical additives have been authorized for use by FDEP.

Offloading and Handling

- No sketches or written descriptions of spoil island design to accommodate truck loading and traffic (100 trucks /day). Figure labeled 'haul route' shows path from south end of the island to Kiwanis Park, which is not acceptable under current permit conditions.
- Estimates production at 2000 – 3000 yds/day.
- 100 trucks per day will have a significant impact on traffic at the park or at the park entrance.
- Barge bridge permitting may be difficult, and the bridge would likely include some seagrass impacts (based on existing seagrass map in area where bridge is proposed).

- County has limited park uses to temporary use only in specific locations. Plan appears to violate that limited use plan.

Transport and Disposal

- No assurance given that proposed permanent disposal site can be permitted for dredged material disposal. No wetland delineation or other natural resource survey information was provided or referenced regarding the final disposal site. Discussion regarding the wetland impacts suggests a lack of understanding the issue. On-site mitigation not likely to meet county approval as the county is the permit holder and would become responsible for the future mitigation success.
- No dike design, calculations or plan view demonstrating how the 48-acre permanent disposal site can accommodate 640,000 cy of dredged material. Reviewing Engineer estimates site size is adequate if material bulking factor or over-dredging quantity are not too great.
- In determining permanent disposal site capacity - no bulking factor mentioned for expansion of muck material during hydraulic dredging. Engineer estimates some expansion over in-situ volume amounts since material will be hydraulically dredged (added water) and transported from DMMA in semi-liquid form.
- To transport material – contractor estimates that ten (10) 10,000-gallon tanker trucks are sufficient to accomplish the task. Contractor estimates each tanker truck hauling muck would contain 30 cy of dried muck. Based on this, Engineer estimates more than 21,000 truck trips would be required to transport dredged material to permanent disposal site (not including any consideration of material bulking). Contractor is proposing 100 trips per day to keep up with estimated 3000 cy/day production rate.
- Contractor estimates offloading of truck to take 10 minutes. This seems like a very short time to pump out 10,000 gallons.
- Contractor does not mention handling or treatment of dewatered effluent at permanent disposal site. Engineer notes that the nearest main water body about 2 miles from disposal site, however contractor does not indicate how treated effluent would be returned to receiving waterbody
- Plan will require permit modification; the proposed plan may pose potential permitting issues pertaining to wetland and groundwater impacts.
- Respondent provided proof of site ownership.

Dredging

- The team appears to include experienced dredgers.
- Respondent proposes hydraulic transport of dredged sediment to the DMMA island via 12-inch dredge. Contractor states that although a 14- to 16-inch dredge could be used, that dewatering efforts could not keep up with production rate of dredge. Reviewer agrees with this statement.

- Contractor provided production rate of 2000 to 3000 cy/day; data regarding muck density and trucking plans raises concerns that they may not meet this target. No evidence, details, testing, or calculations were provided to support the production rates claimed

Schedule

- Contractor indicated 0-6 month permitting timeframe while other activities are underway. Wetland impacts might be difficult to resolve in 6-months even with purchase of mitigation credits.
- 47-month project schedule seems reasonable. However, contractor included a very aggressive 6-month permitting timeframe at project start, which may result in project not meeting proposed schedule.

Review Comments: Gator Dredging Response

Summary

- Hydraulic dredging with five-mile pipeline to transport dredge slurry to 16 ac DMMA located on N. Courtney Parkway next to barge canal. Dredging volume of 387,800 cy of material proposed
- Dewatering approach proposed by gravity settling of coarse non-cohesive materials and polymer flocculent-assisted settling of fine materials. Contractor proposed that decanted water would be treated to remove nitrogen and then discharged to the barge canal.
- Dewatered muck will be transported about 5 miles in sealed dump trucks to a 44-ac borrow pit for permanent disposal.

Dewatering of Dredged Material

- Contractor proposes to use an alternate DMMA site and not use Kiwanis Island.
- Descriptions of dewatering methods for sand and fines is clearly described. Contractor outlines approach to settling of fines using same methods successfully applied for Turkey Creek dredging project. This means that the respondent proposes use of a DEP-approved flocculant/ coagulant.
- Respondent presented case study of successful projects using geotubes to dewater fine grained (muck) material treated with flocculants.
- Respondent did not provide details, calculations or other means of assurance that the proposed 16 ac DMMA can provide enough space to maintain stated production rate of 3000 cy/day for material dewatering and provide adequate retention time for effluent cleanup and nitrogen removal. Contractor states under 'Offloading and Handling' section that dewatering rate will be achieved by "dual 2-acre dewatering basin," implying that only a quarter of the property space will be used for dewatering efforts. Reviewer is of the opinion that proposed 16 ac DMMA site is very small for such an operation. Several acres will be consumed in access roads and berms, reducing the available area for settling and treatment actions.
- Contractor estimated 90-day permit modification period. This timeframe is not sufficient in the event contractor activity results in impacts to wetlands, seagrasses, or groundwater. There was no data presented on the existing conditions at DMMA site; however aerial review of google earth images suggest that some potential wetland areas are present near canals.
- Contractor indicates muck dewatering rates of 3000 cy/day, but overall production rate (due to hauling/transport) of 1500 cy/day
- Respondent has significant similar project experience and experienced EOR identified (Tyler McDougal, PE)
- Contractor provided details of dewatering facility and has experience using geotubes but does not provide details on how estimated dewatering rate will be achieved using geotubes. No description was provided on estimating the size, number of tubes required, or schematic for filling/stacking of tubes.

- Similar projects referenced for dredging, one project using geotubes for dewatering.

Effluent Nutrient Removal

- Contractor states that process uses Gator Aquatic Technologies (GAT) H2Optimizer Application System in a 5-step process. This process appears to be flocculent injection at 5 different locations along the dredge pipeline. Dosage rates are provided.
- Flocculant/ coagulant mixture proposed for use is already approved and vetted by FDEP, used in Turkey Creek.
- Turkey Creek project demonstrates they have been successful with TP removal.
- Propose to use Pseudomonas bacteria to remove nitrogen. No previous project experience with this method is provided. The respondent indicates that they will have to develop the methods for effective nitrogen treatment using these bacteria. "The process of removing TDN will be a collaboration between GAT and the company responsible for dredging to build and maintain adequate retention times for TDN reductions". Respondent provided bench-test results of nutrient removal for 4 samples. 3 of 4 samples met the 2,000-ppb target after 48 hrs.
- Contractor states a minimum retention time of 32-48 hours is needed for nitrogen removal. Reviewer believes that the minimum required retention time cannot be attained for such a small site at a production rate of 1500 cy/day.
- Regarding TN bacteria, only pseudomonas jar test data provided. Reviewer is unclear what approval is required for use of bacteria to treat water and what tests are necessary to demonstrate the safety of the proposed method.
- Sampling plan for performance/compliance verification of nutrient removal is described in good detail.

Offloading and Handling

- Offload operation to be achieved via excavation equipment and sealed dump trucks. No clear traffic pattern provided for use of the small site within limits of the DMMA. This area is very constricted in space.
- Will use conventional trucking to disposal site. Respondent estimated that only a few trucks/day would be necessary to meet project deadline. However, this claim was not detailed; it is unclear how quickly the offload would have to occur in order to keep 16 ac site operational.

Transport and Disposal

- Contractor to transport dewatered muck via sealed dump trucks.

- Contractor states capacity of borrow pit as determined by survey is 1.34 million cubic yards. A desktop analysis shows the borrow pit to be about 25 acres, meaning the borrow pit would have to have an average depth of about 33 ft.
- No assurance given that proposed permanent disposal site can be permitted for dredged material disposal. No wetland delineation, or other details provided.
- In determining permanent disposal site capacity - no bulking factor mentioned for expansion of muck material during hydraulic dredging. Engineer estimates some expansion over in-situ volume amounts since material will be hydraulically dredged (added water).
- The borrow pit in Cocoa off Grissom Pkwy is proposed for permanent disposal, but no information about allowable discharges from that site were provided. Is discharge of saline material into a non-marine surface water acceptable? How will potential for saltwater intrusion into the groundwater be addressed?

Dredging

- Contractor indicates approximately 30,000 LF (5.7 miles) pumping distance with use of up to 2 boosters through 16" HDPE pipeline
- The respondent presented an out of season seagrass survey and used that data to reach erroneous conclusions for dredging and equipment placement. See permit for requirements regarding pipeline placement rules. These same constraints will be applied to the pipeline outside the dredge footprint; and planning for this pipeline would require an in-season seagrass survey.

Schedule

- Propose to complete the job 1.2 years ahead of schedule, but prepared schedule shows completion in May 2019, which is even more aggressive. Schedule does not seem reasonable, especially when dewatering this quantity of muck material on such a small site is considered.
- Respondent did acknowledge required manatee window canal dredging restrictions, and this was considered in the contractor's proposed schedule
- 3-month time period may be adequate for to obtain approval of chemical treatment process. However, securing approvals for wetland impacts and mitigation, if required, will likely take longer than proposed. Seagrass survey period is June 1 through September 30; so permit revision schedule would have to extend at least to the end of June.

Review Comments: Florida Dredge and Dock Response

Summary

- Hydraulically dredge and transport via 8.5-mile pipeline directly to 65 ac permanent disposal site within a 125-acre site "secured for use" … "binding, enforceable contract to purchase the 125 acres".
- Up to 5 booster pumps required.
- All material pumped to the diked disposal area will remain on site. The decant water will be clarified before it is released.
- Total dredge volume of 642,000 cy proposed, completing all zones.

Dewatering of Dredged Material

- Contractor proposes to transport material directly to permanent disposal site via hydraulic dredge pipeline. Material will be dewatered via addition of flocculants at the permanent disposal site. This results in less handling of material compared to other respondent's approach.
- No specifics or calculations given for estimated settling rates and retention time.
- Transport of dredged material effluent water is not specifically addressed. Nearest potential discharge water body is about 1.5 miles from permanent disposal site.
- Unclear whether contractor is aware there are wetlands on site (Google Earth photos suggest that they are present). Respondent states that oranges grove would not grow in wetlands, however this assumption is unfounded and may be inaccurate. Site may contain extensive wetlands that have redeveloped after drainage associated with citrus production ceased. Unclear as to whether contractor performed due diligence of the site in this regard as no site investigation results were presented.
- Contractor assumes 2 years for permitting. Reviewer considers this realistic timeframe.
- Propose conventional dewatering method using gravity settling aided by flocculants/coagulants. Not clear if they propose using the same chemicals as approved for the Mims project.
- Stantec consultants identified for engineering, project manager is Professional Geologist, EOR is registered Professional Engineer.
- Lacking information and explanation of decant water management.
- Flocculant chemicals and possible alkali mentioned as additives during spoil management. This method would require state authorization. No discussion of methods to restore appropriate pH, or recent permitting experience for use of such chemicals.
- Respondent refers to Eau Gallie River dredging project as similar to what they propose. However, the reviewer notes that the Eau Gallie contractor has not applied flocculants, and the Eau Gallie offloading production rates have been lower than expected. Notably, the respondent's approach does not require offloading and transport to a permanent disposal location. The dewatering and final disposal site is co-located. The reduced handling represents a benefit in the proposed approach.

- Technical approach to dewatering depends on flocculants, but contractor's presentation provides limited details on technical issues. Based on limited information provided, it appears contractor has no prior experience using flocculants. Mims project was referenced, which includes use of flocculants. However, that project has not yet started dredging, and DMMA site is not yet constructed.
- Submittal is lacking information on how or where effluent water will be discharged. There is no consideration of potential saline contamination of groundwater at DMMA site which has residential neighborhoods on 3 sides.

Effluent Nutrient Removal

- Contractor's page 1 states that SNF Holding Company (flocculent supplier) has confirmed that air stripping via holding time will reduce dissolved Nitrogen to levels below 1000 PPB. Page 2 signed by representative from SNF states that "Lab scale air stripping was done with small volumes for long contact times. A full-scale treatment would involve large volumes and short contact times, which would require engineering to help achieve". These 2 statements seem to conflict.
- The firm providing chemicals has a successful track record of PT removal at BV-52 on the Turkey Creek project. Those chemicals may already be approved, but respondent does not specifically indicate that they plan to use already approved materials or whether they expect to go through a complete approval process.
- Respondent presented only statements that Nitrogen air stripping will work. The details are as yet undetermined and/or not presented in the response. Respondent states dependency on Mims project (which has not yet been determined/verified) to provide methods for successful Nitrogen removal at Sykes Creek.

Offloading and Handling

- Contractor proposes to transport material directly to permanent disposal site via hydraulic pipeline. Therefore, there is no need for offloading as Contractor will purchase site that provides dewatering and final disposal.

Transport and Disposal

- Contractor proposes to purchase a 125-ac parcel, of which about 67 ac is old upland orange groves. The County should recognize that some portion or all the cost for purchasing the site may be embedded in the bid. If the contractor is selected, contract negotiations should include review of the payment terms to verify Contractor and County agree on the timing of the payments as currently outlined in the contract/specifications/bid. County may wish to avoid large up-front cost prior to beginning of production work.
- The submittal includes no dike design, calculations, or plan view showing that 48 ac permanent disposal site can accommodate 642,000 cy of dredged material. Reviewer estimates site size is adequate if material bulking factor or over-dredging quantities are not too great.

- No assurance given that proposed permanent disposal site can be permitted for dredged material disposal. No wetland delineation, etc.
- In determining permanent disposal site capacity - no bulking factor mentioned for expansion of muck material during hydraulic dredging. Reviewer estimates some expansion over in-situ volume amounts since material will be hydraulically dredged (added water).
- Pipeline route is described in detail but no mention of in-water conditions, potential wetland / seagrass impacts are discussed. Also – the success of this pipeline route will depend on the contractor's ability to secure approvals for land owners.
- Key permitting issues such as wetland impacts, pipeline access permissions, groundwater impacts, and return water location are not presented.

Dredging

- Respondent proposes to use some of Kiwanis Island for a staging area.
- Schedule provided for each of the zones 1, 2, 3. Respondent does not identify dredging rates necessary to meet the proposed schedule.

Schedule

- Schedule appears reasonable with estimated completion date of Dec 2022.
- Realistic planned timeline for permitting (2 years).

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VIA E-MAIL AND HAND DELIVERY

January 23, 2018

Leslie Rothering, Purchasing Manager
Brevard County Purchasing Department
Government Center, 2725 Judge Fran Jamieson Way
Building C, Third Floor, Suite 303
Viera, Florida 32940

Re: Formal Protest by Central Sand, Inc. re Proposal No. P-3-18-04, Sykes Creek Dredging Muck Removal Project

Dear Ms. Rothering:

This law firm represents Central Sand, Inc. ("CSI") in connection with Brevard County Proposal No. P-3-18-04, Sykes Creek Dredging Muck Removal Project ("Proposal"). The Proposal consists of an $18,000,000 project over a period of five (5) years. CSI hereby timely files this formal written protest ("Protest") with the Purchasing Manager of Brevard County ("County") on the basis that CSI is aggrieved in connection with the pending award of a contract pursuant to Section II, Article 18.5(b) of the Proposal's Bid Documents ("Bid Documents"). CSI has standing to protest because CSI is a "Responsive Bidder" as such term is defined in the Bid Documents.

The facts and law upon which this Protest are based, including the adverse effects and relief sought, are set forth in this Protest. CSI respectfully requests that the Purchasing Manager reject the Proposal submittal of Florida Dredge and Dock ("FDD") for the reasons described herein and award the contract to CSI. In the alternative, CSI requests that, within seven (7) calendar days of the date hereof, the Purchasing Manager convene a meeting with the Protest Committee and the affected parties in accordance with Section II, Article 18.5(c) of the Bid Documents.

1. FACTUAL MATTERS

1.1 Public Meeting Notice

Pursuant to a Public Meeting Notice by Brevard County Purchasing Services, CSI was notified that a Selection Committee would hold a meeting on January 17, 2018 regarding submittals received in response to the Proposal ("Public Meeting Notice"). A copy of the Public Meeting Notice is attached hereto as **Exhibit "A".** According to the Public Meeting Notice, "Bidders are requested to attend the selection meeting for [sic] to discuss their proposal with the selection committee." The Public Meeting Notice identified the following three (3) bidders: CSI, FDD, and Gator Dredging ("GD") (CSI, FDD, and GD are collectively referred to herein as the "Bidders"). The Public Meeting Notice did not notify the Bidders that the Selection Committee would formally evaluate and score the Bidders' at such meeting.

1.2. Selection Committee Meeting

On January 17, 2018, the Selection Committee convened the meeting described in the Public Meeting Notice ("Selection Committee Meeting"). At the commencement of the Selection Committee Meeting, for the first time, the Selection Committee provided the Bidders with a document prepared by the County's engineering consultant, Taylor Engineering Inc., titled: "Sykes Creek Muck Dredging Project, Qualification Package Evaluation, Taylor Engineering's Technical Review Comments, January 11, 2018" ("Engineer's Report"). The Engineer's Report contains cursory technical review comments on each of the Bidders' submittals.

After delivering the Engineer's Report to the Bidders, the Selection Committee informed CSI that CSI would have ten (10) minutes to review the Engineer's Report before privately interviewing CSI. Since ten minutes was not sufficient for CSI to perform a meaningful review, CSI requested time to review the Engineer's Report. Accordingly, the Selection Committee granted CSI twenty (20) additional minutes to review the Engineer's Report for a total of thirty (30) minutes for CSI to review the Engineer's Report, which was still not sufficient time for CSI to fully analyze the Engineer's Report. Moreover, as the first of the Bidders to be privately interviewed by the Selection Committee, CSI was prejudiced because the other Bidders had additional time to scrutinize the Engineer's Report and prepare for their own private interviews while CSI was privately meeting with the Selection Committee. Had CSI been afforded more time to analyze the Engineer's Report, CSI would have been in a better position to respond to the Selection Committee's interview questions and address the demerits of the other Bidders' submittals as detailed herein.

After the Selection Committee completed its private interviews of all of the Bidders, the Selection Committee immediately convened an open meeting, which was attended by the Bidders, the Purchasing Manager, and Taylor Engineering Inc. Each of the Selection Committee members independently evaluated the submittals of each Bidder without openly debating the merits and demerits of the Bidders' submittals. Although the Selection Committee was afforded the opportunity to openly debate the merits and demerits of each of the Bidders' submittals, the Selection Committee declined such opportunity for reasons which are unknown. The Selection Committee members then provided their independent evaluations of the Bidders' submittals to

the Purchasing Manager. Thereafter, the Purchasing Manager tallied the independent evaluations of the Selection Committee members and announced the ranking of the Bidders in the following order: 1) FDD, 2) CSI, 3) GD. Notably, CSI was ranked just one point behind FDD.

1.3 FDD's Submittal

After the conclusion of the Selection Committee Meeting, CSI obtained from the County copies of certain documents included in FDD's submittal. In its submittal, FDD included a letter from FDD dated December 19, 2017 ("FDD's Conditional Letter"), which states: "FDD must be successful in obtaining all necessary governmental approvals of every nature whatsoever from all federal, state, county, municipal or other governmental agencies having jurisdiction over the FDD Spoil Lands and associated pipeline route to allow it to deposit the spoil material on said lands, *failing which FDD shall be relieved of all further obligations under this Proposal or any contract granted in connection therewith.*" (emphasis added). A copy of FDD's Conditional Letter is attached hereto as **Exhibit "B"**.

1.4 Engineer's Report

After the conclusion of the Selection Committee meeting, CSI engaged in a thorough analysis of the Engineer's Report. A copy of the Engineer's Report is attached hereto as **Exhibit "C"**. The Engineer's Report included the following technical deficiencies concerning FDD's submittal:

Dewatering of Dredged Material (Engineer's Report, p.9):

- "DMMA site ... has residential neighborhoods on 3 sides."
- "Site may contain extensive wetlands that have redeveloped after drainage associated with citrus production ceased. Unclear as to whether contractor performed due diligence of the site in this regard as no site investigation results were presented."
- "Nearest potential water body is about 1.5 miles from permanent disposal site."

Transport & Disposal (Engineer's Report, pp.10-11):

- "Contractor proposes to purchase a 125-ac parcel...."
- "No assurance given that proposed permanent disposal site can be permitted for dredged material disposal. No wetland delineation, etc."
- "Also - the success of this pipeline route will depend on the contractor's ability to secure approvals for [sic] land owners."
- "Key permitted issues such as wetland impacts, pipeline access permissions, groundwater impacts, and return water location are not present."

Schedule (Engineer's Report, p.11)

- "Realistic planned timeline for permitting (2 years)"

1.5 Ranking Sheet

On January 18, 2018, the Purchasing Manager posted the "Ranking Sheet" for the Proposal. The Ranking Sheet was consistent with the ranking of Bidders announced at the

conclusion of the Selection Committee Meeting. A copy of the Ranking Sheet is attached hereto as **Exhibit "D"**. The Ranking Sheet only includes the final ranking of the Bidders; the specific results of each of the sections of the "Contractor Selection Criteria" used by the Selection Committee members to achieve the final ranking of the Bidders were not disclosed.

2. LEGAL BASIS OF PROTEST

2.1 FDD is not a "Responsive Bidder" under the Bid Documents

FDD is not a "Responsive Bidder" under the Bid Documents. The Bid Documents define a "Responsive Bidder" as follows: "A bidder who has submitted a proposal which conforms in all respects to the requirements of the proposal package, including, but not limited to, submission of proposal on required forms with all required information, signatures, and notarizations at the place and time specified." FDD is not a "Responsive Bidder" because FDD's submittal is a conditional proposal. In addition, FDD is not a "Responsive Bidder" because FDD did not own or have use of a permanent disposal facility to accept the dredged material at the time of FDD's submittal.

2.1.1 FDD's submittal is a Conditional Proposal

FDD's submittal is a conditional proposal. The Bid Documents expressly state: "Conditional proposals will not be accepted." Bid Documents, Section II, Article 25.5. FDD's Conditional Letter clearly states that "*FDD shall be relieved of all further obligations under this Proposal or any contract granted in connection therewith*" if FDD is not successful in obtaining all necessary governmental approvals for its proposed permanent disposal site and its proposed pipeline route. FDD's inclusion of the Conditional Letter makes FDD's submittal a conditional proposal by changing a material term to the Proposal. FDD's Conditional Letter renders FDD ineligible for the award of the contract.

2.1.2 No Permanent Disposal Facility

As detailed in Section 2 below of this Protest, FDD did not own or have use of a permanent disposal facility to accept the dredged material at the time of FDD's submittal. The Bid Documents' Technical Approach Requirements and Contractor Selection Criteria include the following requirement: "The Contractor shall provide a letter or correspondence from disposal facilities providing assurance they can accept the type and quantity of dredged material to be disposed of." (Bid Documents, Technical Approach Requirements and Contractor Selection Criteria, "Transport and Disposal of Dredged Material," p.4). Based on the Engineer's Report as well as a letter included with FDD's submittal dated December 20, 2017 from Kent Runnells, P.A. ("FDD's Counsel's Letter"), FDD has not included with its submittal any letter or correspondence from a disposal facility providing assurance they can accept the type and quantity of dredged material to be disposed of by FDD. A copy of FDD's Counsel's Letter is attached hereto as **Exhibit "E"**.

2.2 FDD Cannot Be a "Qualified Bidder" under the County's Procurement Policy

FDD cannot be a "Qualified Bidder" under the County's Procurement Policy. The County's Procurement Policy defines a "Qualified Bidder or Proposer" as: "The best bidder or proposer who has the capability in all respects to fully perform the bid or RFP requirements, *and has the ... facilities necessary to assure good faith performance of the contract....*" Brevard County Commissioners' Procurement Policy No. BCC-25, II.P (emphasis added). It is noteworthy that the quoted procurement policy uses the present tense of the verb "have" (i.e., "has") rather than the future tense ("will have"); a Qualified Bidder is a bidder who *has the facilities* at the time of its submittal.

FDD cannot be a "Qualified Bidder" under the County's procurement policy because, as set out in the Engineer's Report, at the time of FDD's submittal: (i) FDD had not acquired, leased, or otherwise obtained the right to use real property necessary for the permanent disposal of the dredged material; (ii) FDD did not provide assurance that the proposed disposal site, which has residential neighborhoods on three (3) sides, can be permitted for the dredged material disposal; and (iii) FDD had not secured the approvals from land owners for the pipeline route to the dredged material disposal site as well as effluent discharge. Each of the foregoing items will be described below.

2.2.1 FDD did not have a dredged material disposal facility

The Engineer's Report states that FDD "proposes to purchase" a 125-acre parcel. "Proposing to purchase" and having a "enforceable contract to purchase" do not constitute the legal equivalent to "having the facilities necessary to assure good faith performance" at the time of submittal as required by the Procurement Policy. Moreover, according to FDD's submittal, it appears that FDD actually proposes to purchase multiple parcels from different property owners, rather than a single parcel from a single owner. Closing on a single purchase and sale agreement for the conveyance of real property is subject to a litany of contingencies: issues concerning marketability of title to the real property; due diligence on the real property, including governmental approvals and permits regarding any proposed change in zoning or land use; financing contingencies; appraisal contingencies; leases, easements, and other interests limiting the intended use of the property; mortgages and liens on the property which must be satisfied; the absence or release of any *lis pendens* giving public notice of any lawsuit concerning the real property; FDD's payment of the purchase price, and the willingness and/or legal ability of the seller(s) to complete the closing (i.e., death, incapacity, divorce, bankruptcy, dissolution, disagreement of or among any seller party, etc.). Closing on multiple purchase and sale agreements with multiple owners only compounds such contingencies. These contingencies elucidate the difference between a bidder who "has" the necessary facilities and a bidder who hopes that they "will have" the necessary facilities one day in the future.

2.2.2 FDD did not provide assurance that it's proposed disposal facility can be permitted

The Engineer's Report states that FDD has "given no assurance that the proposed disposal site can be permitted for the dredged material disposal." The Engineer's Report states that FDD's proposed disposal site has residential neighborhoods on three (3) sides. The Engineer's Report

does not discuss the potential for the dredged material to emit noxious odors. The Engineer's Report also does not discuss the current zoning or land use of FDD's proposed disposal site, but any change in zoning or land use necessary for FDD's proposed disposal site could be met with opposition from the residents and landowners in the adjacent neighborhoods. Given the location of FDD's proposed disposal site in a residential area, FDD could not give assurance at the time of its submittal that it "had" the facilities to dispose of the dredged material at the time of its submittal.

2.2.3 FDD did not secure approvals from landowners for pipeline route or effluent discharge

The Engineer's Report states that FDD has not secured the approvals from land owners for the pipeline route to the dredged material disposal site. These "approvals" are actually "agreements" which would be in the form of an easement or lease to use the landowner's property. Such agreements are typically reached through arms' length negotiations, which include compensation for use of the landowner's property, the specific portion of the landowner's property which may be used, the duration of agreement, operational hours, site remediation, insurance requirements, indemnification, prevailing party attorneys' fees, etc. It may be the case that some landowners would not agree to allow the pipeline to cross their property under any circumstances. The Engineer's Report also notes that FDD's submittal did not specifically address effluent discharge, notwithstanding that a permit to discharge effluent may be challenging to obtain due to the quantity of effluent which FDD must discharge and the specific location of FDD's proposed disposal site. As a result, it can hardly be said that FDD "had" the facilities necessary to assure good faith performance of the contract at the time of FDD's submittal.

2.3 FDD Cannot Be a Bidder who is "Qualified" under the Bid Documents

FDD cannot be a bidder who is "Qualified" as that term is defined under the Bid Documents. The Bid Documents define a "Qualified" bidder as: "The best bidder who has the capability in all respects to fully perform the proposal requirements, and *has ... facilities ... necessary to assure good faith performance of the Contract....*" See Bid Documents, Section II, Article 1 (Definitions), at 1.34 (emphasis added). Since the definition of a bidder who is "Qualified" under the Bid Documents is substantially similar to the definition of a "Qualified Bidder" under the County's Procurement Policy, CSI hereby adopts and incorporates by reference its contentions set forth in Section 2.2 of this Protest that FDD cannot be a bidder who is "Qualified" as that term is defined under the Bid Documents.

2.4 The Ranking of the Bidders is Illegal, Arbitrary and Capricious

Competitive bidding procedures protect the public by creating a system by which goods or services required by public authorities may be acquired at the lowest possible cost. *Dep't of Transp. v. Groves–Watkins*, 530 So.2d 912, 913 (Fla. 1988) (construing the Florida Administrative Procedure Act). In challenging an agency's decision to award or reject bids, "the scope of the inquiry is limited to whether the purpose of competitive bidding has been subverted." *Id.* at 914. "In short, the hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly." *Id.* at 914. "[T]he agency

must accept the factual determinations of the hearing officer unless those findings are not based upon competent, substantial evidence." *Asphalt Pavers, Inc. v. Dep't of Trans.*, 602 So.2d 588, 560-61 (Fla. 1992) (citing *Groves–Watkins*, 530 at 913)).

Awarding the contract to FDD would be illegal because the Proposal award can only be made to a person who is defined as: (i)) a "Responsive Bidder" as defined by the Bid Documents, (ii) a "Qualified Bidder" as defined by the County's Procurement Policy, and (iii) "Qualified" as defined by the Bid Documents. As detailed in this Protest, FDD does not fall within all of the foregoing definitions because FDD's Conditional Letter is not an informality which may be waived by the County. *See generally, Douglas N. Higgins Inc. v. Florida Keys Aqueduct Auth.*, 565 F. Supp. 126, 128-30 (S.D. Fla. 1983) (discussing cases involving noncompliance with bidding procedures by the successful bidder). Accordingly, an award of the contract to FDD would constitute an illegal act by the County.

Awarding the contract to FDD would be arbitrary and capricious because, as detailed in this Protest, there is no competent, substantial evidence indicating that FDD: (i) is a "Responsive Bidder" as defined by the Bid Documents, (ii) can be a "Qualified Bidder" as defined by the County's Procurement Policy, and (iii) can be a Bidder who is "Qualified" as defined by the Bid Documents. Through the Selection Committee's hasty decision-making process, which failed to afford CSI sufficient time to analyze the Engineer's Report in its entirety and which failed to include any open debate concerning the merits and demerits of the Bidders' submittals, the Selection Committee failed to engage in reasoned decision-making and consider all factors pertaining to the foregoing. Accordingly, the ranking of the Bidders is illegal, arbitrary and capricious. Thus, an award of the contract to FDD would be arbitrary and capricious.

3. ADVERSE EFFECTS

If the County awards the contract to FDD, then numerous adverse effects may occur, including but not limited to the following:

3.1 Potential Inability of FDD to Fully Perform under the Contract

FDD may be unable to fulfill its obligations under the contract because of the numerous contingencies which FDD must achieve to carry out its vision, including, but not limited to: acquiring the proposed permanent disposal site, obtaining the necessary permits for use of the permanent disposal site notwithstanding that the proposed permanent disposal site is bounded on three (3) sides by residential neighborhoods, obtaining the agreement of landowners to allow a pipeline across their property to the dredged material disposal site, and obtaining permits to discharge effluent. At least two (2) of the five (5) years of the contract are allocated to permitting alone. These contingencies are precisely why FDD included FDD's Conditional Letter with its submittal.

3.2 Pressure on County to Approve Changes in Zoning or Land Use Requested by FDD

Given that FDD's proposed disposal site is bounded on three (3) sides by residential neighborhoods, the property owners and residents of such neighborhoods may object to any

proposed change in zoning or land use necessary to accommodate the permanent disposal site. Their concerns could be based on the potential release of noxious odors from the dredged material, the potential decrease in property values, or other legitimate concerns. Since FDD's proposed disposal site is within the jurisdiction of the County, the County will be placed in the untenable position of deciding whether to approve a change in zoning or land use which may be requested by the awardee of the County's contract (i.e., FDD) over the objections of the County's constituents (i.e., the affected property owners and residents who were unaware of FDD's intended vision for the proposed disposal site until the request for a change in zoning or land use was made). This is akin to illegal contract zoning.

3.3 Discourages Responsive Bids in Future Requests for Proposals

The County's failure to require strict compliance with the Proposal requirements would discourage others from submitting responsive bids to its future requests for proposals. Rejecting FDD's submittal on the basis of including conditions which change a material term of the Proposal would send a clear message to others that strict adherence to the material terms of bid documents is required.

4. RELIEF SOUGHT

CSI respectfully requests that the Purchasing Manager reject FDD's Proposal submittal and award the contract to CSI for the reasons set forth in this Protest. In the alternative, CSI requests that, within seven (7) calendar days of the date hereof, the Purchasing Manager convene a meeting with the Protest Committee and the affected parties in accordance with Section II, Article 18.5(c) of the Bid Documents.

Respectfully submitted,

CANTWELL & GOLDMAN, P.A.

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copy furnished: Scott L. Knox, Esq., County Attorney

Brevard COUNTY
Purchasing Services

Florida's Space Coast

PUBLIC MEETING NOTICE

A Selection Committee will be holding a meeting regarding proposals received for Request for Proposals #P-3-18-04/Sykes Creek Ecosystem Restoration Dredging Project. The meeting will be will be held on January 17, 2018 starting @ 12:30 a.m. at the Brevard County Government Center, 2725 Judge Fran Jamieson Way, Bldg C, 2nd Floor, Space Coast Conference Room, Viera, FL 32940.

Bidders are requested to attend the selection meeting for to discuss their proposal with the selection committee. Interviews times are scheduled as follows:

12:45 p.m.	Central Sand
1:15 p.m.	Florida Dredge and Dock
1:45 p.m.	Gator Dredging

Per Florida Statute, the portions of this meeting in which the firms present and the committee asks questions of the proposers related to their proposal response will not be open to the public.

If a person desires to appeal any decision made by this Committee with respect to any matter considered at this meeting, such a person will need a record of the proceedings and that, for such proposals, such person may need to ensure that a verbatim record of the proceedings is made, at his/her own expense, which record includes testimony and evidence upon which any such appeal is based.

The needs of the hearing and/or visually impaired persons shall be met if the department sponsoring the meeting/hearing is presented with such a request and contacts the ADA Coordinator at least 48 hours prior to the public meeting/hearing at (321) 637-5347.

Persons needing accommodations or an interpreter to participate in this proceeding should contact the Purchasing Services Office no later than 48 hours prior to the meeting at 321-617-7390, Attn: Purchasing Manager, for assistance.

Recipients of this FAX should post it on the nearest public bulletin board. Your assistance will be appreciated.

Notice Posted At:
Purchasing Services Bulletin Board
Brevard County Website

EXHIBIT "A"

FLORIDA DREDGE AND DOCK

December 19, 2017

TO: BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS

RE: NOTICE REGARDING BID SUBMITTED BY FLORIDA DREDGE & DOCK LL FOR THE SYKES CREEK RESTORATION PROJECT P-3-18-04

FD&D's obligations to perform the scope of services set forth in this Proposal is expressly conditioned upon the following conditions:

1. FD&D will decline the use of the spoil area provided or suggested by Brevard County, and all spoil material will be discharged upon private lands owned or leased by FD&D (the "FD&D Spoil Lands"); and

2. FD&D must be successful in obtaining all necessary governmental approvals of every nature whatsoever from all federal, state, county, municipal or other governmental agencies having jurisdiction over the FD&D Spoil Lands and associated pipeline route to allow it to deposit the spoil material on said lands, failing which FD&D shall be relieved of all further obligations under this Proposal or any contract granted in connection therewith.

Sincerely,

William D. Fletcher Jr – Manager, Florida Dredge & Dock LLC

1040 ISLAND AVENUE • TARPON SPRINGS, FL 34689 • (727) 942-7888

EXHIBIT "B"

SYKES CREEK MUCK DREDGING PROJECT

Qualification Package Evaluation

Taylor Engineering's Technical Review Comments

January 11, 2018

General Comments: All Respondents

- All 3 respondents propose the use of flocculants, either at the temporary DMMA or at the final disposal site, to aid in dewatering material via gravity settling and to clean dredged material effluent water to levels meeting state water quality standards.
- All 3 respondents indicate that gravity settling with the use of flocculants will remove phosphorous to minimum levels required. This is a reasonable assumption, supported by the Turkey Creek project results
- None of the 3 respondents have provided sufficient documentation on nitrogen removal to assure the reviewer of a reasonable likelihood of success.
- The successful respondent will have to address the need to modify the required storage capacity due to material bulking or over-dredging. None of the 3 respondents presented consideration of these issues.
- Reviewer estimates some quantity of salt water effluent will discharge from all 3 proposed permanent disposal sites, i.e. that groundwater infiltration will not keep up with production rates. None of the 3 respondents have addressed dredged material effluent handling at the chosen permanent disposal site. It's not clear how the clarified effluent water will be returned to the nearest receiving water body.
- None of the 3 respondents addressed the permitting challenge of disposing of salt-water muck material and subsequent leaching of salt-water into the groundwater table at their chosen permanent disposal site. None of the respondents specifically indicated that the level of pre-treatment and dewatering sufficiently address this risk. Alternatively, none of submittals mention the use of a membraned lined site to prevent salt-water contamination of the groundwater, use of monitoring wells, interdiction ditches, or any other means typically applied to control or monitor salt-water intrusion into the groundwater.
- While each respondent offered limited discussion on potential wetland and seagrass impacts resulting from their proposed DMMA and/or disposal site; there was no mention of potential natural resource impacts and subsequent mitigation related to transport pipeline placement in any proposal. It is unclear if mitigation credit purchase costs are included in any of the bids, but no mention is made of this mitigation method, only on-site mitigation is discussed.

EXHIBIT "C"

Review Comments: Central Sand Response

Summary

- Hydraulic dredge and pump material via pipeline to DMMA on Kiwanis spoil Island. Total dredge volume of 552,800 cy proposed.
- Allow sand to settle at one end of treatment area and treat remaining dredged slurry with polymer flocculent and allow solids to settle out in water column. Flocculant laden muck material to be pumped into tanker trucks in a semi-liquid state on Kiwanis Island and then transported to permanent disposal site.
- Nutrient removal treatment for Phosphorus is associated with flocculants; proprietary treatment method "NutriGone" will remove the nitrogen in decanted water prior to discharge.
- Sand and treated muck material will be transported via tanker truck across a segmented floating barge bridge from the island to Kiwanis Park. Respondent states that they will not need a temporary staging area at park, only a thru-route for truck traffic.
- Tanker trucks (estimated 100 tanker truck hauls / day) will transport material about 10 miles to a permanent 186-acre disposal site owned by Contractor's sister company.
- Respondent indicated production rate of 3,000 cy/day placed in final disposal area.
- Proposal claims Sister company of Central Sand Inc. — Space Coast Airport Business Center— has purchased 186 ac site, of which about 48 ac has been set aside for permanent disposal of 727,567 cy of sediment. The purchased site also includes "64 acres for mitigating wetland impacts..."

Dewatering

- Contractor states that they have successfully dewatered muck material using this method for 3 other projects – over 200,000 cy of muck.
- Demonstrated via picture of previous Cocoa Beach project that successfully met turbidity requirements using what appears to be a very small DMMA site (smaller than Kiwanis Island).
- No plan view of proposed Kiwanis DMMA plan was provided, only schematic cross-section of a typical design detail. Although one sketch shows a DMMA, this appears to be DMMA used on another project and does not include dimensions or other relevant information. We assume contractor will use Taylor Engineering's Kiwanis Island DMMA layout or similar. Contractor claims they will not need the total area currently permitted on Kiwanis Island. However, Contractor also mentions 117,000 cy capacity of Kiwanis Island as shown on bid plans. The Contractor's intention for Kiwanis Island is not clear.
- No details, other than to dose with polymers, were provided to address how the Contractor will meet water quality standards for effluent before discharging from the site. There was no information regarding estimated settling rates and retention time, etc.
- Respondent does not provide assurance via calculations or other means that Kiwanis Island can provide sufficient room to maintain production rates for material dewatering and

provide adequate retention time for effluent cleanup and nitrogen removal. Reviewer notes that Kiwanis Island is very small for such an operation.

- No Engineer of Record (EOR) is identified for design tasks.
- Team appears to be competent at dredging and dewatering muck.
- Dewatering method identified with chemically aided settling. Proposal claims 30 cy dried sediment in each 10,000-gallon tanker truck at about 60% solids. This solid content seems infeasible for a pumped liquid slurry.
- Contractor provided capacity of final disposal area but no clear plan for spoil island facility.
- Dewatering rate was not clearly defined.
- Use of Kiwanis Island and offloading over a barge bridge likely means significant impacts and disruption to the Park. This will likely disrupt traffic and may not fit the County's criteria that park use be "temporary" only. No clear site plan (drawing) for the use of the park area was provided
- No wetland impacts were identified, or mitigation plan presented.
- No details or dimensions provided in cross section sketches

Effluent Nutrient Removal

- 3-stage plan proposed – but not clearly described. Reviewer estimates 2 stages of a flocculent dosing followed by filter media process.
- Proposes use of "NutriGone filter media bed" to remove nitrogen from dredged effluent.
- No specific information on NutriGone performance or how it works.
- No calculations given that Kiwanis Island has enough area to accommodate nitrogen removal process. Sketch by EcoSense International provided in the qualifications statement shows nitrogen removal bed as about 110 x 110 ft area.
- No nutrient removal project examples were presented.
- Effluent treatment to be performed on island; cross section of proposed DMMA not clear; not clear how much area or volume would be necessary to achieve functional design.
- Little information provided on treatment rates.
- Respondent has not performed TN removal, resumes of nutrient removal experts not provided, no EOR or engineering designs referenced for nutrient removal component.
- No indication that proposed chemical additives have been authorized for use by FDEP.

Offloading and Handling

- No sketches or written descriptions of spoil island design to accommodate truck loading and traffic (100 trucks /day). Figure labeled 'haul route' shows path from south end of the island to Kiwanis Park, which is not acceptable under current permit conditions.
- Estimates production at 2000 – 3000 yds/day.
- 100 trucks per day will have a significant impact on traffic at the park or at the park entrance.
- Barge bridge permitting may be difficult, and the bridge would likely include some seagrass impacts (based on existing seagrass map in area where bridge is proposed).

- County has limited park uses to temporary use only in specific locations. Plan appears to violate that limited use plan.

Transport and Disposal

- No assurance given that proposed permanent disposal site can be permitted for dredged material disposal. No wetland delineation or other natural resource survey information was provided or referenced regarding the final disposal site. Discussion regarding the wetland impacts suggests a lack of understanding the issue. On-site mitigation not likely to meet county approval as the county is the permit holder and would become responsible for the future mitigation success.
- No dike design, calculations or plan view demonstrating how the 48-acre permanent disposal site can accommodate 640,000 cy of dredged material. Reviewing Engineer estimates site size is adequate if material bulking factor or over-dredging quantity are not too great.
- In determining permanent disposal site capacity - no bulking factor mentioned for expansion of muck material during hydraulic dredging. Engineer estimates some expansion over in-situ volume amounts since material will be hydraulically dredged (added water) and transported from DMMA in semi-liquid form.
- To transport material – contractor estimates that ten (10) 10,000-gallon tanker trucks are sufficient to accomplish the task. Contractor estimates each tanker truck hauling muck would contain 30 cy of dried muck. Based on this, Engineer estimates more than 21,000 truck trips would be required to transport dredged material to permanent disposal site (not including any consideration of material bulking). Contractor is proposing 100 trips per day to keep up with estimated 3000 cy/day production rate.
- Contractor estimates offloading of truck to take 10 minutes. This seems like a very short time to pump out 10,000 gallons.
- Contractor does not mention handling or treatment of dewatered effluent at permanent disposal site. Engineer notes that the nearest main water body about 2 miles from disposal site, however contractor does not indicate how treated effluent would be returned to receiving waterbody
- Plan will require permit modification; the proposed plan may pose potential permitting issues pertaining to wetland and groundwater impacts.
- Respondent provided proof of site ownership.

Dredging

- The team appears to include experienced dredgers.
- Respondent proposes hydraulic transport of dredged sediment to the DMMA island via 12-inch dredge. Contractor states that although a 14- to 16-inch dredge could be used, that dewatering efforts could not keep up with production rate of dredge. Reviewer agrees with this statement.

- Contractor provided production rate of 2000 to 3000 cy/day; data regarding muck density and trucking plans raises concerns that they may not meet this target. No evidence, details, testing, or calculations were provided to support the production rates claimed

Schedule

- Contractor indicated 0-6 month permitting timeframe while other activities are underway. Wetland impacts might be difficult to resolve in 6-months even with purchase of mitigation credits.
- 47-month project schedule seems reasonable. However, contractor included a very aggressive 6-month permitting timeframe at project start, which may result in project not meeting proposed schedule.

Review Comments: Gator Dredging Response

Summary

- Hydraulic dredging with five-mile pipeline to transport dredge slurry to 16 ac DMMA located on N. Courtney Parkway next to barge canal. Dredging volume of 387,800 cy of material proposed
- Dewatering approach proposed by gravity settling of coarse non-cohesive materials and polymer flocculent-assisted settling of fine materials. Contractor proposed that decanted water would be treated to remove nitrogen and then discharged to the barge canal.
- Dewatered muck will be transported about 5 miles in sealed dump trucks to a 44-ac borrow pit for permanent disposal.

Dewatering of Dredged Material

- Contractor proposes to use an alternate DMMA site and not use Kiwanis Island.
- Descriptions of dewatering methods for sand and fines is clearly described. Contractor outlines approach to settling of fines using same methods successfully applied for Turkey Creek dredging project. This means that the respondent proposes use of a DEP-approved flocculant/ coagulant.
- Respondent presented case study of successful projects using geotubes to dewater fine grained (muck) material treated with flocculants.
- Respondent did not provide details, calculations or other means of assurance that the proposed 16 ac DMMA can provide enough space to maintain stated production rate of 3000 cy/day for material dewatering and provide adequate retention time for effluent cleanup and nitrogen removal. Contractor states under 'Offloading and Handling' section that dewatering rate will be achieved by "dual 2-acre dewatering basin," implying that only a quarter of the property space will be used for dewatering efforts. Reviewer is of the opinion that proposed 16 ac DMMA site is very small for such an operation. Several acres will be consumed in access roads and berms, reducing the available area for settling and treatment actions.
- Contractor estimated 90-day permit modification period. This timeframe is not sufficient in the event contractor activity results in impacts to wetlands, seagrasses, or groundwater. There was no data presented on the existing conditions at DMMA site; however aerial review of google earth images suggest that some potential wetland areas are present near canals.
- Contractor indicates muck dewatering rates of 3000 cy/day, but overall production rate (due to hauling/transport) of 1500 cy/day
- Respondent has significant similar project experience and experienced EOR identified (Tyler McDougal, PE)
- Contractor provided details of dewatering facility and has experience using geotubes but does not provide details on how estimated dewatering rate will be achieved using geotubes. No description was provided on estimating the size, number of tubes required, or schematic for filling/stacking of tubes.

- Similar projects referenced for dredging, one project using geotubes for dewatering.

Effluent Nutrient Removal

- Contractor states that process uses Gator Aquatic Technologies (GAT) H2Optimizer Application System in a 5-step process. This process appears to be flocculent injection at 5 different locations along the dredge pipeline. Dosage rates are provided.
- Flocculant/ coagulant mixture proposed for use is already approved and vetted by FDEP, used in Turkey Creek.
- Turkey Creek project demonstrates they have been successful with TP removal.
- Propose to use Pseudomonas bacteria to remove nitrogen. No previous project experience with this method is provided. The respondent indicates that they will have to develop the methods for effective nitrogen treatment using these bacteria. "The process of removing TDN will be a collaboration between GAT and the company responsible for dredging to build and maintain adequate retention times for TDN reductions". Respondent provided bench-test results of nutrient removal for 4 samples. 3 of 4 samples met the 2,000-ppb target after 48 hrs.
- Contractor states a minimum retention time of 32-48 hours is needed for nitrogen removal. Reviewer believes that the minimum required retention time cannot be attained for such a small site at a production rate of 1500 cy/day.
- Regarding TN bacteria, only pseudomonas jar test data provided. Reviewer is unclear what approval is required for use of bacteria to treat water and what tests are necessary to demonstrate the safety of the proposed method.
- Sampling plan for performance/compliance verification of nutrient removal is described in good detail.

Offloading and Handling

- Offload operation to be achieved via excavation equipment and sealed dump trucks. No clear traffic pattern provided for use of the small site within limits of the DMMA. This area is very constricted in space.
- Will use conventional trucking to disposal site. Respondent estimated that only a few trucks/day would be necessary to meet project deadline. However, this claim was not detailed; it is unclear how quickly the offload would have to occur in order to keep 16 ac site operational.

Transport and Disposal

- Contractor to transport dewatered muck via sealed dump trucks.

- Contractor states capacity of borrow pit as determined by survey is 1.34 million cubic yards. A desktop analysis shows the borrow pit to be about 25 acres, meaning the borrow pit would have to have an average depth of about 33 ft.
- No assurance given that proposed permanent disposal site can be permitted for dredged material disposal. No wetland delineation, or other details provided.
- In determining permanent disposal site capacity - no bulking factor mentioned for expansion of muck material during hydraulic dredging. Engineer estimates some expansion over in-situ volume amounts since material will be hydraulically dredged (added water).
- The borrow pit in Cocoa off Grissom Pkwy is proposed for permanent disposal, but no information about allowable discharges from that site were provided. Is discharge of saline material into a non-marine surface water acceptable? How will potential for saltwater intrusion into the groundwater be addressed?

Dredging

- Contractor indicates approximately 30,000 LF (5.7 miles) pumping distance with use of up to 2 boosters through 16" HDPE pipeline
- The respondent presented an out of season seagrass survey and used that data to reach erroneous conclusions for dredging and equipment placement. See permit for requirements regarding pipeline placement rules. These same constraints will be applied to the pipeline outside the dredge footprint; and planning for this pipeline would require an in-season seagrass survey.

Schedule

- Propose to complete the job 1.2 years ahead of schedule, but prepared schedule shows completion in May 2019, which is even more aggressive. Schedule does not seem reasonable, especially when dewatering this quantity of muck material on such a small site is considered.
- Respondent did acknowledge required manatee window canal dredging restrictions, and this was considered in the contractor's proposed schedule
- 3-month time period may be adequate for to obtain approval of chemical treatment process. However, securing approvals for wetland impacts and mitigation, if required, will likely take longer than proposed. Seagrass survey period is June 1 through September 30; so permit revision schedule would have to extend at least to the end of June.

Review Comments: Florida Dredge and Dock Response

Summary

- Hydraulically dredge and transport via 8.5-mile pipeline directly to 65 ac permanent disposal site within a 125-acre site "secured for use" … "binding, enforceable contract to purchase the 125 acres".
- Up to 5 booster pumps required.
- All material pumped to the diked disposal area will remain on site. The decant water will be clarified before it is released.
- Total dredge volume of 642,000 cy proposed, completing all zones.

Dewatering of Dredged Material

- Contractor proposes to transport material directly to permanent disposal site via hydraulic dredge pipeline. Material will be dewatered via addition of flocculants at the permanent disposal site. This results in less handling of material compared to other respondent's approach.
- No specifics or calculations given for estimated settling rates and retention time..
- Transport of dredged material effluent water is not specifically addressed. Nearest potential discharge water body is about 1.5 miles from permanent disposal site.
- Unclear whether contractor is aware there are wetlands on site (Google Earth photos suggest that they are present). Respondent states that oranges grove would not grow in wetlands, however this assumption is unfounded and may be inaccurate. Site may contain extensive wetlands that have redeveloped after drainage associated with citrus production ceased. Unclear as to whether contractor performed due diligence of the site in this regard as no site investigation results were presented.
- Contractor assumes 2 years for permitting. Reviewer considers this realistic timeframe.
- Propose conventional dewatering method using gravity settling aided by flocculants/coagulants. Not clear if they propose using the same chemicals as approved for the Mims project.
- Stantec consultants identified for engineering, project manager is Professional Geologist, EOR is registered Professional Engineer.
- Lacking information and explanation of decant water management.
- Flocculant chemicals and possible alkali mentioned as additives during spoil management. This method would require state authorization. No discussion of methods to restore appropriate pH, or recent permitting experience for use of such chemicals.
- Respondent refers to Eau Gallie River dredging project as similar to what they propose. However, the reviewer notes that the Eau Gallie contractor has not applied flocculants, and the Eau Gallie offloading production rates have been lower than expected. Notably, the respondent's approach does not require offloading and transport to a permanent disposal location. The dewatering and final disposal site is co-located. The reduced handling represents a benefit in the proposed approach.

- Technical approach to dewatering depends on flocculants, but contractor's presentation provides limited details on technical issues. Based on limited information provided, it appears contractor has no prior experience using flocculants. Mims project was referenced, which includes use of flocculants. However, that project has not yet started dredging, and DMMA site is not yet constructed.
- Submittal is lacking information on how or where effluent water will be discharged. There is no consideration of potential saline contamination of groundwater at DMMA site which has residential neighborhoods on 3 sides.

Effluent Nutrient Removal

- Contractor's page 1 states that SNF Holding Company (flocculent supplier) has confirmed that air stripping via holding time will reduce dissolved Nitrogen to levels below 1000 PPB. Page 2 signed by representative from SNF states that "Lab scale air stripping was done with small volumes for long contact times. A full-scale treatment would involve large volumes and short contact times, which would require engineering to help achieve". These 2 statements seem to conflict.
- The firm providing chemicals has a successful track record of PT removal at BV-52 on the Turkey Creek project. Those chemicals may already be approved, but respondent does not specifically indicate that they plan to use already approved materials or whether they expect to go through a complete approval process.
- Respondent presented only statements that Nitrogen air stripping will work. The details are as yet undetermined and/or not presented in the response. Respondent states dependency on Mims project (which has not yet been determined/verified) to provide methods for successful Nitrogen removal at Sykes Creek.

Offloading and Handling

- Contractor proposes to transport material directly to permanent disposal site via hydraulic pipeline. Therefore, there is no need for offloading as Contractor will purchase site that provides dewatering and final disposal.

Transport and Disposal

- Contractor proposes to purchase a 125-ac parcel, of which about 67 ac is old upland orange groves. The County should recognize that some portion or all the cost for purchasing the site may be embedded in the bid. If the contractor is selected, contract negotiations should include review of the payment terms to verify Contractor and County agree on the timing of the payments as currently outlined in the contract/specifications/bid. County may wish to avoid large up-front cost prior to beginning of production work.
- The submittal includes no dike design, calculations, or plan view showing that 48 ac permanent disposal site can accommodate 642,000 cy of dredged material. Reviewer estimates site size is adequate if material bulking factor or over-dredging quantities are not too great.

- No assurance given that proposed permanent disposal site can be permitted for dredged material disposal. No wetland delineation, etc.
- In determining permanent disposal site capacity - no bulking factor mentioned for expansion of muck material during hydraulic dredging. Reviewer estimates some expansion over in-situ volume amounts since material will be hydraulically dredged (added water).
- Pipeline route is described in detail but no mention of in-water conditions, potential wetland / seagrass impacts are discussed. Also – the success of this pipeline route will depend on the contractor's ability to secure approvals for land owners.
- Key permitting issues such as wetland impacts, pipeline access permissions, groundwater impacts, and return water location are not presented.

Dredging

- Respondent proposes to use some of Kiwanis Island for a staging area.
- Schedule provided for each of the zones 1, 2, 3. Respondent does not identify dredging rates necessary to meet the proposed schedule.

Schedule

- Schedule appears reasonable with estimated completion date of Dec 2022.
- Realistic planned timeline for permitting (2 years).

EXHIBIT "D"

RANKING SHEET for - PROPOSAL # P-3-18-04
Sykes Creek Ecosystem Restoration Dredging Project

MEETING DATE: January 17, 2018
Posting Date: 1/18/18 through 1/25/18 @ 5:00 p.m.

POSTED BY: Leslie Rothering

Selection Committee Member

Proposers	Mike McGarry	Matt Culver	Mark Reagan	Walker Dawson	Bruce Black	TOTAL	RANK
Central Sand	1	2	3	2	1	9	2
Florida Dredge & Dock	2	1	1	1	3	8	1
Gator Dredging	3	3	2	3	2	13	3

The Selection Committee completed the review and evaluation of the proposal submittals for the above referenced solicitation. The Purchasing Services Office hereby provides notification the ranking of firms based on the decision of the Selection Committee.

#1 Ranked Firm: Florida Dredge and Dock

Brevard County encourages prompt and fair handling of all complaints and disputes with the business community. Filing of any disputes and appeals shall be in accordance with procedures specified in bid documents.

KENT RUNNELLS, P.A.
ATTORNEY AT LAW

[illegible]
[illegible]
[illegible]

December 20, 2017

Board of County Commissioners of Brevard County
Brevard County Government Center
2725 Fran Jamieson Way, Building C
Viera, FL 32940

Re: Sykes Creek Dredging Muck Removal Project, RFP No. P-5-18-04 (the "Project")

Honorable Commissioners:

This office represents Florida Dredge and Dock, LLC ("FD&D"), a party that has submitted a proposal ("Proposal") for the completion of the Project. As you know, the Project will require a spoil area to accept the approximately 642,000 cubic yards of material that will be removed in the dredging process. FD&D would note that although the RFP provides that the BOCC will provide a [illegible] the spoil area for the Project, FD&D's proposal is based upon not using the spoil area proposed by the BOCC. In fact, FD&D has made its proposal based upon the use of private lands to accept the spoil material, as [illegible] cost effective [illegible] to complete the Project.

The purpose of this letter is to advise you that FD&D currently is under binding enforceable contracts to purchase real property consisting of over 125 acres situated very near the Project site. This property is sufficient in size and suitable in location to accommodate the spoil material produced by the Project. You will please note that their Proposal specifically references their innovative approach to completing the Project with these alternative lands. If granted the Project, they will move forward with obtaining all environmental consents to allow the use of these lands to complete the Project and will close on these lands at the appropriate time.

Please feel free to contact me if I may be of further assistance.

Sincerely,

Kent Runnells

cc: Don Fletcher, FD&D

EXHIBIT "E"

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(813) 221-2777 • (813) 221-3737 fax • www.johnrains.com

PROTEST INTERVENTION
OF
FLORIDA DREDGE AND DOCK, LLC

FEBRUARY 20, 2018

Via U.S. Mail, Federal Express: 771523346978
and Email: Leslie.Rothering@brevardfl.gov
Ms. Leslie Rothering, Purchasing Manager
Brevard County Purchasing Department
Government Center, 2727 Judge Fran Jamieson Way
Building C, Third Floor, Suite 303
Viera, Florida 32940

PROCUREMENT SOLICITATION:

RFP No. P-3-18-04
Sykes Creek Dredging Muck Removal Project ("Project")

PROTEST INTERVENTION IN RESPONSE TO:

Central Sand, Inc.'s Formal Protest dated January 23, 2018

INTERESTED PARTY

Florida Dredge and Dock, LLC
1040 Island Avenue
Tarpon Springs, FL 34689
727-942-7888
William D. Fletcher, Jr. Mgr.
don@floridadredge.com

LEGAL COUNSEL

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FEB 21 2018 AM 10:12

FLORIDA DREDGE AND DOCK, LLC ("FDD") PRELIMINARY STATEMENT AND OVERVIEW:

- Brevard County produced a Request for Proposal No. P-3-18-04, Sykes Creek Dredging Muck Removal Project (the "Request for Proposal").

- The Request for Proposal in Section 1, p. 5 of the Bid Documents states that the County "is soliciting proposals from qualified licensed and experienced Marine Contractors that are capable of implementing the dredging, dewatering and disposals of approximately 642,000 cubic yards of organic sediments from the Sykes Creek Project Area. . . ." (Emphasis added).

- Addendum 5 to the Request for Proposal contained the following question and answer:

    - Q4: Please be more specific as it relates to contractor licensing requirements for this project. As I understand dredging is not a regulated trade in Brevard County but any other work that is regulated will require special contractor licensing?

    Response: The contractor, or their sub, must meet all Federal, State and Local contracting and licensing requirements as required to implement all components of the project. Contact Brevard County Licensing Regulation and Enforcement, (321)633-2058, with specific licensing questions. (Emphasis added)

- The Request for Proposal in Section 1, p. 13 of the Bid Documents defines a responsive proposer as "[a] bidder who has submitted a proposal which conforms in all respects to the requirements of the proposal package, including, but not limited to, submission of proposal on required forms with all required information, signatures, and notarizations at the place and time specified."

- The Request for Proposal in Section 1, p. 28 of the Bid Documents states that the County "expressly reserves the right to reject the proposal and/or subcontractor of any Bidder if such record discloses that such Bidder, in the opinion of the Owner, is not the best or most qualified Bidder..."

- The Request for Proposal required the proposers to submit a bid using a lump sum amount for three different nitrogen concentration levels: 1000 ppb, 2000ppb or 3000ppb. The County reserved the right to contract for any of the three levels – even if such resulted in a price adjustment downward.

- The Request for Proposal recognized that additional permitting would be required and allowed for additional design and alternative proposals:

    - Sykes Creek Technical Specs Package

    Pg. 11 of 942 - Dredged Material Management Area (DMMA) Construction and Restoration

    Item 03: Engineering Design and Permitting – Payment for this item will be made as a lump sum (LS) for costs for all accepted and approved submittals associated with engineering design, environmental permitting and modifications to the existing environmental permit as necessary to implement the Contractor-designed dewatering and dredged material management approach.

Item 04: Temporary Utilities Construction and Permitting – Payment for this item will be made as a lump sum (LS) for costs associated with engineering design, permitting and construction of temporary utilities as necessary to implement the Contractor-designed dredged material management approach.

Pg. 35 of 942

E. It is the Contractor's responsibility to obtain all other relevant Federal, State and local environmental permits (e.g. NPDES permit, dewatering permit, etc.) or any modifications to the provided permits at no cost to the Owner. The Contractor shall be responsible for any delays and costs resulting from failure obtain permits or permit modifications or failure to comply with said permits and permit modifications and all federal, state and local environmental protection laws and regulations.

- Sykes Creek Addendum 4

13. Please confirm if the application for any required permit modifications will be made by the Owner/Engineer or the Contractor.

Response: The permit was issued to the County; therefore, County and County's engineer will prepare the permit modification application request. However, all information, design details, signed and sealed drawings or other information that may be required to support the permit modification request shall be the responsibility of the contractor and must be provided to the County for agency submittal. It is the contractor's responsibility to ensure all submittals and responses to requests for additional information (RAI) are provided to the County and the County's engineer (a) within the time period required by regulatory agencies and (b) to allow sufficient time for the County and the County's engineer to review submittals. Any design, methodology, etc. associated with the contractor's approach will be the responsibility of the Contractor and Contractor's licensed engineer.

- Addendum 4 to the Request for Proposal contained the following question and answer

  - 30. What is the permitted width of the access corridor on the southwest section of Kiwanis Island? And, if required, are access stabilization efforts allowed?

Response: The permits identify no width for the corridor. The use of the existing trail, which measures about 6 ft. 10 wide at most locations, is limited to activities that will not impact wetlands or wetland vegetation. Note that the trail runs through mangrove wetlands at both ends and Brazilian pepper-dominated wetlands along the rest of the path. Trimming within local, state and federal limits (as applicable) is allowed. Allowable mangrove trimming. following the 1996 Mangrove Trimming and Preservation Act, will be required to allow foot traffic and light / small construction equipment movements without creating additional wetland impacts. Stabilization including placement of materials such as rock or sand or other sediments is not allowed. Placement of matting or cribbing are allowed but must be: (1) placed and

must remain within the existing path boundaries and 2) removed in their entirety at the end of the construction.

- Addendum 5 to the Request for Proposal contained the following question and answer

    - Q3: Pursuant to Questions 20 and 27 of Addendum No.4 dated 12-1-2017, definitions of temporary use appears to restrict contractors to minimal use of the Kiwanis Park staging area in the parking lot. Does this temporary use include offloading of dewatered sediment from barges throughout the entire contract period? Also does it include dewatering and nutrient removal materials staging, construction trailers, and loading equipment storage?

    Response: In this instance the phrase "temporary use" refers to work intervals of 4-5 months, intervals may be reoccurring over the project period and must meet requirements of the Brevard County Parks Department. Use of Kiwanis Park does not presently include offloading of dewatered sediment from barges. Given the volume of dewatered sediment this project will generate, the county considers offloading dewatered sediment a regular, frequent activity not within allowable uses of Kiwanis Park. Appropriate uses do include the temporary staging of pipeline and heavy equipment, along with temporary dewatering and nutrient removal materials staging. Long-term equipment storage is not an acceptable use of the site. The park will be available for the staging of a construction trailer for the project duration. All materials and equipment stored at the site must be fenced. This is a busy park site with frequent children's sports activities and events on weekends. The use of heavy equipment within the park on Saturdays and Sundays will be limited.

    If this is not authorized at Kiwanis Park, where has the County designated for these activities?

    Response: Kiwanis Island is available for Contractors use for duration of project. Otherwise, the contractor is solely responsible for the identification of an appropriate area or areas for long-term storage and execution of activities that will occur on a regular and/or frequent basis.

- The form contract included with the Request for Proposal documents includes a termination provision that protects the County from any uncertainties that arise in the permitting process. Specifically, Section 23 of the contract allows the County to terminate the performance of work on the Project "whenever the Owner shall determine that such termination is necessary." Therefore, should FDD encounter difficulties in obtaining the required permits to proceed, and the County determines it necessary, the County can terminate the contract.

- The Project included the removal of nitrogen from the dredge effluent which presented a unique issue to the proposers. The County provided a study prepared by the Florida Institute of Technology regarding dredge effluent nutrient information in a separate dredging project – Turkey Creek. However, as set forth by the County, such information did not include nitrogen removal. Thus, the removal of nitrogen from the dredge presented

a first of its kind problem to be addressed and as such all of the proposals submitted were in effect "conditional".

- FDD was one of three respondents to the Request for Proposal along with Central Sand, Inc. ("CSI") and Gator Dredging.

- In conjunction with the Request for Proposal, the Selection Committee held a public meeting on January 17, 2018 to discuss the three proposals that had been received.

- Following the Selection Committee meeting, the Ranking Sheet was released on January 18, 2018 which scored FDD the highest of the three proposals.

- CSI submitted its Formal Protest on January 23, 2018 alleging that 1) FDD was not a responsive bidder under the Request for Proposal Documents; 2) FDD was not a qualified bidder under the County's Procurement Policy; 3) FDD could not be a qualified bidder under the Request for Proposal Documents; and 4) the ranking of the bidders was illegal arbitrary and capricious. Additionally, CSI takes issue with the procedure used by the Special Committee in its meeting to discuss the various proposals.

- For the reasons set forth in more detail below, CSI's protest is without merit and accordingly, FDD requests that the Protest be denied and the Project awarded to FDD.

OVERVIEW

FDD was both a responsive and qualified bidder, and FDD's proposal was properly ranked as the highest by the County. As set forth in detail above, this Project presented a complex problem for the contractors to address and included a unique issue of nitrogen removal from the dredge effluent. The County presented to the proposers a study prepared by the Florida Institute of Technology regarding dredge effluent nutrient information in a separate dredging project – Turkey Creek. However, as set forth by the County, such information did not include nitrogen removal. Thus, the removal of nitrogen from the dredge presented a first of its kind problem to be addressed and as such, the County used the request for proposal process as opposed to an invitation to bid – the importance of which is set forth below. Due to the nature of this request, FDD's proposal, including the use of larger conventional land to act as the DMMA, was in keeping with the unknown factors of the Project.

Further, aside from the reasons set forth below, the County's acceptance of FDD's proposal was proper as FDD's proposal would be more cost effective for any future expansion. Specifically, should the County determine that an expansion of the Project was needed, FDD's cost projection, based on the original cost proposal, would be $14.05 per yard whereas CSI's cost would be $25.85 per yard to expand. For example, if the County wanted to expand a contract with CSI in order to complete the full 640,000 cubic yards as advertised, it would cost an additional $2,254,120.00 on top of the original contract. Please see Project Extension Pricing Analysis attached hereto as **Exhibit A.**

I. REQUEST FOR PROPOSAL VS. INVITATION TO BID

As a preliminary issue, this matter concerns a Request for Proposal as opposed to an Invitation to Bid. The distinction between the two is important for the analysis of CSI's Protest. None of the three court decisions cited by CSI involve requests for proposals. A Request for Proposal is used where an agency determines that the use of competitive sealed bidding (an Invitation to Bid) is not practicable and it is incapable of specifically defining the scope of the word required. *Sys. Dev. Corp. v. Dept. of Health and Rehabilitative Services*, 423 So. 2d 433, 434 (Fla. 1st DCA 1982). **(Exhibit B)**. Contrary to the rigid invitation to bid process, a request for proposal is flexible – consideration of a response to an invitation to bid is controlled by cost (i.e. the lowest and best bid), whereby the response to a request for proposal is controlled by technical excellence as well as cost. *Id.* The award of contracts under requests for proposals are based on the results of an extensive evaluation which includes criteria set forth in the RFP. *Id.*

II. CSI HAS NO STANDING BECAUSE IT IS NOT A LICENSED MARINE CONTRACTOR

As set forth in detail in FDD's Motion to Dismiss, CSI was not a licensed Marine Contractor and therefore has no standing to bring this protest.

III. FDD RESPONSE TO CSI PROTEST ALLEGATIONS

All of CSI's arguments are based on its contention that FDD's proposal did not contain assurances of a permanent disposal facility for the dredge material and therefore the proposal should have been rejected.

Responsive Bidder

CSI first argues that FDD was not a responsive bidder under the Request for Proposal Documents because FDD's submittal was a "conditional proposal" as FDD did not have a permanent disposal facility to accept the dredged material at the time FDD submitted its proposal and stated that it needed to be successful in obtaining all necessary approvals. FDD fully addressed these issues during their interview with the committee and based on it, and its engineer's experience, they are confident the required permitting will be achievable. Additionally, FDD's proposed pipeline route passes through primarily County-controlled property, with the single exception of one private landowner. If FDD is unable to obtain permission from the sole private owner, FDD has alternative pipeline route plans, with no added cost, that would travel exclusively through County-controlled land.

CSI argues that because FDD included a condition in their proposal, their proposal is automatically disqualified, quoting Section II, Article 25.5 of the Request for Proposal Documents to support this conclusion (i.e. "Conditional proposals will not be accepted.") Likewise, CSI argues that because FDD's proposal did not, in their view, contain assurances that FDD had a disposal facility to accept the dredge material, the submittal was not responsive. CSI, however, ignores the statement in Mr. Runnells' December 20th letter that FD&D has binding and enforceable contracts to purchase the suitable spoil area.

In addition, Section 16.1 of Article 16 - RIGHT TO ACCEPT OR REJECT PROPOSALS leaves the rejection of a proposal based on the inclusion of a condition to the Owner's discretion:

> 16.1 Proposals which contain modifications that are incomplete, unbalanced, conditional, obscure, or which contain additions not requested or irregularities of any kind, or which do not comply in every respect with the Instructions to Bidders and the Contract Documents, ***may be*** rejected at the option of the Owner. The Owner is not bound to accept the minimum bid stated herein, but reserves the right to accept any proposal which, in the judgment of the Owner, will best serve the needs and interest of the Owner. (emphasis added)

It is important to note that FDD was the only respondent to submit a proposal to complete the Project at the budget set forth in the Request for Proposal. Further, CSI also did not have its own permanent disposal site but would be required to use the site owned by a "sister "corporation[1]. In section 2.4 of the CSI Protest, CSI conceded that "Competitive bidding procedures protect the public by creating a system by which goods or services required by public authorities may be acquired at the lowest possible cost." Therefore, because FDD was the only bidder to propose completing 100% of the Project for the budgeted amount, FDD's proposal represented the best value at the lowest cost and the County was well within is discretion to not only accept but select the proposal.

Qualified Bidder

CSI next argues that under both the County's Procurement Policy and the Request for Proposal Document FDD could not be a qualified bidder because it did not have a permanent dredged material disposal facility and could not give assurances that the proposed site would receive the proper permits. However, FDD's attorney, Kent Runnells, in his correspondence dated December 20, 2017, informed the County that "FD&D currently is under binding, enforceable contracts to purchase real property consisting of over 125 acres situated very near the Project site. This property is sufficient in size and suitable in location to accommodate the spoil material produced by the Project."

In Section 2.2 Protest, CSI refers to item "P" of the Brevard County Procurement Policy. However, item "P" clearly states that it is the responsibility of County staff to determine if a given bidder is a Qualified Bidder or Proposer:

[1] CSI did not "own" the site in its proposal. Instead, it states that the land is owned by a "sister" corporation. CSI cannot under Florida law claim that ownership by a "sister" corporation is the same as ownership by CSI. See St. Petersburg Sheraton Corporation v. Stuart, 242 So. 2d 185 (Fla. 2d DCA 1970) (plaintiff suing for personal injuries due to being burned by cherries jubilee by employee of a subsidiary corporation could not sue the parent corporation for negligence).

Qualified Bidder or Proposer:

> The best bidder or proposer who has the capability in all respects to fully perform the bid or RFP requirements, and has the financial stability, honesty, integrity, skill, business judgment, experience, facilities, and reliability necessary to assure good faith performance of the contract, as determined by reference to the Contractor's Qualification Statement, evaluations by County staff of the bidder or proposer or its subcontractors' past performance for the Board, and any other information required by Board policies and Administrative Orders.

Therefore, the County was within its rights to determine FDD a Qualified Proposer.

CSI was not a Qualified Bidder

The CSI protest claims that FDD is not a qualified bidder because the success of the Project hinges on FDD successfully securing multiple permits with regard to land use. However, CSI fails to note that their own proposal hinges on the securing of permits that are equally if not more difficult to obtain. Specifically, their primary proposal involves the use of Kiwanis Island as the DMMA. However, the permit that the County has obtained for use of the island does not include removal of dredged material from the island, nor does it include the use of flocculants to treat the dredged material. The island is estimated to only have the capacity for approximately 1/6 of the project volume. Therefore, failure to secure these permit modifications would result in failure to complete the Project as proposed.

Additionally, CSI proposes to truck the material from the Kiwanis Island DMMA via Kiwanis Park using a temporary causeway that CSI would construct for this Project. They estimate it will take 100 trucks a day running in and out of Kiwanis Park, over the causeway, during daylight hours to complete the Project as proposed. This would equal 10 trucks an hour or a truck arriving or leaving every 3 minutes. Such an arrangement would effectively end usage of the park by the general public. Taylor Engineering detailed the following in the Qualification Evaluation Package regarding CSI's proposal:

Offloading and Handling

- No sketches or written descriptions of spoil island design to accommodate truck loading and traffic (100 trucks/day). Figure labeled 'haul route' shows path from south end of the island to Kiwanis Park, which is not acceptable under current permit conditions.
- Estimates production at 2000 – 3000 yds/day.
- 100 trucks per day will have a significant impact on traffic at the park or at the park entrance.
- Barge bridge permitting may be difficult, and the bridge would likely include some seagrass impacts (based on existing seagrass map in the area where bridge is proposed).

- County has limited park uses to temporary use only in specific locations. Plan appears to violate that limited use plan.

Therefore, CSI would face significant hurdles in obtaining permitting to offload the material, and the County could face significant public outcry were CSI successful in doing so. Further, if they were unable to obtain these contracts, they would be unable to complete the Project as proposed.

Similarly, CSI proposes to haul the dredged material via 10,000 gallon truckloads. Ten thousand gallons of pure water with no other additives weighs 83,286 lbs. Per F.S. §316.535, the FDOT weight limits for a commercial vehicles are 70,000 lbs gross vehicle weight for straight frame vehicle trucks and 80,000 lbs gross vehicle weight for tractor trailers. Therefore CSI's proposed hauling of the dredge material by 10,000 gallon truckloads exceeds FDOT weight limits, before factoring in the weight of the vehicle. CSI's proposal would haul not only 10,000 gallons of water per load, but water with as much as 60% dissolved solids. Because the hauled material is divisible (i.e. capable of being hauled in two smaller loads vs one large load), it is unlikely the FDOT will grant overweight permits to CSI to haul this material. Therefore, CSI's proposal is not viable. It is probable that to be able to legally haul the material, CSI would have to reduce the amount of dredged material in each truck, thereby increasing the truck count in and out of Kiwanis Park beyond the amount already raised as a concern by Taylor Engineering.

In apparent recognition of the potential difficulties in obtaining the required permits for their primary proposal, CSI also included an alternative proposal in the form of a single drawing of the Kiwanis Island DMMA and Kiwanis Park area. (**Exhibit C**). It appears that CSI may have anticipated that the causeway itself, through wetland and mangrove, would be the part of the plan that could not be permitted.

As opposed to a causeway designed to handle large, fully-loaded dump trucks, CSI alternatively proposed a pipeline from Kiwanis Island DMMA to a portion of Kiwanis Park that CSI would control for the project duration. Under this alternative, trucks would enter Kiwanis Park and pass through a contractor-controlled gate. The trucks would travel down a 12 foot wide corridor approximately 175' long. This corridor will have 6 foot security fence on both sides. Trucks would arrive at the Tanker Truck Muck Loading Station, located next to the Equipment Area. The maximum width in this area expands to 40 feet. Muck would then be pumped from the DMMA, through the proposed pipeline, directly into the trucks in the Kiwanis Park staging area. The trucks would then pass through a Type A Soil Tracking Prevention Device (with wash down), before exiting the contractor-controlled gate and leaving the park to deliver the muck to the final disposal site.

Although a pipeline connecting the DMMA to Kiwanis Park may be easier to obtain permitting for than a truck-capable causeway, the remaining changes of the alternative plan will increase the impact to Kiwanis Park's function, directly violate the Request for Proposal specifications, and fails to address numerous flaws in the design.

The County's response to Question 30 in Addendum 5 to the Request for Proposal, as set forth in full above, demonstrates that the County forbids use of Kiwanis Park for offloading of

dredged material. Likewise it forbids long-term equipment storage. The alternate proposal submitted by CSI included no indication of a timeframe for the use of the Equipment Area, therefore, it is possible that any equipment needed during truck loading operations would be permanently staged at that area as the CSI proposal indicated that trucking would be an ongoing operation.

It should be noted that the 12 foot corridor that the trucks are intended to use would not be wide enough to allow two-way truck traffic. It is also uncertain that the width of the equipment area, the widest part intended for equipment storage, would be wide enough for trucks to turn around in order to exit. This could lead to trucks waiting to be loaded being forced to queue up outside of the contractor's fenced area if a truck is already inside being loaded. Given that CSI's proposal estimates 100 truck loads per day during daylight hours (10 hours per day), CSI would need to cycle 10 truck loads per hour, or one truck every 6 minutes. The slightest delay in this timeframe could lead to trucks stacking up rapidly. The trucks would most likely either line up on Kiwanis Island Park Rd, which would close off one lane of the road and require traffic control to manage visitors coming and going, or the trucks would travel past the contractor's gate and wait in the Northeast parking lot. This could cause considerable congestion, especially on weekends when the County specifically pointed out that the park becomes busy with children's sports.

In sum, CSI's alternative plan would violate the Project specifications and cause sizeable negative impact to the flow of traffic at Kiwanis Park. According to the CSI proposal, each truck would need to enter through the gated entrance, travel down the 12 foot wide 175 foot corridor, accept a payload of 10,000 gallons of dredged muck, either turn around in tight confines or be forced to back down the 175 foot corridor, undergo a wash down, and exit the park all within a 6-minute timeframe. It is doubtful that this is a workable timeframe. Issues with traffic (both within the park and between the park and disposal site), malfunctions or routine maintenance of the pump or wash down systems, as well as flaws in the design of operations could all lead to delays which will cause trucks to stack up rapidly in the park (one every 6 minutes). This system could create times when the park is effectively shut down to the general public.

Finally, CSI's alternative proposal shows an area on the Southern end of Kiwanis Island labeled Sand Stockpile Area. However, CSI included no text with their drawing describing the proposed operations at this site. It is unclear in the drawing how they intend to remove the sand from this stockpile area.

The design of CSI's alternate proposal is unworkable and fails to address numerous issues. It is likely that if CSI's primary proposal proves to be fruitless, their secondary proposal will also be deemed undoable. This would mean that if CSI fails to secure the necessary permits for their primary proposal, they will be unable to complete the Project. In this respect, they have essentially submitted either a "conditional proposal" or a non-responsive proposal. Whereas FDD was upfront about the potential permitting issues with its plan in its submitted proposal, CSI failed to address its potential permitting issues and it's reasonable to infer that if CSI incurred extra costs, it would attempt to pass those extra costs along to the County.

CSI raises several "adverse effects" if FDD is awarded the contract including 1) inability to full perform under the contract; pressure on the County to approve zoning or land use changes and

3) discouragement of responsive bids. All three potential adverse effects are highly speculative and CSI fails to acknowledge that acceptance of its own proposal could have similar if not more adverse effects. As shown above, CSI faces uncertain permitting issues that could impede its ability to perform the Project. Further, CSI's proposed plan to use Kiwanis Park could open the County up to objections from the public. Thus, CSI has failed to show its own proposal would be responsive and a qualified bid to the request for proposal.

LEGAL DISCUSSION

The Ranking of the Proposers was not Illegal, Arbitrary or Capricious

CSI claims that the ranking of the proposers was illegal, arbitrary and capricious because FDD's proposal was not responsive or qualified. An arbitrary decision is one not supported by facts or logic, while a capricious action is one taken without thought or reason or irrationally. *Empower, Inc. v. Tampa Bay Water, et al.*, 1999 Fla. Div. Adm. Hear. LEXIS 5667 (ALJ Lawrence Johnston 1999). (**Exhibit D**). "[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 and even if reasonable persons may disagree." *Dept. of Transportation v. Groves-Watkins Constructors*, 530 So. 2d 912, 913 (Fla. 1988). (**Exhibit E**). Further, the agency's decision based upon a good faith exercise of its discretion cannot be overturned without a showing of illegality, fraud, oppression or misconduct. *Id.*

As set forth above, CSI has made no showing that the Selection Committee acted in anything but good faith when reviewing and ranking the proposals. FDD's proposal was not only responsive but the only proposal to abide with the budget set forth in the Request for Proposals. Therefore, it cannot be said that the Selection Committee's action in ranking FDD's proposal the highest was made without thought or reason or not supported by facts of logic.

A. CSI does not having standing to Protest because it's proposal was not responsive to the RFP

Although in its protest CSI simply asserts it is a responsive bidder and thus has standing, as noted above not only was CSI not a licensed Marine Contractor, its proposal had deviations and project concerns, including permitting and cost issues. In its Proposal, CSI depends on extensive use of Kiwanis Park to complete the Project. However, it is clear from the questions set forth in Addendum 5 to the Request for Proposal, that any use of Kiwanis Park was to be limited and temporary and CSI could not confirm that they could receive the proper permitting needed to use the Kiwanis Park site as they intended.

Florida law is clear that for a protestor to have standing the protestor's proposal must be responsive. *Intercontinental Properties, Inc. v. State Dep't of Health & Rehabilitative Services*, 606 So. 2d 380 (Fla. 3rd DCA 1992). (**Exhibit F**). The Court noted that having a protest by a non-responsive bidder is a waste of time and money. Id. at p. 384.

B. CSI waived the grounds stated in its protest by failing to timely protest the RFP Procedure.

Part of CSI's argument in its protest is to the procedure used in by the Selection Committee at the public hearing. There is nothing in CSI Protest to indicate that CSI made any timely objection to the process or that procedure and waived any right to protest based on that process.

C. FDD's highest rank proposal is responsive

As set forth above, FDD's proposal is responsive and the County's determination that FDD was the highest rank was proper.

REQUESTED RELIEF

FDD respectfully requests that CSI's Protest be dismissed and FDD and the County be allowed to proceed to timely complete the Sykes Creek Dredging Muck Removal Project without any further delay.

Respectfully submitted by,

John H. Rains, III
Counsel for Florida Dredge and Dock, LLC

cc: Ms. Shannon Lynn Wilson, Esq., Deputy County Attorney, w/ encl. (by email shannon.wilson@brevardfl.gov and Federal Express: 771523355696)

cc: Michael Sjuggerund with encl. (by email mike@cfglawoffice.com and Federal Express 771523364094)

Sykes Creek

Project Extension Pricing Analysis

In their respective proposal, each proposer stated how many cubic yards they would dredge for the maximum $18,000,000 budget for the project. In the event that the County decides to expand the project to include additional areas not covered under the original contract, below is the estimate, using the same cubic yards set forth in each proposal, for an extension under FDD's pricing and CSI's pricing.

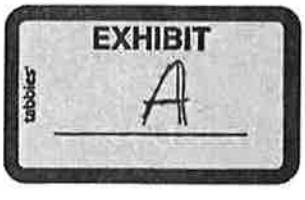
FDD

Bid Item	Item Description		Unit	Lump Sum Total
12	Pre-dredging survey	LS		$50,000.00
20	Progress/post dredge survey	LS		$120,000.00
22	Dredged material dewatering	LS		$1,200,000.00
24	Operations material testing	LS		$50,000.00
25	Turbidity Testing	LS		$40,000.00
26	Environmental Monitoring	LS		$40,000.00
27	Phosphorus Removal	LS		$1,000,000.00
28	Nitrogen Removal	LS		$100,000.00
	Total			$2,600,000.00

Prorated over 640,000 cubic yards (as set forth in FDD's proposal) equals $4.05 per cubic yard plus base dredge rate of $10.00 per yard becomes $14.05 per yard to expand project.

CSI

Bid Item	Item Description		Unit	Lump Sum Total
12	Pre-dredging survey	LS		$66,000.00
20	progress/post dredge survey	LS		$130,000.00
22	dredged material dewatering	LS		$701,650.00
24	Operations material testing	LS		$3,000.00
25	Turbidity Testing	LS		$82,500.00
26	Environmental Monitoring	LS		$60,000.00
27	Phosphorus Removal	LS		$400,000.00
28	Nitrogen Removal	LS		$600,000.00



	Total		$2,043,150.00
Plus adding in line item			
23	Trucking	LS	$7,000,000.00
For a Total of			$9,043,150.00

Prorated over 552,800 cubic yards (as set forth in CSI's proposal) equals $16.35 per cubic yard plus base dredge rate of $9.50 per yard becomes $25.85 per yard to expand project.

Sys. Dev. Corp. v. Dep't of Health & Rehabilitative Servs.

District Court of Appeal of Florida, First District

November 29, 1982.

NO. AO-356

Reporter
423 So. 2d 433 *; 1982 Fla. App. LEXIS 21806 **

SYSTEM DEVELOPMENT CORPORATION, Appellant, v. DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, STATE OF FLORIDA, Appellee, and EDS FEDERAL CORPORATION, Intervenor.

Prior History: [1]** An appeal from order of Hearing Officer G. Steven Pfeiffer.

Case Summary

Procedural Posture
Appellant sought review of an order of the Florida Department of Health and Rehabilitative Services adopting the recommendation of the hearing officer and awarding a public contract to appellee.

Overview
The Florida Department of Health and Rehabilitative Services (HRS) awarded a public contract to appellee instead of appellant. The court affirmed the decision. Appellee's offer, made in response to HRS' request for proposals (RFP) did not give appellee an unfair competitive advantage. There was a difference between a RFP and a invitation for bids (IFB). An IFB was rigid and identified the solution to the problem. The invitation specifically defined the scope of the work required by soliciting bids responsive to the detailed plans and specifications set forth. Whereas, an RFP was flexible, identified the problem, and requested a solution. Consideration of a response to an IFB was controlled by cost, whereas consideration of an offer to an RFP was controlled by technical excellence as well as cost. Nothing in the instant RFP precluded an offeror from proposing or suggesting innovations or improvements. Appellant failed to demonstrate that HRS acted in either bad faith or irrationally. Nor had appellant shown that appellee's proposal accorded it a palpable economic advantage over the other offerors, where all the offerors were given the same opportunity to be innovative.

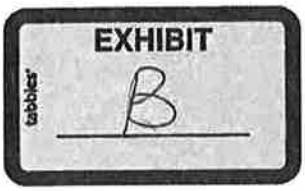
Outcome
The order adopting the recommendation of the hearing officer and awarding a public contract to appellee was affirmed because the Florida Department of Health and Rehabilitative Services' decision was supported by competent substantial evidence.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contract Formation > Contracts Law > Contract Formation

HN1[] **Contracts, Formation of Contracts**

The statutory provision governing the procurement of contractual services is *Fla. Stat. ch. 287.057(3)* (1981). Under that provision, where an agency determines that the use of competitive sealed bidding, i.e., an Invitation for Bids is not practicable and it is incapable of specifically defining the scope of the work required, contractual services shall be procured by an Request For Proposals.



Business & Corporate Compliance > ... > Contract Formation > Contracts Law > Contract Formation

HN2[⬇] **Contracts, Formation of Contracts**

See *Fla. Stat. ch. 287.057(3)* (1981).

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN3[⬇] **Standards of Review, Arbitrary & Capricious Standard of Review**

An agency's decision is reviewed to determine whether the decision was arbitrary, capricious or beyond the scope of its discretion.

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Standard of Review

HN4[⬇] **Standards of Review, Clearly Erroneous Standard of Review**

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.

Counsel: Bernard Fried, Santa Monica, California; and F. Alan Cummings and John Radey, of Holland & Knight, Tallahassee, for appellant.

Robert A. Weiss, Medicaid Staff Counsel, Department of Health and Rehabilitative Services, Tallahassee; and M. Stephen Turner, of Culpepper, Beatty & Turner, Tallahassee, for appellee.

Richard E. Benton and David L. Cook, of Young, van Assenderp, Varnadoe & Benton, P.A., Tallahassee; and Claude Chappelear, EDS Federal Corporation, Dallas, Texas, for intervenor.

Judges: Before WIGGINTON, J. SHAW AND JOANOS, JJ., CONCUR.

Opinion by: WIGGINTON

Opinion

[*434] WIGGINTON, Judge.

The System Development Corporation (SDC) appeals the final order of the Department of Health and Rehabilitative Services (HRS) substantially adopting the recommended order of the hearing officer and awarding the contract to administer the Florida Medicaid Management Information System (FMMIS) to appellee EDS Federal Corporation. The hearing officer concluded, inter alia, that the EDS offer was responsive to the HRS Request for Proposals (RFP) and nothing had occurred to give EDS any unfair competitive advantage over other **[**2]** offerors. We affirm.

Pertinent to this appeal is an understanding of the nature of the RFP procedure. *HN1*[⬆] The statutory provision governing the procurement of contractual services in this instance is *Section 287.057(3), Florida Statutes* (1981), as amended by Chapter 82-196, Laws of Florida. Under that provision, where, as here, an agency determines that the use of competitive sealed bidding, i.e., an Invitation for Bids (IFB), is not practicable and it is incapable of specifically defining the scope of the work required, contractual services shall be procured by an RFP. *HN2*[⬆] *Section 287.057(3)*, as amended, states:

> A request for proposals which includes a statement of the services sought and all contractual terms and conditions applicable to the procurement of contractual services, including the criteria, which shall include, but need not be limited to, price, to be used in

> determining acceptability of the proposal shall be issued... To assure full understanding of and responsiveness to the solicitation requirements, discussions may be conducted with qualified offerors. Said offerors shall be accorded fair and equal treatment prior to the submittal date specified in the request for **[**3]** proposals with respect to any opportunity for discussion and revision of proposals. The award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the other criteria set forth in the request for proposals...

Implicit in the definition of an RFP is the underlying rationale that, in some types of competitive procurement, the agency may desire an ultimate goal but cannot specifically tell the offerors how to perform toward achieving that goal; thus, a ready distinction arises between an RFP and an IFB. Typically, an IFB is rigid and identifies the solution to the problem. By definition, the invitation specifically defines the scope of the work required by soliciting bids responsive to the detailed plans and specifications set forth. *Section 287.057(1) (a)* and *(2)*, as amended. On the contrary, an RFP in flexible, identifies the problem, and requests a solution. Consideration of a response to an IFB is controlled by cost, that is, the lowest and best bid, whereas consideration of an offer to an RFP is controlled by technical excellence as well as cost. [1]

[4]** Nothing in the instant RFP precluded an offeror from proposing or suggesting innovations or improvements to the FMMIS. We see from the record that companies making competitive proposals in the field of systems procurement regularly suggest technologically innovative approaches. Moreover, the RFP process contemplates that offerors will address the problem with creativity and will utilize advanced state-of-the-art equipment and processes.

We are constrained to *HN3*[↑] review the agency's decision under these circumstances only so far as to determine whether the decision was arbitrary, capricious or beyond the scope of its discretion, which discretion is very broad:

> *HN4*[↑] 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 **[*435]** appear to some persons to be erroneous. *Volume Services Division v. Canteen Corp., 369 So.2d 391, 395 (Fla. 2d DCA 1979)*.

SDC has not demonstrated that HRS acted in bad faith or irrationally. Nor have they shown that the EDS proposed enhancements to the FMMIS accorded EDS a palpable **[**5]** economic advantage over the other offerors, where all the offerors were given the same opportunity to be innovative. *Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d 505, 7 FLW 484 (Fla. 1982)*. Although *Liberty County* specifically dealt with the IFB procedure, fair economic competition is likewise a hallmark of proposals submitted pursuant to an RFP.

HRS's conclusion that the proposed enhancements did not constitute material irregularities is supported by competent substantial evidence and we affirm. The other points raised by SDC were not raised or litigated before the hearing officer and SDC may not now argue these issues on appeal.

SHAW AND JOANOS, JJ., concur.

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[1] *IBM v. Departement of General Services and Department of Highway Safety and Motor Vehicles*, 11 FAR 140, DOAH Case No. 79-078 (1979).

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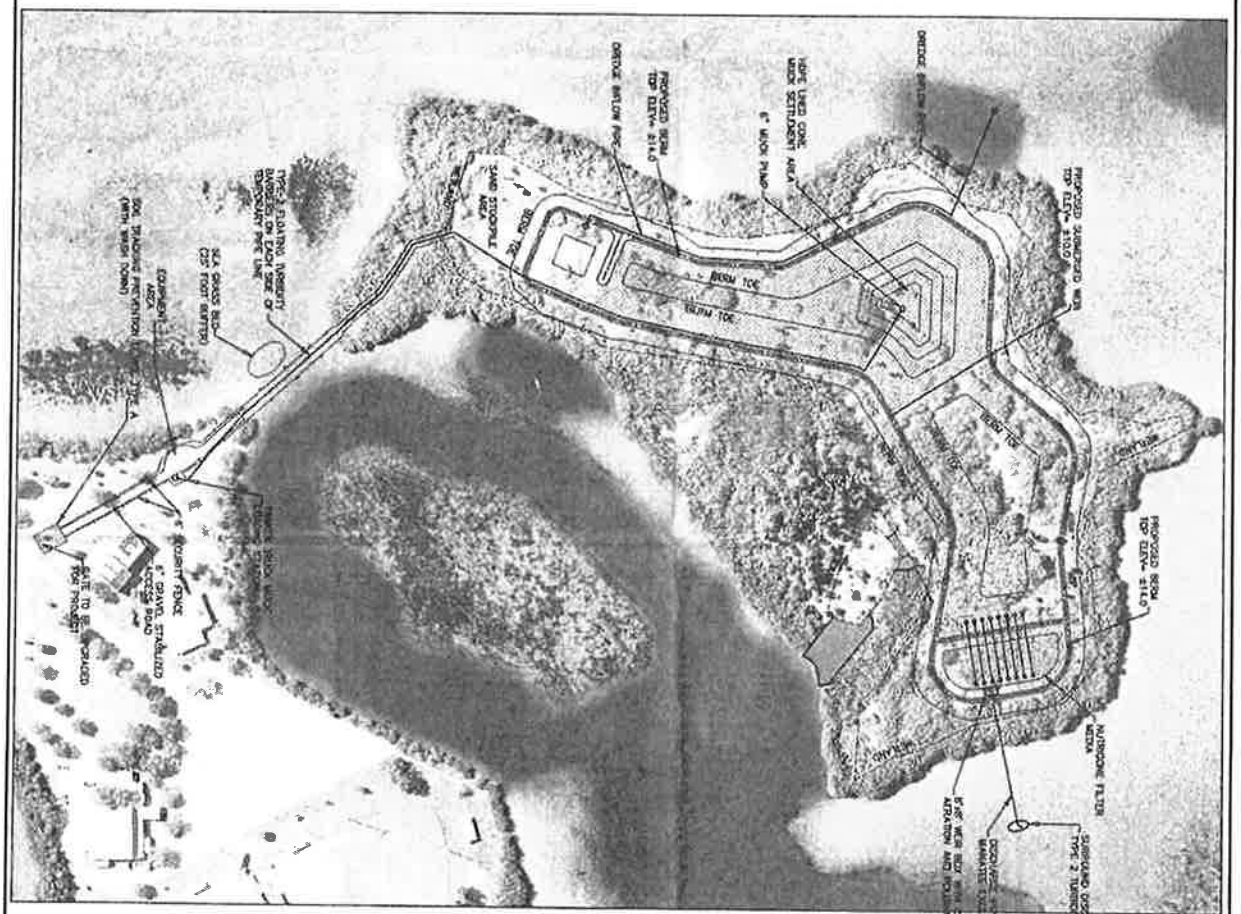

GRAPHIC SCALE

EXHIBIT

C

tabbies

CENTRAL SAND

PROPOSED DREDGED MATERIAL MANAGEMENT AREA PLAN
LOCATED ON KIWANIS IDLAND
ALTERNATIVE PLAN
FOR
BREVARD COUNTY
BREVARD COUNTY FLORIDA

SHEET NO 2 OF 2

Honeycutt & Associates, Inc.
ENGINEERS • SURVEYORS • PLANNERS
3700 South Washington Avenue
Titusville, Florida 32780
(321) 267-6233 Fax (321) 269-7847
Certificate of Authorization EB-0007623

PRELIMINARY FOR REVIEW ONLY

DATE | JOB NO. | F.B. NO. | SCALE AS SHOWN | DRAWN STS | APPR. Rich

DATE | REVISION

SUBMITTAL DATE
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1999 Fla. Div. Adm. Hear. LEXIS 5667

State of Florida Division of Administrative Hearings, STATE OF FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

October 25, 1999, Recommended Order

Case No. 99-3398BID

Reporter
1999 Fla. Div. Adm. Hear. LEXIS 5667 *

ENPOWER, INC., for itself and for FLORIDA SEAWATER DESALINATION COMPANY (not Inc.), Petitioner, vs. TAMPA BAY WATER, a regional water supply authority, Respondent, and S & W WATER, LLC, Intervenor.

Core Terms

negotiate, plant, desalination, procurement, protest, site, sea water, water supply, rank, mgd, team, bromide, bid, finance, member-governments, staff, recommend, water quality, contingent, membrane, waive, design-build, irregularity, regional, gallons, wellfields, permittability, clarification, interconnect, contractor

Panel: J. LAWRENCE JOHNSTON, Administrative Law Judge

Opinion

[*1]
RECOMMENDED ORDER

On September 7 through September 14, 1999, a formal administrative hearing was held in this case in Tampa, Florida, before J. Lawrence Johnston, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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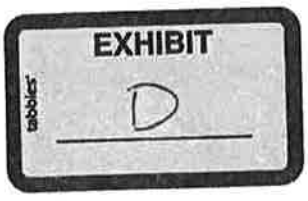
For Respondent: Richard A. Harrison, Esquire
John W. Wilcox, Esquire



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STATEMENT OF THE ISSUES

This is a procurement protest. The ultimate issue is whether the Respondent's award of the "Agreement for the Construction and Operation of a Seawater Desalination Plant and Water Purchase Agreement" ("WPA") to Intervenor, S & W Water, LLC ("S&W") on July 19, 1999, is contrary to Tampa Bay Water's (TBW's) **[*2]** governing statutes, its rules or policies, or the proposal specifications, or is clearly erroneous, contrary to competition, arbitrary, or capricious. Additional issues presented for decision are: (1) whether Petitioner has standing to maintain this protest; and (2) whether, by participating in the procurement process, Petitioner has waived or is estopped from claiming irregularities arising out of that process.

PRELIMINARY STATEMENT

In May 1997, TBW, a regional water supply authority, issued a Request for Proposals ("RFP") for the Seawater Desalination Water Supply Developmental Alternative of the Master Water Plan (the "Project"). The seawater desalination facility contemplated by the RFP would be the largest such facility in North America and would have a production capacity more than twice as large as the only other existing seawater desalination facility in the United States. The RFP contemplated a process that would culminate in a contract to design, build, own, operate, and potentially transfer to TBW, a seawater desalination plant to provide 25 to 35 million gallons per day of potable water to Hillsborough, Pinellas, and Pasco counties and to the cities of Tampa **[*3]** and St. Petersburg for 30 years. At the WPA's "take-or-pay" water price (an average of $ 2.08 per 1,000 gallons for 30 years), this is a $ 569,400,000 contract.

After the RFP, the procurement process included interviews, simultaneous negotiations, a Request for Binding Offers (RFBO), and a Request for Best and Final Offers (RFBAFO). Eventually, on March 15, 1999, TBW's Board of Directors ("Board") approved the ranking of the BAFOs and authorized staff to conduct final negotiations with the top-ranked developer, S&W. At this point, Petitioner filed a protest, which TBW dismissed on April 19, 1999. The Final Order Dismissing Formal Protest was appealed to the District Court of Appeal, Second District of Florida.

On July 19, 1999, TBW's staff, consultants and legal counsel recommended that TBW enter into a contract with S&W. TBW's Board approved the contract, and it was executed by the parties the same day.

Petitioner timely filed its Notice of Protest on July 22, 1999, and timely filed its Formal Written Protest on July 29, 1999. S&W filed a Motion for Leave to Intervene on August 6, 1999. TBW referred the Formal Protest and the pending Motion for Leave to Intervene to the **[*4]** Division of Administrative Hearings (DOAH) on August 9, 1999.

By order dated August 12, 1999, S&W's Motion for Leave to Intervene was granted, and a final administrative hearing was scheduled for September 7 through September 16, 1999. Petitioner moved to continue on August 13, 1999, but TBW and S&W opposed the continuance, and the motion was denied by order dated August 23, 1999, based on the provisions of *Section 120.57(3), Florida Statutes.* (All statutory references are to the most recent codification--either Florida Statutes (1997), or Florida Statutes (Supp. 1998).)

On September 1, 1999, TBW and S&W filed a Joint Motion for Summary Recommended Order of Dismissal for Lack of Standing accompanied by a motion to shorten the time for Petitioner's written response. The motion to shorten time was denied, and ruling on the motion to dismiss was deferred. Petitioner filed its written response during the final hearing, and ruling continued to be deferred, effectively denying the motion for a summary disposition and reserving the substantive issues for disposition in the Recommended Order.

The parties filed a Pre-Hearing Stipulation on September 3, 1999.

At the final hearing, Petitioner **[*5]** called Michael Sweet, an employee of Parsons Engineering (which was one member of the Florida Water Partners (FWP) joint venture, another proposer on the Project); Dr. J. Nicholas Ehringer, a professor of biology at Hillsborough Community College; Suzanne Cooper, principal planner for the Tampa Bay Regional Planning Council; James Keppeler, a former employee of Progress Energy, one of the members of the PEIP joint venture, another proposer on the Project; Cheryl Bradford, Secretary and spokesperson for the Alafia River Basin Stewardship Council and member of other environmental organizations; and Phillip Elovic, an employee of IDE Technology, the other member of the FWP joint venture. Elovic testified via telephone without objection. Petitioner also called Donald E. Lindeman, a registered professional engineer employed by TBW who was also the Project Manager for the desalination project; James Jensen, a professional geologist employed by PB Water; John W. Wilcox, an attorney representing TBW; and Dr. Peter Hofmann, an employee of S&W.

TBW called Maxwell; Lindeman, P.E.; and David MacIntyre, P.E., an employee of PB Water and the principal consultant to TBW on the desalination project.

[*6] S&W did not call any witnesses.

Upon stipulation of the parties, the depositions of James Smith, an employee of U.S. Water, and Robert Lutz, an employee of Dupont, were received in evidence as Joint Exhibits 1 and 2. (U.S. Water and Dupont were members of the FSDC joint venture, along with Enpower. Ruling was reserved on Petitioner's objection to S&W Exhibit 47, the deposition of Enpower's President, Dan Smith; the objection is now overruled, and S&W Exhibit 47 is received in evidence.

The following exhibits were received in evidence: Petitioner's Exhibits 102, 104, 120, 121, 123-128, 131, 136, 141, 158, 162, 163, 165-192, 194-198, 213-222, 224-232, 234, 238, 240-251, and 262; TBW's Exhibits 1-41, 41A, 42-77, 78A, 78B, 78C, 79-92, 94-128, 130-143, and 148-150; and S&W Exhibits 46 and 47.

After presentation of the evidence, S&W requested a reservation of jurisdiction for determination under *Section 120.595(1), Florida Statutes*, that Petitioner prosecuted its Formal Protest for an improper purpose.

The Transcript of the final hearing (1325 pages in six volumes) was filed with DOAH on September 27, 1999. Petitioner filed a 41-page proposed Recommended Order and a 41-page **[*7]** Petitioner's Memorandum on October 7, 1999, along with Petitioner's Motion to Accept Filings of that length; TBW and S&W filed a 78-page joint proposed Recommended Order, accompanied by a Joint Motion for Enlargement of Page Limitation for Proposed Recommended Order. Upon consideration, the post-hearing submissions have been accepted and considered.

FINDINGS OF FACT

TBW and WCRWSA

1. Tampa Bay Water (TBW) is a regional water supply authority existing under the authority of *Sections 373.1962*, *373.1963*, and *163.01, Florida Statutes*. TBW is not a part of the executive branch of state government. It exists by virtue of an Amended and Restated Interlocal Agreement among Hillsborough County, Pasco County, Pinellas County, the City of Tampa, the City of St. Petersburg, and the City of New Port Richey. The Board of TBW comprises elected officials from each of the six member-governments.

2. TBW is the exclusive wholesale water supplier for the region and is responsible for meeting the potable water needs of its six member-governments. The member-governments collectively serve approximately 2 million retail customers.

3. TBW does not furnish water to any person or **[*8]** entity other than its six member-governments and does not sell any water on a retail basis. All potable water produced by TBW's facilities is for resale on a wholesale basis to the member-governments.

4. Under the Amended and Restated Interlocal Agreement, TBW has the unequivocal obligation to meet the potable water needs of its six member-governments on a regional basis. The Master Water Supply Contract between TBW and the six member-governments outlines how TBW's facilities will be connected to the member-governments' facilities and sets forth provisions for billing and collecting for the sale of water by TBW to the member-governments.

5. TBW was originally created as the West Coast Regional Water Supply Authority (WCRWSA). WCRWSA was reorganized and restructured pursuant to the Amended and Restated Interlocal Agreement Reorganizing the West Coast Regional Water Supply Authority, dated June 10, 1998. The process of restructuring the former WCRWSA into TBW began in 1995 and culminated on August 31, 1998. See Finding 48, infra.

TBW's Existing Facilities

6. TBW's existing water supply facilities consist of a series of groundwater wellfields located throughout Hillsborough, **[*9]** Pinellas, and Pasco counties. These are: the Cypress Creek Wellfield; the Cross Bar Ranch Wellfield; the Cypress Bridge Wellfield; the Northwest Hillsborough Wellfield; the Starkey Wellfield; the North Pasco Wellfield; the South Central Hillsborough Wellfield; the Cosme-Odessa Wellfield; the Section 21 Wellfield; the South Pasco Wellfield, the Eldridge-Wilde Wellfield; and the Morris Bridge Wellfield. With the exception of the South Central Hillsborough, Starkey, and North Pasco Wellfields, these facilities are interconnected and are part of the interconnected water production system.

7. With the exception of the City of Tampa's Hillsborough River supply, the existing wellfields and the interconnected system supply all of the water to meet the demands of the six member-governments. The existing facilities currently produce approximately 145 to 150 million gallons per day ("mgd"), on average, with higher production during peak demand.

8. The potential for environmental impacts of TBW's groundwater pumping have been a matter of substantial concern to and dispute among the member-governments, the District, the Florida Legislature, and the public over the course of several **[*10]** years.

The "Partnership Agreement" with the Southwest Florida Water Management District

9. The Southwest Florida Water Management District (the "District") is a water management district in the State of Florida created pursuant to Section 373.069(1)(d) and (2)(d), Florida Statutes. The District is the governmental agency charged with the responsibility and authority to review and act upon water use permit applications, pursuant to Chapter 373, Part II, Florida Statutes, and Chapters 40D-1 and 40D-2, Florida Administrative Code, and to otherwise regulate the consumptive use of water within its jurisdiction. TBW and all of its member-governments are within the geographical and legal jurisdiction of the District.

10. In April 1998, WCRWSA, its six member-governments, and the District entered into an agreement entitled the "Northern Tampa Bay New Water Supply and Ground Water Withdrawal Reduction Agreement," commonly called the "Partnership Agreement." The negotiation of the Partnership Agreement occurred concurrently with the restructuring of WCRWSA into TBW and the execution of the Master Water Supply Agreement.

11. The Partnership Agreement has four principal stated **[*11]** objectives: to develop at least 85 mgd annual average of new water supply to meet the needs of the area; to effect a reduction in groundwater pumping from the 11 existing wellfields to no more than 121 mgd annual average as of December 31, 2002, through December 31, 2007, and to no more than 90 mgd annual average as of December 31, 2007, through December 31, 2010, to

allow environmental recovery; to end existing litigation between the parties to the agreement and avoid future litigation, including administrative proceedings; and to create a funding mechanism through which TBW can develop new water supply projects.

12. Pursuant to the Partnership Agreement, the existing water use permits for eleven specified wellfields (all the wellfields in the system except South Central Hillsborough) were consolidated into a single permit (the "Consolidated Permit") under which WCRWSA (later TBW) became the sole permittee. The expiration date of the Consolidated Permit is December 31, 2010.

13. Prior to execution of the Partnership Agreement, the existing permits for the 11 wellfields allowed for cumulative withdrawals totaling approximately 192 mgd. Upon execution of the Partnership **[*12]** Agreement, the Consolidated Permit immediately reduced allowed withdrawals to no more than 158 mgd.

14. The Partnership Agreement required that wellfield pumping from the 11 wellfields be further reduced to no more than 121 mgd by December 31, 2002, and then to no more than 90 mgd by December 31, 2007.

15. The Partnership Agreement also required WCRWSA (now TBW) to develop at least 38 mgd of new water supply by December 31, 2002, and a total of 85 mgd of new water supply by December 31, 2007. The Partnership Agreement required that the new water supply projects be fully permitted, constructed, in operation, and providing water for regional distribution by the stated deadlines.

16. The Partnership Agreement required WCRWSA (now TBW) to submit to the District by July 1, 1998, a New Water Plan describing the projects intended to be implemented to meet the requirements of 38 mgd of new water supply by December 31, 2002, and 85 mgd of new water supply by December 31, 2007. The planning and development of the New Water Plan were required to calculate and take into account projected increased demand based on population projections and per capita usage, the 6% reserve capacity **[*13]** required under the Amended and Restated Interlocal Agreement, and the wellfield pumping reductions and new water supply requirements mandated by the Amended and Restated Interlocal Agreement and the Partnership Agreement.

17. The Partnership Agreement identified the Seawater Desalination Project as an alternative source of potable water that is eligible for co-funding by the District of up to 90% of the capital cost of the project.

The Seawater Desalination Procurement Process

A. The Request for Statements of Qualifications

18. WCRWSA had been discussing the seawater desalination project as a privatized, out-sourced project since early 1996. The seawater desalination project was never contemplated to be procured as a design-build project. It was originally conceived and ultimately procured as a DBOOT (Design-Build -Own-Operate-Transfer) project. There are significant differences between the two procurement methods. The requirement that the designer-builder also own and operate the facility and the option for later transfer of ownership and operation to WCRWSA, expand the relevant considerations well beyond those of a mere design-build procurement, as reflected in the process **[*14]** undertaken in this case.

19. In February 1997, WCRWSA issued a "Request for Statements of Qualifications ("SOQs") and Project Approach for the Seawater Desalination Water Supply Alternative of the Master Water Plan" (the "RFQ"). At the time the RFQ was issued, WCRWSA had not yet completed the development of the Master Water Plan,

and it was not certain that the desalination project would be part of the new Master Water Plan.

20. The RFQ clearly indicated that the seawater desalination project was one of a number of alternatives then being considered by WCRWSA. The RFQ stated, under the heading of "Purpose and Scope of Services": "The seawater desalination supply will be evaluated with other developmental alternatives in the [WCRWSA's] Master Water Plan." [TBW #1 at Section 1.1] This was reiterated in the RFQ under the heading "General Information," which states: "Seawater desalination is one of three developmental alternatives identified in the [WCRWSA's] Master Water Plan, a 10-year resource development blueprint designed to bring 50 mgd of new supply on line in

six years." The same section of the RFQ referred to "[T]he investigation of seawater desalination as a source **[*15]** of additional water . . . ."

21. SOQs were submitted by six developers: Enova/SSI ("Enova"); Florida Seawater Desalination Company("FSDC"); Florida Water Partners ("FWP"); National Advanced Technology Exchange ("NATE"); Progress Energy/Ionics ("PEIP"); and Stone and Webster ("S&W").

22. WCRWSA's consultant, PB Water, prepared a report entitled "Basis for Recommendation Report for the [SOQs]," dated May 13, 1997, in which PB Water determined that all of the developers except NATE met the requirements for pre-qualification on the Project. At its May 19, 1997, meeting, the WCRWSA's Board

considered and approved the recommendation of PB Water and accepted the five pre-qualified developers.

B. The RFP

23. On May 27, 1997, WCRWSA issued the Request for Proposals ("RFP") for the Project. Addenda to the RFP were issued on July 15, 1997 (Addendum No. 1); August 19, 1997 (Addendum No. 2); October 3, 1997 (Addendum No. 3); and November 10, 1997 (Addendum No. 4). Responses to the RFP were due no later than December 3, 1997.

24. At the time the RFP was issued, WCRWSA still had not yet finalized the Master Water Plan. The RFP clearly indicated that the proposed seawater **[*16]** desalination project was to be "evaluated in comparison with other water supply developmental alternatives in the [WCRWSA's] Master Water Plan." Due to concern that desalination would not ultimately be selected as a part of the Master Water Plan, the RFP provided for an incentive award consisting of a limited reimbursement of certain costs incurred by the developer of the top-ranked proposal in the event the desalination project did not proceed to contract.

25. The RFP described the scope of the project as follows:

2.2 Detailed Scope of the Project

The scope of the project includes the following:

Financing the project. Selecting the proposed site (s) for the seawater desalination plant (s) and ancillary equipment. Determining the need for environmental permits, conducting the necessary studies and/or mitigation and

securing the required environmental permits.

Developing the site (s) and its plant (s) including road and seawater transportation routes and on- and off-loading facilities and other site infrastructure as required.

Determining the availability and securing main electrical power input (for a plant not producing its own power).

Obtaining construction, operation **[*17]** and all other required permits. The AUTHORITY may assist the developer in obtaining some of the permits. The Developer must identify those permits that it will expect the AUTHORITY'S assistance in obtaining.

Designing, supplying, procuring, erecting, and testing the seawater desalination plant (s) and any required power plant (s) and other associated plant equipment to the approval of the AUTHORITY.

Operating and maintaining the seawater desalination plant (s) and any ancillary equipment to a standard acceptable to the AUTHORITY under a build, own and operate contract with the AUTHORITY. The contract may include an option to transfer operation and/or ownership of the plant (s) to the AUTHORITY at a later date. Selling the desalinated water to the AUTHORITY at an agreed specific price and a specified quality and minimum quantity under a Water Purchase Contract or similar contractual agreement of a specified terms of years.

(TBW Ex. 9 at pp. 5-6, Section 2.2)

26. The RFP established 22 "selection criteria" to which were ascribed a total of 500 available points. The selection criteria were: site-related issues; environmental issues; utilities; intake water quality; feed water **[*18]**

pre-treatment; cleaning; effluent discharge; site development, engineering and works; seawater desalination process; plant optimization; function requirements; mode of operation; plant design lifetime, including major components and systems; product water turndown capability; plant performance; product water quality; plant operation; aesthetics of the facility; economic feasibility; transfer or disposition of facility at conclusion of contract period; life cycle cost of blended product water in $ (US)/1000 gallons (US); and performance schedule. The RFP stated:

The Proposals will be ranked based on the total points each Proposal receives during the evaluation process out of the total available 500 points. The proposal evaluation team reserves the right to ask for clarification or additional information for some requirements in order to make an informed decision.

(TBW Ex. 9 at Section 2.5, as superceded by Addendum 2 (emphasis in original))

27. The 22 selection criteria were to be used for a limited purpose, as stated in the RFP:

The following criteria for ranking will ensure that the desalination water supply is properly designed and reliable (constructed of the right materials, **[*19]** has sufficient redundancy, storm resistant, etc.), that the facility can and will be maintained for the life cycle (negotiated period) in good operating condition, the quality and quantity of water is deliverable when required, and the supply is economically viable (the Developer will have an adequate return on his investment for delivered water at an agreed unit price acceptable to the Authority).

* * *

The required General Information (Section 3.1) will not receive a point rating but will be evaluated as to whether each item provides the required information in a complete and satisfactory manner. The Authority's Evaluation Committee shall use the following weighted criteria [i.e., the 22 selection criteria] to score the completeness and technical merit of the Technical Proposal (Section 3.2) responses. The Evaluation Committee may schedule a meeting(s) with a Developer (s) for the Developer (s) to explain or clarify their Proposal(s). Such meeting(s) will not be used for the Developer (s) to provide new information but will only be used to explain or clarify information provided in the Proposal(s).

The Committee's evaluation will be presented to the AUTHORITY's Board of Directors **[*20]** for final action. The Board may interview Developers as provided in Section 3.4. The Board will consider the Committee's evaluations, interviews, and its determination of how each Proposal best serves the interest of the AUTHORITY and its member-governments in making a final selection and taking final agency action on Proposals received in response to this RFP.

(TBW Ex. 9 at Section 2.5, as superceded by Addendum No. 2)

28. The RFP also clearly indicated that the evaluation and ranking of the responses would be followed by a period of negotiations, potentially including simultaneous negotiations with more than one developer, and that any contract ultimately awarded would be the result of such negotiations. Section 1.5.10 of the RFP, entitled "Contract Negotiations, " stated:

Contract negotiations will be based on the draft Water Supply Agreement provided by Developer . . . and the information in their Proposal. The AUTHORITY reserves the right to conduct simultaneous negotiations with the top rank developers if it is in the best interest of the AUTHORITY." Section 2.4 of the RFP, entitled "General Contract Information," stated that "The nature and term of the contract with **[*21]** the Developer will be negotiated. It is anticipated that a long-term contract will be negotiated to finance, design, build and operate the seawater desalination supply. The Developer will sell water to the AUTHORITY at a negotiated price, quality and quantity for a set period.

Section 3.1, subpart (16), of the RFP required each developer to submit a proposed contract with its response and stated: "The final contract conditions, including the delivered water price, will be determined through contract negotiations. "

29. WCRWSA always envisioned that the Project would entail a series of simultaneous negotiations with one or more developers. WCRWSA reasonably believed that simultaneous negotiations with more than one developer would ensure greater competition in the procurement process.

30. The RFP also provided: "The AUTHORITY reserves the sole and exclusive right to waive any minor irregularities, as determined by the AUTHORITY, in any Proposal, to reject any or all Proposals, and to re-solicit for Proposals, as may be deemed to be in the best interest of the AUTHORITY." (TBW Ex. 9, at p. 3, Section 1.5.5)

31. The RFP did not prohibit changes to the organization, **[*22]** structure of the organization, responsibilities, etc., from that provided in the SOQs. Rather, Section 3.1 of the RFP required:

Any substantial changes to the organization, structure of the organization, responsibilities, etc. from that provided in the Statement of Qualifications should be highlighted in the Proposal. Unless the changes to the organization, proposed financing, plant processes, etc., from those proposed in the Statement of Qualifications are clearly beneficial to development of an economically viable seawater desalination water supply, the changes may result in disqualification of the Proposal.

32. Section 3.1 of the RFP required that independently audited financial statements be furnished for all developer team members.

33. Section 3.2 of the RFP required the developers to submit a "legal land use agreement" for their proposed sites.

C. Evaluation and Ranking of Proposals

34. Each of the five pre-qualified developers submitted a response to the RFP. In early March 1998, PB Water issued a two-volume report entitled "Proposal Evaluation and Ranking. " (TBW Ex. 15-16) This report preliminarily ranked the proposals based on a 20 mgd facility. As noted **[*23]** by PB Water in the report: "This was the only option to which all the Developers were required to respond, and it was the only option to which they all did respond."

35. PB Water's ranking was based on the 22 specified evaluation criteria set forth in the RFP. PB Water observed:

Each of the proposals was found to contain some deficiencies and/or lacked sufficient supporting or backup material in one or more area. Clarification meetings, teleconferences and facsimiles were exchanged with each of the Developers to explain or clarify certain items in their Proposals. Such information exchanges were not intended for the Developer (s) to provide new information but to explain or clarify the information provided in the Proposal(s).

36. On March 16, 1998, the WCRWSA Board received and reviewed PB Water's evaluation and ranking of the proposals. PB Water presented its ranking of the proposals and recommended that the top four developers be advanced to the next stage of the process--Board interviews. The Board eliminated the Enova proposal from any further consideration and approved the ranking of the remaining four developers based on PB Water's evaluation. The Board also decided **[*24]** to hold a workshop for the developers on the morning of April 20, 1998, immediately prior to the regular Board meeting that day, to give the developers guidelines and a framework for their presentation to the Board.

37. At the workshop on April 20, 1998, WCRWSA discussed, among other things: how the evaluation criteria would be weighted and used for the final ranking of proposals; what role PB Water would play during the presentations by the developers; and what guidance would be given the developers as to the form and content of their presentations to the Board. The Board discussed that the initial proposal ranking was a "shortlisting" process and that the initial 22 evaluation criteria had served their purpose of identifying quality proposals. PB Water suggested that the final assessment criteria be based on five broader categories: plant siting and design; environmental effects; permitability; product water quality and delivery; and schedule, contract terms, and financial factors.

38. The Board approved the use of the five broader categories, based on the original 22 criteria. However, the Board did not want to be bound by point totals in making its final selection **[*25]** of the top proposals. The Board was concerned that, under the point system, a number of relatively insignificant, minor differences between proposals could accumulate to give a false impression that one was better than the other. The Board wanted the final assessment to focus on the broad categories, compare the proposals on each category, and use letter grades to compare the proposals on each category. It was hoped that, using this method, only distinctions between proposals that were regarded as substantial would be reflected. Finally, the Board specified that it did not want PB Water to assign an overall comparison of the proposals; the Board reserved to itself the right to make the ultimate comparison at a later time based on relevant policy considerations.

39. The Board also discussed whether it wanted to consider plant capacity options greater than 20 mgd. Ultimately, it was determined that the developers should present information for plants of between 20 and 35 mgd, based on their original proposals.

40. Finally, the Board scheduled developer presentations and interviews for May 4, 1998.

41. After condensing the 22 criteria into five major categories, PB **[*26]** Water produced a cross-reference table that showed how the original 22 criteria were related to the five categories. In assigning a letter grade to the five categories, PB Water utilized the same criteria as used in the first evaluation. The determination of the letter grades was based on the exercise of PB Water's best professional judgement and the criteria applicable to each of the five categories.

42. WCRWSA's Board approved its General Counsel's recommendation at its meeting on May 18, 1998, that Lindeman, the Project Manager, be authorized to negotiate on behalf of the WCRWSA through simultaneous negotiations, with any resulting contract recommendation to be presented to the Board for consideration and action.

43. In June 1998, PB Water issued its Final Proposal Assessment of the four remaining proposals. For this report, the 22 evaluation criteria were grouped into the five broader categories.

44. Based on WCRWSA's interest in construction of a desalination facility with a firm base capacity of up to 35 mgd by the year 2001, PB Water evaluated the base capacity proposals of each developer and certain alternative proposals falling within these capacity and **[*27]** time parameters. The proposals were scored on a relative basis using a scale of "A" to "D" for each of the five evaluation categories. In accordance with the Board's instructions, the proposals were not "ranked" on an overall basis at this time.

45. On June 15, 1999, after reviewing the results of the evaluation, WCRWSA eliminated one of PEIP's alternative proposals--one proposed at the former Higgins plant site on Old Tampa Bay.

D. Commencement of Simultaneous Negotiations
and the RFBO

46. At the Board meeting on July 20, 1998, WCRWSA authorized its staff to conduct simultaneous negotiations with all four developers. The Board directed staff that the negotiations should set up a matrix identifying price components of various plant capacities and should further develop water quality standards. The intent was to narrow the focus by examining three potential plant capacities and three different sets of product water quality parameters. The Board wanted to obtain as nearly equivalent proposals as possible and then embark on negotiations with all four developers based on these specific proposals.

47. On July 31, 1998, in order to satisfy the Board's directives, staff **[*28]** issued a Request for Binding Offers (RFBO) to the four remaining developers. Addendum No. 1 to the RFBO was issued on August 12, 1998. The Binding Offers were required to be submitted by August 28, 1998. Binding Offers were timely submitted by all four developers.

48. At WCRWSA's meeting on August 31, 1998, WCRWSA was dissolved and the new TBW was formed. TBW considered PB Water and staff's presentation of a "cursory review" of the Binding Offers just received and recommendation to schedule simultaneous negotiations with the four developers which had submitted the Binding Offers. The Board approved a modified schedule that called for a final "go/no-go" decision on the desalination project in November 1998 and selection of a top-ranked developer in January 1999.

49. Simultaneous negotiations took place with all four developers weekly until the December 1998 Board meeting. The Binding Offers and subsequent negotiations were partially successful in developing more nearly equivalent results. Although TBW was successful in producing a model water purchase agreement, it was not successful in obtaining the insurance and surety bond or project financing information it desired **[*29]** from the developers.

50. In examining the insurance and surety bond terms as well as in developing the model water purchase agreement, TBW received input from not only the developers, but also from a variety of consultants and its Technical and Legal Advisory Committees. In addition, TBW reviewed project financing options, including FSDC's proposed "63-20" financing, taxable and tax-exempt financing, and private activity bonds. TBW also considered accepting a letter of credit in lieu of a cash contribution from the developers but decided that a cash contribution would be required.

E. Continuation of Simultaneous Negotiations, the Master Water Plan, and the RFBAFO

51. On November 16, 1998, TBW approved a "Master Water Plan" intended to meet the requirements of the Amended and Restated Interlocal Agreement and the requirement of the Partnership Agreement to develop the "New Water Plan." This plan established the projects selected by TBW to meet the requirements of groundwater reduction and new supply development. Based on an update on the status of the simultaneous negotiations and some additional recommendations, the Board adopted the seawater desalination project as a **[*30]** part of the Master Water Plan.

52. Based on the Master Water Plan, the Board specified an initial plant capacity of 20-25 mgd with an expansion capacity to 35 mgd. It also opted for an owner-controlled, integrated insurance program and tax-exempt private activity bond financing. To address incomplete information about the Binding Offers, and in an effort to extract the remaining details from the developers, the Board also approved solicitation of "Best and Final Offers" ("BAFOs") limiting the developers to a base offer and one alternative offer.

53. On December 14, 1998, and December 21, 1998, PB Water, TBW staff and legal counsel presented a further update and recommendations to the Board. The Board directed the preparation of a Request for BAFO ("RFBAFO") to be presented for final approval at its January 1999 meeting.

54. On January 25, 1999, the Board approved the form of a draft Water Purchase Agreement (WPA) and the RFBAFO and set a February 1999 deadline for submittal of the BAFOs. The Board directed PB Water to provide a relative ranking of the Developers based on their BAFOs, applying the same five evaluative categories as had been utilized previously.

[*31] 55. On January 27, 1999, TBW sent the RFBAFO to the Developers. The Developers were instructed to submit any questions or requests for clarification and to attend a clarification meeting. On February 4, 1999, a Clarification Meeting was held with all developers in attendance, and all questions were addressed by TBW staff and consultants.

56. On February 5, 1999, a memorandum containing the Developers' questions and the answers provided to them at the meeting was sent to the Developers. In addition, revised instructions and tables were sent out to ensure consistency with the clarifications. A memorandum containing corrections to scrivener's errors was sent to the Developers on February 8, 1999.

57. The RFBAFO served to further narrow the scope of the solicitation and to put into place a mechanism for selection of a developer for final negotiations. TBW made it clear in this final step of the procurement process that, at its sole discretion, it could consider the BAFOs as the basis for further negotiations; TBW was not bound to accept the lowest proposed price and reserved the right to make a selection based on the criteria specified in the RFBAFO.

58. TBW also specifically **[*32]** reserved the right to reject any and all BAFOs, the right to waive or modify minor irregularities in any BAFOs received; and the right to negotiate separately with any source in any manner that was deemed to be in the best interest of TBW.

59. The draft WPA that had been developed during the simultaneous negotiations with the Developer teams was attached to the RFBAFO. TBW likewise reserved the right to modify this WPA form during final negotiations with the selected Developer to meet insurance and surety company requirements, project financing requirements, or other requirements as deemed appropriate by TBW. TBW cautioned the Developers that the instructions which accompanied the RFBAFO were intended to provide information and guidance in the preparation of their BAFO and that the draft WPA contained additional requirements for the preparation of the BAFO. The Developers were instructed to identify and disclose any inconsistencies between the instructions and draft WPA which they perceived and to explain the assumptions they utilized in preparing their proposal in the event they differed from the instructions and draft WPA.

60. The RFBAFO bound the Developers to all **[*33]** information, including the required General Information and the Technical Proposal, submitted in each original RFP proposal received on December 3, 1997, except as modified by the Binding Offers and clarifications, or as otherwise provided in the RFBAFO. The RFBAFO also required the costs in the Binding Offers to remain binding as the maximum allowable costs in the BAFO except as provided in the RFBAFO.

61. In order to provide an equivalent basis for the selection of a Developer, any changes or corrections to their previous proposals were limited to those necessary to meet the terms and conditions of the draft WPA and the requirements of the RFBAFO instructions. The evaluation criteria remained the same as for the RFBO.

62. The RFBAFO specifically provided that the evaluation criteria previously adopted by the TBW Board would remain the same. The Board noted that it had previously directed PB Water to group the evaluation criteria into five broad categories for final evaluation and ranking of the proposals. The RFBAFO went on to point out that the 22 original evaluation criteria had been consolidated into the same five assessment categories: environmental effects; permittability; **[*34]** product water quality and delivery; schedule; and water purchase agreement terms and financial factors (including present value analysis and impact on rate stability).

F. The BAFOs

63. BAFOs were timely submitted by all four developers. Although each BAFO contained some incomplete information which did not fully conform to the RFBAFO, TBW accepted all of them for evaluation purposes as though they were complete and noted the flaws for the Board's consideration.

64. S&W's BAFO prices were significantly lower than the other BAFOs. See Findings 76, infra. The cover letter to S&W's proposal contained an overall guarantee of its BAFO prices. PB Water treated the letter as part of the BAFO and construed the entirety of the cost and pricing as guaranteed. PB Water gave S&W an "A" in the category "water purchase agreement terms and financial factors."

65. In its BAFO, S&W modified its intake and discharge. By proposing to take its feed water from the cooling water of Tampa Electric Company's (TECO's) Big Bend power plant before its discharge to the power plant discharge canal, S&W would avoid entrainment, impingement and mortality of additional marine organisms in its **[*35]** water intake system. Similarly, by discharging the concentrate discharge from the desalination plant to the power plant cooling water prior to its discharge to the power plant discharge canal, environmental impacts

from the concentrate discharge would be minimized, and disturbance of the discharge canal would be avoided. This change in S&W's intake and

discharge system resulted in a higher grade than FSDC in both environmental and permittability categories.

66. The proposed location of FSDC's intake and discharge structures in the discharge canal of the Anclote Power Station produces greater environmental impact on entrainment, impingement, and mortality of marine organisms because of the introduction of such organisms through the cooling water bypass utilized by the power plant. It also requires disturbance of the bottom of the canal to construct the discharge line and diffuser. The S&W design does not result in similar impacts, and it was PB Water's opinion that S&W's BAFO would be more readily permittable.

67. TBW also determined through studies performed by its consultants that locating the plant at TECO's Big Bend power plant would not cause significant environmental **[*36]** impact.

68. Based on primarily on S&W's redesign, PB Water gave S&W "A" in "plant siting and design," "environmental effects," and "permittability."

69. PB Water presented its evaluation of the BAFOs by way of a written report dated March 1, 1999, and an oral presentation of its evaluation to the Board on March 15, 1999. PB Water ranked the Developers: 1. S&W; 2. FWP; 3. PEIP; 4. FSDC. The S&W BAFO received an "A" grade in each rating category.

70. At the March 15, 1999, Board Meeting, the Board approved the recommended ranking and instructed staff to commence negotiations with the top-ranked Developer, S&W, for the purpose of developing a final WPA based on S&W's BAFO. In the same process, the Board selected water quality option 2 as the system design standard.

71. After the March 15, 1999, ranking and decision to negotiate with S&W, Petitioner filed a protest, which TBW dismissed on April 19, 1999. The Final Order Dismissing Formal Protest was appealed to the District Court of Appeal, Second District of Florida.

72. At the July 19, 1999, Board Meeting, staff presented and recommended approval of a WPA negotiated with S&W over the course of the three **[*37]** preceding months. After deliberation, the Board approved the WPA, and it was executed by the TBW and S&W Water that same day.

73. Petitioner timely filed its Notice of Protest on

July 22, 1999, and timely filed its Formal Written Protest on July 29, 1999. Neither PEIP nor FWP protested. TBW and S&W defended against Petitioner's protest and challenged Petitioner's standing.

Claim Of Unrealistic, "Low-ball" Proposal

74. Petitioner claims that S&W's BAFO water price is an unrealistic, unattainable, "low-ball" proposal.

75. All BAFOs proposed using essentially the same reverse osmosis process. Yet, without question, S&W's BAFO water price is palpably lower than the prices of the other water developers. It also is significantly lower than any existing price for seawater desalination in the world. The low cost is a primary reason why S&W's BAFO received an "A" on the category "water purchase agreement terms and financial factors."

76. The first-year average for the BAFOs submitted by FSDC, FWP, and PEIP was $ 2.05; these three Developers are all within $ .06 or 3 percent of the average. S&W's BAFO price was $ .34 or 16.6 percent below this average. The 30-year **[*38]** average for FSDC, FWP, and PEIP was $ 2.42. The largest variation among these three Developers from the average was FWP at 6 percent below the average. S&W's price of $ 2.08 was 14 percent below the average, more than 8 percent below the next low bid of FWP at $ 2.27.

77. All Developers spent substantial amounts of money, time, and effort over more than two years to refine their prices. Yet, S&W reduced its 30-year price by $ .80 (2.88 - 2.08 = .80) between its Binding Offer and BAFO. This is a 27.8 percent decrease.

78. S&W's reduction from its Binding Offer to its BAFO occurred primarily in Operations and Maintenance (O&M), which is approximately 60 percent of the costs (see PX 244). Table 3-G from S&W's Binding Offer 20 mgd showed total "Other Escalated Charges" ranging from $ 4,500,000 in year one to $ 10,604,545 in year 30. S&W's BAFO shows a combined "Chemical Cost Escalated Charges" and "Other Escalated Charges" for a 25 percent larger plant (25 mgd) ranging from $ 2,950,863 in year one to $ 7,714,866 in year 30. S&W's O&M in its BAFO price was from 66 percent to 73 percent of the O&M in its Binding Offer price, even though the plant size has increased **[*39]** by 5 mgd, or by 25 percent.

79. FWP also reduced its prices substantially from the Binding Offer to the BAFO, but its Binding Offer prices were quite high due to FWP's proposed efficacy insurance program. The reduction in FWP's BAFO brought its prices in line with FSDC and PEIP. By comparison, S&W's Binding Offer prices fit into a narrow range that included the FSDC and PEIP prices.

80. Knowledgeable witnesses questioned the S&W prices. Dan Smith, President of Enpower, whose background is in the commercial and pricing side of infrastructure projects and in the RFP process, gave his opinion that S&W would not be able to perform under the WPA at its BAFO prices. Sweet and Elovic of FWP and Keppeler of PEIP, all of whom have considerable technical expertise, testified essentially that their developer teams would not enter into a WPA at S&W's BAFO water prices. Keppeler testified that PEIP was "astonished at the low pricing that was offered by [S&W]."

81. The other Developers expressed their reservations about the S&W prices soon after the BAFOs were received. PEIP wrote the TBW Board on March 11, 1999: "There remains skepticism regarding the validity of the delivered **[*40]** water prices and the extent to which they are guaranteed." FSDC wrote several letters complaining about S&W's prices not being guaranteed.

82. After ranking S&W's BAFO best and deciding to enter into negotiations with S&W, TBW's efforts were directed towards testing the validity of S&W's BAFO, maintaining the benefit of S&W's low price, and structuring the WPA so as to eliminate the financial risks to TBW of S&W's possible failure to perform in accordance with the WPA.

83. R.W. Beck was hired by TBW to serve as an independent reviewer to evaluate the financial feasibility of the WPA. The Beck Report of July 14, 1999, raised and addressed questions about the ability of S&W to produce water of the quality required at the price proposed. Beck noted that S&W's BAFO "is designed for product recovery of 60 percent. A 60 percent recovery is at the upper end of recovery for a seawater system." Beck also noted that costs "are near or at the low end of the reported range for reverse osmosis seawater desalination plants, " and "certain details remain to be resolved." But Beck also noted that S&W was responsible under the contract. For instance, R.W. Beck reported:

The cartridge **[*41]** filter life of six months may be optimistic. A more conservative design would allow for at least a quarterly replacement schedule. . . . While the estimated useful lives of certain assets are optimistic, not yet proven or contingent on maintenance practices, pursuant to the provisions of the Water Purchase Agreement the Water Developer is responsible for their replacement. (p. 12).

84. Beck questioned the reasonableness of membrane and energy costs, which are major operational cost components:

With the exception of membrane and energy costs, the plant annual operating and maintenance expenses appear reasonable including the staffing levels. (p. 13).

85. Beck noted that membrane costs are low:

[P]er unit membrane costs are low. . . . membrane costs on Table 8 of the Proposal are less than our estimated costs for the first twenty-five years of the Water Purchase Agreement. . . . It appears the Water Developer has assumed in Table 8 an average membrane life greater than five years or alternatively lower membrane costs than $ 400 per membrane in current dollars. (p. 13).

86. Beck found the pump and motor efficiencies to be "at the high end of reported pump and **[*42]** motor efficiencies."

87. Overall, Beck said:

In general, the cost of both capital and operations included in the Proposal by the Water Developer are at the low end of the reported range for seawater desalination plants utilizing similar equipment. (p. 13).

* * *

The projected capital and operating costs of the Proposal are near or at the low end of the reported range for RO seawater desalination plants with which we are familiar. (p. 17).

88. While S&W's O&M projections are low, FWP's O&M costs are only slightly more than S&W's O&M costs. On the other hand, FWP's construction costs are considerably more than S&W's construction costs, which may suggest that FWP allocated some cost items to construction that S&W allocated to O&M. FSDC's and PEIP's construction costs and O&M costs are comparable.

89. TBW required that S&W's guaranteed BAFO costs and prices be maintained throughout the final negotiations with S&W. The ultimate pricing mechanism contained in the final WPA produces a final wholesale product water price which does not exceed S&W's BAFO. At the same time, the WPA which was entered into by TBW and S&W on July 19, 1999, contains all the material terms proposed **[*43]** in S&W's BAFO.

90. Petitioner contends that S&W has negotiated a $ .15 price increase in the first year and a $ .22 increase in average price over 30 years per 1,000 gallons to meet the water quality Option 2 bromide standard of 0.15 mg/l contained in the RFBAFO. These amounts are not insignificant. The dollar increase over the 30 years of the WPA would total over $ 60 million. But there is a reasonable explanation why TBW acceded to this price increase in negotiations.

91. During its review, Beck raised a question about the ability of the S&W system to achieve the reduction of bromides in the product water to meet the .15 mg/l level at the point of interconnection of the desalination plant pipeline to the TBW system.

92. The RFBAFO instructed the Developers to include, as part of their BAFO, pricing information for two water quality options, options 1 and 2, which were reflected in Table 9 attached to the RFBAFO. The Developers were also instructed to review all applicable Federal and State of Florida drinking water standards (as of January 27, 1999) and a Camp, Dresser & McKee Exhibit D to the TBW Master Water Supply Contract dated May 18, 1998. The Exhibit **[*44]** D standards for water quality Option 1 and Option 2 were summarized in Table 9 of the Request. Exhibit D reflected both adopted standards and other water quality constituents which were then (and still are) under study by TBW's consultant, Camp, Dresser & McKee. Bromides are one of the constituents under study by TBW. Exhibit D provided that its bromide standard established a suggested range for "conceptual design and cost estimating purposes"; it indicated that a final range or unit would be developed as the result of a further study.

93. Exhibit D standards are water delivery standards measured at TBW's delivery point to the member-governments. However, for uniformity in comparing the BAFOs, the RFBAFO provided that the product water quality concentration levels were to be determined at the point of delivery prior to mixing by TBW with waters from other sources. The RFBAFO designated the Developers' delivery points of interconnection with the TBW system as the Keller Water Treatment Plant for FSDC and PEIP and the proposed TBW regional water treatment plant site for FWP and S&W.

94. Product water bromide levels are not normally considered in the design of desalination **[*45]** plants. In order to reach a conclusion about the actual ability of a desalination system to achieve this level of bromide reduction, it is first necessary to know the level of bromides in the source water. The sampling and analysis of the source water has not yet been completed.

95. The level of chlorides in the product water from the desalination plant was the primary concern to TBW and its member-governments. The efficiency in removing chlorides was the center of the Board's discussion of the

developers' proposed designs. Chloride removal efficiency was the primary basis for all of the developers' designs. However, the removal efficiency of chlorides and bromides is essentially the same.

96. When Beck raised the issue, PB Water conducted an investigation of membrane efficiencies and determined that none of the developers could achieve a bromide level of .15 mg/l at the water quality Option 2 chloride level of 100 mg/l. PB Water determined that, to achieve a bromide concentration level of .15 mg/l, all of the developers' systems would have to be redesigned to the equivalent treatment to meet the Option 1 chloride level of .05 mg/l. PB Water determined that redesign would **[*46]** result in a commensurate Option 1 price because design and price are inextricably linked.

97. The TBW Board was informed of the bromide issue and was presented with a proposed solution that paralleled the Exhibit D study process which was already underway. Under the proposal, which the Board adopted, the WPA would establish a Pilot Program to test water quality after blending S&W's product water with TBW's system water. At the conclusion of the S&W study and a study by Black & Veatch, the Board would have an opportunity to determine whether S&W's system can achieve the Option 2 bromide level at the point of interconnection. If not, the Board would have the option of either waiving that requirement and permitting the standard to be met at the point of delivery to the member-governments (as contemplated in Exhibit D) or establishing an entirely new bromide standard which differs from the Exhibit D suggested .15 mg/l level. Alternatively, the Board could retain

the Exhibit D .15 mg/l standard and agree to pay S&W its water quality Option 1 price.

98. S&W's Option 1 price was $ 1.86 for year one and an average of $ 2.30 per 1,000 gallons for 30 years. While higher than **[*47]** its Option 2 price, S&W's Option 1 price not only was lower than the competition's higher Option 1 prices, it also was lower than all of their Option 2 first-year prices and lower than all of the 30-year life-cycle average prices except FWP's. (FWP's 30-year life-cycle average price was $ 2.27 per 1,000 gallons; Petitioner's was $ 2.45, and PEIP's was $ 2.53.)

99. Petitioner also contends that S&W has negotiated a $ .06 water price increase the first year and $ .10 average over 30 years per 1,000 gallons to remove "financing contingencies." (The dollar increase over the 30 years of the WPA would total over $ 27 million.) But the evidence was that TBW and S&W negotiated this increase as an option for the purpose of further decreasing financing contingency risks to TBW below levels contemplated in the RFBAFO. In other words, if TBW exercises the option, financing contingencies contemplated by the RFBAFO will be reduced in return for the additional negotiated cost to TBW.

100. It seems clear that S&W priced its BAFO low to beat the competition. To accomplish this, it appears that S&W's BAFO "pushed the envelope" of commercially proven standards for construction **[*48]** and operational costs and performance. But inducing the Developers to commit to a low water price was a primary purpose of the procurement process. Petitioner's complaint would have some validity only if it could be proven that S&W lowered its prices to unreasonably low levels for the purpose of "getting to the table" and then negotiated them back up to levels closer to its competitors' BAFO prices. The evidence was clear that did not happen.

Claim Concerning Bromide Standard

101. Petitioner also claims that S&W's BAFO was non-responsive and should be disqualified for not meeting the bromide standard. But this is nothing more than another iteration of the claim that S&W's prices were "low-balled," as allegedly demonstrated in part by the potential price increase to meet the Option 2 bromide standard. As explained in Findings 91-96, supra, TBW and all of the developers overlooked the bromide standard as being of less concern than the chloride standard, and none of the BAFOs would meet the bromide standard using the process proposed to meet Option 2 water quality standards.

102. FSDC and FWP testified that they would meet the Option 2 bromide level at their Option 2 prices. **[*49]** Elovic testified that FWP would establish a model, check the bromide level, and make whatever adjustments were necessary to achieve the 0.15 ppm bromide level. He testified that the guaranteed prices would not be affected by any "small" cost increase required to meet the Option 2 bromide standard. But PB Water determined that the other

developers actually would have to redesign their proposed processes so as to meet Option 1 standards in order to meet the Option 2 bromide standard. In essence, the current claims of Petitioner and FWP amount to "second-look" pricing since they did not actually contemplate the needs for achieving Option 2 bromide standard at the point of interconnection to the TBW system until after the award, contract, and protest. It was not until after they lost the business to S&W that they essentially offered to meet Option 1 water quality standards at their Option 2 prices.

Claim About Guaranteed Prices

103. Petitioner claims that S&W's BAFO lacks guaranteed pricing for various reasons, but this is nothing more than yet another iteration of the "low-balling," "bromide standard," and "financing contingency" claims. As previously found, S&W's prices were guaranteed, **[*50]** and TBW got the benefit of those guarantees in the negotiated WPA.

104. Petitioner contends that TBW's reading of the cover letter to S&W's BAFO to guarantee its prices would be "inconsistent with the terms and conditions in the BAFO itself, which provides that the Binding Offer contains the maximum prices." Actually, S&W's BAFO seemed to merely affirm compliance with the part of the RFBAFO cautioning the developers that BAFO prices could not be higher than their Binding Offer prices. While this may have been confusing, it was not inconsistent for S&W to also offer to guarantee BAFO prices that were lower than its Binding Offer prices. Lower BAFO prices certainly were not prohibited by the RFBAFO, and it was reasonable for TBW to give effect to the price guarantee contained in the cover letter.

Claim That WPA Is Indefinite And Makes

"Adjustments" Contrary To The RFBAFO

105. Petitioner claims that the WPA is indefinite, allows for negotiation of substantive and material terms, and allows for pass-through charges contrary to the RFBAFO. In part, this is nothing more than yet another iteration of the "low-balling," "bromide standard," and "financing contingency" claims. **[*51]** Petitioner also contends that the WPA is inappropriately indefinite in other respects.

106. The WPA provides that if S&W does not get sufficient influent (feed) water at no cost, TBW is required to pay a standby compensation rate of $ 1.14 per 1,000 gallons or reimburse S&W for all costs incurred in obtaining sufficient influent water. As of the execution of the WPA, there was no firm commitment by TECO to supply feed water. However, there is no expectation of a problem obtaining such an agreement from TECO. The standby compensation provision was intended to address the contingency of TECO's ceasing operations towards the end of the 30-year life-cycle of the desalination plant, or during either of the two optional 30-year extensions of the WPA.

107. Under the WPA, TBW and S&W are to "mutually develop influent water specifications. " Influent water specifications are a major factor in operating costs, and it is conceivable that S&W will attempt to negotiate influent water specifications in a narrow range that would make it less expensive for S&W to operate the plant. Petitioner raises the specter that, if such specifications are negotiated, and if influent water does **[*52]** not meet the negotiated specifications, S&W might be in a position to invoke the standby compensation/cost reimbursement provision of the WPA.

108. As found, the WPA establishes a Pilot Program to test water quality after blending S&W's product water with TBW's system water as part of TBW's way of addressing the bromide standard issue. The WPA provides that TBW will reimburse S&W for Pilot Program costs in excess of $ 50,000. Petitioner points out that no such Pilot Program and cost reimbursement agreement was included in the RFBAFO. But that is because the bromide standard problem was not discovered until later. See Finding 91, supra. Petitioner raises the specter that the cost reimbursement provision exposes TBW to the risk of having to reimburse costs in "an unknown amount." There is was no evidence from which it could be determined that Pilot Program costs would exceed $ 50,000 or, if so, by how much.

109. Petitioner contends that the O&M Term Sheet, Exhibit 4.2.1B to the WPA, provides that it can be revised "upon the final terms and conditions negotiated by S&W and an O&M contractor to be selected to operate the

plant. " Petitioner points out that it had "a guaranteed **[*53]** O&M contract price in place through U.S. Water" and would not have required term sheets subject to revisions.

Petitioner raises the specter that "[t]his will have a direct bearing upon the delivered cost of water."

110. Actually, the WPA's O&M Term Sheet simply provides that it can be "revised to, and the [WPA] shall, assure consistency with and reflect the terms of the [WPA] as such terms relate to the [O&M] Work Scope." While perhaps circular, this provision does not create a loophole for negotiation of an O&M contract inconsistent with the WPA or RFBAFO.

111. There was nothing in the RFBAFO requiring developers to have a O&M contract in place at the time of the BAFOs; to the contrary, it was contemplated that such a contract could be negotiated after the WPA on terms consistent with the WPA and the RFBAFO.

112. Petitioner complains that the "Term Sheet on construction performance bond does not indicate costs, which are being passed through to TBW, and there is no mention of the $ 4,500,000 that was required to be included in the BAFOs for construction performance and security." Petitioner seems to contend that this exposes TBW to costs not contemplated in the **[*54]** RFBAFO: "The reasonable cost associated with financing or subsequent refinancing of Project Debt will be a pass-through to [TBW] and will include Water Developer's financing-related transaction costs." An adjustment for a change in interest rates (that were required to be assumed in the BAFO) was the only adjustment contemplated by the RFBAFO.

113. Petitioner did not make it clear how failure to insert the amount of the construction performance bond on the form included as Exhibit 18.2.1.2A to the WPA would expose TBW to the possibility of an adjustment in addition to the interest adjustment allowed under the BAFO.

114. As for the $ 4,500,000, the evidence was clear that the RFBAFO required all developers to include this in their BAFO as the presumed cost of the required Controlled Integrated Insurance Program. Later, TBW determined that the actual cost for the required insurance program probably would be less, perhaps more like $ 3.2 million. WPA Exhibit 18.3.1 actually includes an estimated premium of $ 3.2 million for the required Controlled Integrated Insurance Program, but TBW still is considering whether to allow S&W to provide the required insurance program **[*55]** at a reduced cost or to require S&W to provide an enhanced insurance program for $ 4.5 million or some other higher cost to S&W in excess of $ 3.2 million.

115. Petitioner contends that WPA Section 8.1.2.0 [sic] [actually 8.1.2.1] reduces S&W's risk without a corresponding decrease in water cost by providing:

If the Facility is unable to meet the Acceptance Standards based on the Design Capacity . . . the Design Capacity shall be adjusted to the level at which the facility can meet the Acceptance Standards.

What Petitioner omitted was the language "after using all available insurance proceeds and the available proceeds of the EPC Construction Performance and Payment Bond."

116. Petitioner neglected to mention that TBW negotiated additional security at S&W's expense not even required by the BAFO. WPA Exhibit 4.4.2 is a term sheet for the provision of "Development Period Security" backed by letter(s) of credit. The amount of the required letter(s) of credit is scheduled to vary from an initial amount of $ 1.5 million to $ 9.5 million 5 days prior to the permitting deadline in the WPA. Under this security provision, TBW can draw against the letter(s) of credit as **[*56]** its remedy under WPA Section 11.2 (failure to cure defaults) for any failure to perform obligations under WPA Section 4.2.1 (certain permitting and completion deadlines.)

Claim About Unfair, Anticompetitive Practices

117. Petitioner claims that TBW "improperly corrupted and negated the [RFBO] process by thereafter imposing new requirements and by requesting [BAFOs]." In part, Petitioner simply complains about the nature of the procurement process used by WCRWSA and TBW. Petitioner refers to the process as an "auction," noting that some Board members cautioned against the process devolving into an "auction."

118. Actually, as already found, the process was not an auction. It included: the use of an RFP process to solicit quality seawater desalination DBOOT proposals, prior to any final decision to proceed with seawater desalination, for subsequent contract negotiation, with reservation of the right to abort the RFP process and negotiate with one or more proposers, or with any source; the use of the RFBO to begin the process of simultaneous negotiation with four proposers by soliciting more comparable Binding Offers having the features TBW wanted at that point; a final "go" **[*57]** decision on desalination and a choice of plant capacity; the use of the RFBAFO to conclude the process by soliciting even more comparable BAFOs having more of the features TBW wanted at that point, to wring out an even better deal for TBW, and to proceed with the development of a WPA; and, ultimately, sequential, exclusive final contract negotiations with the highest-ranked BAFOs, which succeeded on the first try with S&W. The evidence is clear that the WCRWSA and TBW Boards chose the procurement process employed.

119. Petitioner also complains that it offered the best response to the RFP (assuming its incomplete and deficient Appendix J surface-water intake option were considered and given the same scores as PEIP's more complete Anclote proposals) and contends that its Binding Offer also should have been scored highest (at least on price, if TBW had decided to score and rank Binding Offers.) Petitioner now faults TBW for not halting the process at those stages. But, as previously found, Petitioner did not protest the procurement process until the last step in the process--the ranking of BAFOs and decision to initiate sequential, exclusive final contract negotiations with **[*58]** the highest-ranked BAFOs.

120. Petitioner also complains that combining the 22 weighted RFP criteria into the five broader categories for the rest of the procurement process eliminated all objectivity. Although Petitioner's counsel was able to extract an admission from one TBW witness that the change made the process subjective, other witnesses maintained that the subsequent reviews were objective in nature even though there was room for the exercise of professional judgments and for Board policy considerations.

121. Petitioner also complains that rankings for "permittability" and "environmental effects" for Big Bend and Anclote proposals changed between final assessment of the responses to the RFP in June 1998 and ranking of the BAFOs in March 1999. Petitioner characterizes the reasons for the changes as being "obscure." But the evidence was clear that the rankings changed primarily due to the redesign of S&W's proposal. See Findings 65-66, supra.

122. Petitioner also complains that the "permittability" and "environmental effects" of S&W's Big Bend site were not studied enough to justify S&W's ranking in those categories. Virtually all marine life on the West Coast **[*59]** of Florida depends upon Tampa Bay at some point in its life cycle, and many small organisms cannot survive changes in salinity and are killed as they move through the water and encounter such changes. But TBW determined through studies performed by their consultants that locating the plant at TECO's Big Bend Power Station on Tampa Bay would not cause significant environmental impact.

123. In a report prepared for TBW dated April 30, 1998, the consultant advised that the cumulative impacts of a 20 mgd desalination plant at Big Bend and other water withdrawals by TBW would produce "4% increase in salinity in September in lower Hillsborough Bay and a 6% increase in salinity in September in upper Hillsborough Bay, averaged over the respective Bay segments." Petitioner offered testimony from Dr. Nick Ehringer regarding potential impacts to Tampa Bay from salinity increases of that magnitude. But Dr. Ehringer did not review the available data or TBW's consultants reports, and he performed no scientific study upon which his opinion could be based. Instead, Dr. Ehringer relied on information he read in the newspaper and additional data he received from Dan Smith of Enpower. Dr. Ehringer **[*60]** utilized an out-of-date assumption regarding withdrawals of surface water from the Bay because he failed to consider that TBW had abandoned the Tampa Resource Recovery Project. In fact, in commenting on a report prepared by one of TBW's consultants which he had never reviewed prior to the final hearing, Dr. Ehringer offered an opinion that expressly ignored the conclusion reached in the report. Dr. Ehringer's conclusions are not supported by any reliable scientific study, and his opinions as to the probable impacts of S&W's proposed desalination project at Big Bend are not persuasive.

124. One study done for TBW was entitled "Impact Analysis Of the Anclote Desalination Water Supply Project," dated March 15, 1999. The Tampa Bay Regional Planning Council recommended a similar study for Big Bend, but no such study was done. TBW believed it had enough information to compare the proposals for "permittability" and "environmental effects."

125. Petitioner also complains that they were unfairly prejudiced by TBW's decision to require all BAFOs to include $ 4,500,000 for a Controlled Integrated Insurance Program. Petitioner contends that no such program was necessary for its **[*61]** proposal because of the financial strength of its proposed Engineering, Procurement, and Construction (EPC) contractor, Raytheon. But it was not unreasonable for TBW to attempt to minimize its risks and place all BAFOs on a level playing field, even if it may have worked to the disadvantage of one or more developers. Besides, Petitioner did not prove that the Controlled Integrated Insurance Program served no purpose in the case of Petitioner's BAFO. In addition, Petitioner's agreement with Raytheon expired on December 31, 1998, and was not extended in writing. By the time of Petitioner's BAFO, Petitioner only had "order-of-magnitude estimates" from Raytheon that were "in no way to be considered a firm price."

126. Finally, Petitioner complained that TBW's evaluation of the proposals failed to consider that it allegedly would cost an additional $ 50 million of capital expenditures to construct water transmission pipelines and related facilities to transport water from the Big Bend to Pinellas County, where there will be water supply deficits from the reduction of groundwater supplies in Pasco County and Northwest Hillsborough County.

127. The evidence is clear that TBW **[*62]** decided from the outset to eliminate water transmission costs beyond the connection with TBW's water transmission system from consideration in this procurement process. It also is clear from the evidence that Petitioner accepted this decision and fully participated in the procurement process without protest until approximately March 15, 1999, when S&W's BAFO was ranked first, and TBW decided to begin sequential, exclusive final contract negotiations with the highest-ranked BAFOs, starting with S&W.

128. When Petitioner raised questions regarding the difference in water transmission costs within TBW's system, TBW had its system engineer, Black & Veatch, study the issue. Black & Veatch determined that it actually would cost TBW approximately $ 2.7 million more in capital costs to add desalinated water to the system from the Big Bend site as compared to the Anclote site. The rest of the additional capital costs alleged and assumed by Petitioner would be required for either site. Adding the difference in capital costs to the difference in power costs, it will cost TBW an additional 4.38 cents per 1,000 gallons to add desalinated water to the system from the Big Bend site as compared **[*63]** to the Anclote site.

Claim About Disqualifying PEIP

129. Petitioner devoted considerable time and effort to attempting to establish that PEIP should have been disqualified for not being responsive to the RFP. Petitioner claims that PEIP should have been disqualified because it: (1) submitted more than one proposal, contrary to RFP Section 1.5.4; (2) did not submit 30-year life-cycle pricing; (3) did not submit an adequate pro forma; and (4) purchased or obtained "exclusive options on multiple sites . . . that result[ed] in excluding other potential Developers from obtaining a suitable site for the development of a seawater desalination plant (s)," in violation of RFP Section 3.2(1). Petitioner also claims that TBW improperly allowed PEIP to provide additional 30-year life-cycle pricing information and an adequate pro forma after the RFP submission deadline.

130. As found, no RFP was selected; the procurement process went forward from the RFP responses ultimately to ranking of BAFOs and sequential negotiation with highest-ranked BAFOs, starting with S&W. Petitioner did not prove that the process was required to end at the RFP responses.

131. While PEIP clearly submitted **[*64]** more that one proposal in response to the RFP, in violation of RFP Section 1.5.4, so did Petitioner. Petitioner included in Appendix J a deficient and incomplete surface water intake proposal, which it contended should have been considered and credited during the evaluation process.

132. PEIP did not submit 30-year life-cycle pricing or an adequate pro forma in its RFP. However, as to the 30-year pricing, the only information needed by PB Water to calculate 30-year pricing was the escalation factors

assumed by PEIP. In the RFBO and RFBAFO, all developers were required to assume the same escalation factors.

133. The Anclote site proposed by PEIP belonged to Florida Power Corporation (FPC); FPC operated a power plant there. FPC and PEIP partner, Progress Energy, both were owned by Florida Progress Corporation. WCRWSA knew the relationship between PEIP and the owner of the Anclote site proposed by PEIP, but it was not proven that WCRWSA knew PEIP had an exclusive option to use the site (in the form of a long-term lease and joint use agreement.)

134. Even if WCRWSA knew of the long-term lease and joint use agreement, the evidence was clear that Petitioner, FWP, and **[*65]** S&W all had suitable sites for their RFP responses. Petitioner offered a site on which it had an own exclusive option at the Anclote Road Industrial Park near the FPC Anclote plant. There was no evidence that any developer was prevented from obtaining a suitable site. Under the terms of RFP Section 3.2(1), PEIP did not have "exclusive options on multiple sites . . . that result[ed] in excluding other potential Developers from obtaining a suitable site for the development of a seawater desalination plant (s)."

135. After the responses to the RFP, in August or September 1998, FPC offered Petitioner non-exclusive access to the Anclote site, along with PEIP. Thereafter, in evaluating Petitioner's proposals (Binding Offer and BAFO), PB Water assumed that, if TBW decided to contract with Petitioner, Petitioner would be able to use the FPC Anclote site; in that respect, Petitioner was no longer prejudiced by PEIP's long-term lease and joint use agreement with FPC.

136. PB Water did note, in evaluating Petitioner's BAFO, that the option Petitioner originally had for the Anclote Road Industrial Park site had expired January 2, 1999, prior to the RFBAFO. But Petitioner was not eliminated **[*66]** from the process as a result; PB Water and TBW continued to assume that Petitioner would be able to use the FPC Anclote site if TBW decided to contract with Petitioner. In addition, the evidence was that Petitioner still could get access to the Anclote Road Industrial Park site after expiration of the option agreement and also could get access to a third site, if necessary. There also was evidence that PB Water visited all three sites in January 1998 as part of its initial evaluation of RFP responses.

137. WCRWSA's decision to allow both PEIP and Petitioner continue to participate in the procurement process after their respective responses to the RFP did not prove that the process was so "flawed, unfair, and corrupt" that the results must be overturned.

Claim of Discrimination Against Petitioner

138. Under this heading, Petitioner essentially reiterates some of its claims regarding PEIP's multiple responses to the RFP and multiple exclusive options. Most of those claims were addressed in the preceding section. Under this heading, Petitioner adds the allegation that, in a memorandum dated December 19, 1998, PB Water commented: "It appears that FSDC violated the very RFP **[*67]** requirement that Enpower is invoking against PEIP [i.e., RFP Section 3.2(1)]". The comment was erroneous since Petitioner did not have an option for "multiple sites"; it only had the one option on the Anclote Road Industrial Park site. Petitioner cites this error as additional evidence of bias against Petitioner. But it is found that PB Water's comment was in the nature of an afterthought added to detailed responses to Petitioner's charges of 19 irregularities in the procurement process and a December 10, 1998, letter from counsel for Enpower, Inc., to TBW's general counsel incorporating those charges and accusing PB Water of conflict of interest and bias in favor of PEIP. See Findings 147-151, infra. It was not proved that either PB Water or TBW staff acted on any improper bias against Petitioner or in favor of any other proposer, or on any other improper motivation.

139. Petitioner also reiterates complaints about using five broad categories instead of 22 and adding insurance and bonding requirements to the RFBAFO. These complaints already have been addressed. See Findings 120 and 125, supra.

140. Petitioner also contends under this heading that Petitioner's BAFO was **[*68]** given a "D" in plant siting and design "based primarily on the lack of a binding option to lease or purchase and to a lesser extent on failure to

provide a 23.3 mgd design." To the contrary, the evidence was clear that the primary reason Petitioner got a "D" was its inadequate plant design. Petitioner did no design work for the required 23.3 mgd plant.

141. By the time of the RFBAFO, Petitioner's lead Developers, Dupont and U.S. Water, had decided not to invest any more money or personnel in the procurement process, and Enpower had to get their agreement to allow Enpower be the lead Developer for purposes of preparing Petitioner's BAFO. See Findings 161-164, infra. Since Enpower had no money or personnel except for its President, Dan Smith, it was forced to "size-up" its 20 mgd plant design to 23.3 mgd without any further design work. The resulting proposal had fundamental design and engineering flaws. It did not contain the complete technical information necessary to show the modifications to its previous proposals which would produce the "optimized" 23.3 mgd plant. In addition, the very low head loss stated for the transmission main from the desalination plant to the point **[*69]** of interconnection with TBW's system could not be justified using generally acceptable engineering principles. These flaws called into question the entire proposal, as well as the commitment of former lead Developers, Dupont and U.S. Water.

142. Petitioner also charges that its BAFO was evaluated unfairly in the area of "Schedule, Agreement, and Financial Factors," where it also got a "D." This charge is based on the premise that the reason for the "D" was that Petitioner "did not indicate 'the specific parties contributing cash and the amount contributed by each party.'" Meanwhile, the charge continues, S&W got an "A" when S&W proposed in its BAFO that a project finance company named Poseidon Resources (Poseidon), would invest 90 percent of the 10 percent cash contribution required by the RFBAFO.

143. The RFBAFO specifically required the Developers to affirm that 10 percent of the capital cost would be invested in cash and to specify which team member would invest what. The evidence was clear that Petitioner's BAFO did not comply with that requirement. The evidence is equally clear that S&W's BAFO complied.

144. In addition, there was another reason why Petitioner **[*70]** got a "D" in "Schedule, Agreement, and Financial Factors." Petitioner's BAFO omitted cost tables for a taxable financing option--something specifically requested in the BAFO. Petitioner claims that this deficiency was "inconsequential" since tax-free financing ultimately was selected, but this was not known at the time. Petitioner cites FWP's "B" in this category as proof that the omission was "inconsequential," but it was not proven that FWP's omission of cost tables for taxable financing was not the difference between an "A" and a "B" for FWP.

Complaint About Poseidon

145. As mentioned, S&W's BAFO stated that Poseidon would contribute 90% of the 10% cash contribution required by the RFBAFO. Petitioner claims that this should have disqualified S&W's BAFO because: (1) Poseidon was not included in S&W's initial SOQ; (2) Poseidon was only mentioned in S&W's as having "expressed an interest in being a significant equity investor"; and (3) S&W's response to the RFP only identified two projects in which Poseidon had been involved, although not as the developer, neither of which was a desalination plant. (One, however, involved the long-term lease, construction, and operation of a **[*71]** wastewater treatment plant in Cranston, Rhode Island, which TBW's consultants considered to be very comparable to TBW's Project.) Meanwhile, the RFP required the submission of "[i]ndependently audited financial accounts . . . for the three most recent audited years for all Developer team members."

146. TBW's witnesses explained TBW's position that Poseidon's addition to the S&W team strengthened the team and was not of concern since the rest of the team remained intact. TBW was more concerned about substitutions or deletions from a developer team that could weaken the team. In addition, unlike Petitioner, S&W's BAFO made no change in its lead Developer; Stone & Webster remained the lead Developer throughout the negotiations and ultimately executed the WPA on behalf of S&W Water, LLC.

Claim of Conflict of Interest

147. The final claim maintained by Petitioner in its proposed Recommended Order is that PB Water had a conflict of interest due to its association with Ionics, a PEIP partner. Assuming such a conflict, Petitioner does not specify the proposed remedy in view of PEIP's third-place finish in PB Water's ranking of the BAFOs. Presumably, this

allegation is supposed **[*72]** to add to the other reasons why Petitioner says the entire procurement process should be invalidated.

148. As to the substance of the claim, the evidence was that, after entering into its consulting contract with WCRWSA, PB Water entered into a separate consulting contract with Hafiz Karamath Engineering Services (HKES), which was proposing to develop a desalination facility for the government of Trinidad. PB Water's contract with HKES expressly precluded PB Water from taking any position that would create a conflict of interest with its then existing clients, which included WCRWSA.

149. One of PB Water's tasks under the HKES contract was to advise HKES as to potential contractors. One potential contractor was Ionics. PB Water did not recommend Ionics over other prospective contractors but may have advised HKES from the public record as to the status of the WCRWSA procurement process.

150. PB Water thought it had an understanding with HKES that HKES would not hire any contractors without notice to PB Water. But, unbeknownst to PB Water, HKES entered into a contract with Ionics to play an important role in the Trinidad project.

151. When PB Water learned of **[*73]** the potential conflict with Ionics in November 1998, it terminated its contract with HKES and advised TBW. At about the same time, the St. Petersburg Times ran a story on the potential conflict, and Petitioner and others complained to TBW. TBW conducted an investigation and determined that the HKES contract did not cause any bias or prejudice for or against any developer in the TBW project. It is found that the TBW investigation was a fair inquiry which was reasonably calculated to, and did, arrive at the truth underlying the issue and a proper disposition.

Petitioner's Standing

152. Petitioner's response to the RFP (the "Proposal") was submitted under a cover letter dated December 3, 1997, signed by Dean Bedford, P.E., on the letterhead of Dupont Fabrics & Separations/Permasep Products. It included a notarized statement of Mr. Bedford's authority, also on Dupont Permasep letterhead, signed by William R. Spencer, Director - Fabrics & Separations.

153. To execute the Project, Petitioner proposed to form a Florida limited liability company (LLC) named Florida Seawater Desalination Corporation (FSDC), made up of Dupont Permasep Products, U.S. Water, and Enpower. This represented **[*74]** a change from the composition of FSDC set forth in the SOQ, in which Enpower was merely a consultant, not a participant in the developer team, and in which U.S. Water had originally been named the lead developer. Specifically, the Proposal stated that:

FSDC will be owned jointly by Dupont Permasep Products, US Water and Enpower. A formal agreement will be signed prior to entering into negotiations with the Authority. This agreement will clearly describe the participation levels for all companies. Dupont Permasep Products will act as the lead developer and majority participant in FSDC.

All involved companies reserve the right to sell down part of their interest in FSDC to local participating companies or others that the participants deem would be beneficial to developing the project. However, this will not be in amounts that would materially change the structure of FSDC and Dupont Permasep Products will always maintain the position of majority shareholder.

(TBW #11 at pp. 10-11)

154. Under the Proposal, design-build services for the project were to be provided by Raytheon Engineers, as the design-build contractor to FSDC.

155. A Memorandum of Understanding ("MOU") **[*75]** dated

November 26, 1997, among the FSDC members was included as Appendix A to the Proposal. The parties to the MOU were Dupont, U.S. Water, and Enpower. The MOU reflected the parties' agreement "to establish a limited partnership, a limited liability company or other business entity (the "Company") to respond to the RFP." The parties agreed that they would unanimously determine the form of organization of the entity to be formed. The MOU

provided: "The Company will be owned by the Parties in the percentage interests to be agreed upon in the future; provided, however, that U.S. Water and Dupont will together own a majority interest in the Company, and the ownership interest of each of U.S. Water and Dupont will exceed the ownership interest of Enpower." But, as a practical matter, Enpower had no interest in owning or operating the facility and intended TBW to rely on the strength of Dupont and U.S. Water as the developers who would carry out the project.

156. As to the Company (that is, the entity to be formed later) the MOU provided: "Enpower will not participate in the day-to-day management or control of the Company. Dupont shall be responsible for the day-to-day management **[*76]** of the Company; provided, however, that certain 'Major Decisions,' to be defined in the organizational documents of the Company, will require the consent of U.S. Water."

157. As to the Proposal to be submitted by FSDC in response to the RFP, the MOU provided: "Dupont shall coordinate submission of the response to the RFP and any modifications thereto. However, all parties must agree on all parts of the initial response to the RFP and all modifications thereto prior to submission, as well as all terms and conditions of the Contract prior to execution."

158. The MOU also provided: "In the event any of the parties elects, in its sole discretion, to terminate all development activities associated with the Project and so advises the other parties in writing, said electing parties' [sic] interest in the Company shall revert to the remaining parties on

a pro-rata basis of their pre-election ownership interest in the Company."

159. Through the Binding Offers, Dupont continued in the role of lead developer. Dupont and U.S. Water served as the exclusive negotiators for FSDC. Enpower did not even attend any of the negotiations with TBW. Enpower served the limited role of "site **[*77]** location" consultant and was not to participate in day-to-day management of the company. Indeed, Dupont informed TBW in writing that communications with FSDC were to be limited to the Dupont and U.S. Water representatives.

160. In a January 28, 1999, Memorandum from Dupont to U.S. Water and Enpower, Dupont terminated "all development activities" associated with the TBW project. This change removed FSDC's designated lead developer from any further development activity.

161. On February 15, 1999, Dupont, U.S. Water, and Enpower entered into a new MOU, which superceded their MOU dated

November 26, 1997. On that same date, they also entered into a "Supplemental Contract." Both the new MOU and the Supplemental Contract altered the rights and obligations of the FSDC team members. While the new MOU was provided to TBW as part of Petitioner BAFO, the Supplemental Contract was not revealed to TBW until a redacted copy was filed with their Notice of Protest. A complete copy was not produced until Petitioner was ordered to produce the complete document during discovery in this proceeding.

162. The new MOU indicated that Enpower was to become the registered agent and contact **[*78]** person for FSDC instead of Dupont. The MOU did not contain any reference to the Supplemental Contract or indicate that a fundamental change in the team structure had occurred by virtue of the Supplemental Contract. However, the Supplemental Contract substantially diminished Dupont's role from lead developer to mere membrane supplier for the project. Further, although it gave Dupont the right to sell membranes to FSDC, it clearly stated that Dupont had no obligation to do so. It also altered the basic structure of the FSDC team by deleting the requirement that Dupont and U.S. Water own a combined majority interest in the company and a greater interest than Enpower. In addition, it added a provision that permitted Dupont to sell its interest in FSDC to Enpower for a fixed price after establishment of the company.

163. Other documents exchanged between Enpower, Dupont, and U.S. Water also appeared to indicate an intent of the FSDC team members that upon execution of the Supplemental Contract, neither Dupont nor U.S. Water would retain any obligation with respect to the project.

164. Enpower found it necessary to structure and word the new MOU, Supplemental Contract, and other **[*79]** documents as described in order to persuade Dupont and U.S. Water not to abandon the procurement entirely but rather to at least agree to proceed with the project if the team's BAFO eventually was chosen by TBW for exclusive final contract negotiations. Enpower was reminding Dupont and U.S. Water and emphasizing that, under the terms of the procurement process, such an agreement would not bind them to anything at that time since all obligations would be subject to final contract negotiations. Nonetheless, these developments with the FSDC team gave TBW reasonable and valid concerns as to the continued commitment of Dupont and U.S. Water to the project.

165. Enpower attempted to argue that the term "lead Developer" had no significance, that it simply meant the development group, and that there was no written requirement for designation of one member as the lead Developer. But the term "lead Developer" appears in the RFQ and is repeated in the RFP. This designation carried importance to TBW because it represented who on the developer team stood behind the proposal and would be responsible for the development of the project, ensuring that the terms and conditions of the project **[*80]** were met.

166. By the time of the final hearing, all of the Dupont personnel involved in the development activities had left Dupont.

167. On July 18, 1997, Dupont and Enpower entered into an open-ended Agreement for Consulting Services which provided, among other things, an arrangement for compensation to Enpower that was contingent on Dupont's obtaining a contract for a seawater desalination plant and the closing of construction financing. Enpower asserted that TBW was aware of Enpower's contingent fee arrangement, and that its existence prompted the provisions in the RFP, RFBO, and RFBAFO prohibiting contingent fees in the RFP.

168. During a discovery deposition, Enpower President, Dan Smith, appeared to attempt to mislead counsel for TBW and Intervenor by testifying that the Agreement for Consulting Services did not apply to the TBW procurement. Later in the proceeding, Enpower contended that the Agreement for Consulting Services was supplanted by the November 1997 MOU by way of a verbal understanding between Dupont and Enpower. Actually, it actually applied to the TBW procurement and remained fully enforceable through submission of Binding Offers. Indeed, in August **[*81]** 1998, Enpower claimed entitlement to the success fee in correspondence to Dupont. On January 28, 1999, Dupont and Enpower entered into an "Adjustment Agreement," dated which expressly addressed the Agreement for Consulting Services and waived Enpower's entitlement to the success fee.

169. The January 27, 1999, MOU also provided: "Should Enpower file a bid protest your firms would have nothing to do with it. . . . Protest would be filed and funded by Enpower. . . . The protest would represent that if Tampa Bay Water selected Florida Seawater Desalination proposal, then the Florida Seawater Desalination team would be willing to enter into good faith contract negotiations. "

170. The Supplement Contract also provided: "Enpower will not file a bid protest or other legal proceeding on behalf of the Company" before providing twenty-four hours' notice. Such notice was provided. It further provided that, after such notice: "Enpower, at its sole expense, shall have the right to file a bid protest on behalf of the Company, provided, however, that the other Parties may decide not to participate in the bid protest. " Dupont and U.S. Water decided not to participate. It then provided: **[*82]** "If any Party decides to not participate in a bid protest, it shall, subject to provisions of the MOU and this Supplemental Contract, continue to participate in the Project in accordance with the last bid submitted to Tampa Bay Water to which such party agreed in writing, should Tampa Bay Water later decide to select the Company for final Contract negotiations. Enpower will coordinate the B&FO which must be agreed to by all parties."

CONCLUSIONS OF LAW

Standing

171. Enpower filed the Formal Protest in this case "for itself and for [FSDC]." It is undisputed that FSDC is a joint venture under Florida law. See *Kislak v. Kreedian, 95 So. 2d 510, 514 (Fla. 1957); Tidewater Construction Co. v. Monroe County, 107 Fla. 648, 146 So. 209 (1933); McKissick v. Bilger, 480 So. 2d 211 (Fla. 1st DCA 1985);*

Greiner v. General Electric Credit Corp., 215 So. 2d 61 (Fla. 4th DCA 1968). As one member of the FSDC joint venture, Enpower is not itself entitled to either an award of the contract or a re-proposal.

172. The case law is clear that standing to protest **[*83]** agency decisions concerning a contract award under Section 120.57(3), Florida Statutes, is limited to bidders and proposers except in "exceptional circumstances." See *Brasfield & Gorrie General Contractor, Inc., v. Ajax Construction Company, Inc., of Tallahassee, 627 So. 2d 1200 (Fla. 1st DCA 1993)*(non-bidder construction company would have had no standing to protest award and likewise had no standing to seek injunction of bidding process); Ft. Howard v. Dept. of Management Services, 624 So. 2d 783, 785 (Fla. 1st DCA 1993)(bidder's supplier had no standing to protest award to another bidder with a different supplier); Westinghouse Elec. v. Jacksonville Transp. Authority, 491 So. 2d 1238, 1241 (Fla. 1st DCA 1986)(submission of ruse, instead of good faith proposal, did not confer standing.)

173. In this case, Enpower itself made no proposal; the proposals were made by the joint venture, FSDC. While the Ft. Howard and Westinghouse decisions contained dicta that there can be "exceptional circumstances" conferring standing on a non-bidder to protest a bid award, neither defined the "exceptional circumstances," **[*84]** finding only that they were not present in those cases. It is concluded that this case does not present the kind of "exceptional circumstances" that would confer standing on a non-bidder or non-proposer under Florida law. Contrast Florida Overland Express, L.P. v. Dept. of Transp., 1998 WL 870182 (Fla. Div. Admin. Hrgs.)(adopted in Final Order entered August 24, 1998). Enpower has no standing to prosecute this protest "for itself."

174. On the other hand, there does not appear to be any reason why Enpower cannot protest "for [FSDC]." As Respondent and Intervenor point out in their proposed Recommended Order, the Revised Uniform Partnership Act provides: "A partnership may sue or be sued in the name of the partnership." Section 620.8307(1), Florida Statutes. That seems to be what Petitioner has tried to do (although it would have been clearer and would have eliminated the issue if FSDC had been named as Petitioner). The evidence is clear that Dupont and U.S. Water authorized Enpower to file the protest on behalf of FSDC even though they opted not to participate in the protest.

175. Although Section 620.8307(1), Florida Statutes, has not been construed **[*85]** by a court, it appears to provide an alternative to the common law that all partners are indispensable parties to suits by or against a partnership. Cf. C.F.I. Antilles, N.V. v. Intal Corp., 506 So. 2d 38 (Fla. 3d DCA 1987); DeToro v. Dervan Investments Limited Corp., 483 So. 2d 717 (Fla. 4th DCA 1985); *Waterfront Developers, Inc. v. City of Miami Beach, 467 So. 2d 733 (Fla. 3d DCA 1985);* Deal Farms, Inc. v. Farm & Ranch Supply, Inc., 382 So. 2d 888 (Fla. 1st DCA 1980); Aronovitz v. Stein Properties, 322 So. 2d 74 (Fla. 3d DCA 1975). See also *Brasfield & Gorrie, supra.*

176. The common law recognized certain exceptions to this rule of joinder. One of these exceptions was to prevent an absent partner's claim from being barred by statute of limitations. See Farish v. Bankers Multiple Lines Insurance Co., 425 So. 2d 12 (Fla. 4th DCA 1982); DeToro v. Dervan Investments Limited Corp., supra. In the case of this bid protest, applying the common law to require Dupont and **[*86]** U.S. Water to be named as co-petitioners with Enpower would have the effect of barring the bid protest by limitations since Section 120.57(3), Florida Statutes, requires protesters to file a "notice of protest in writing within 72 hours after the posting of the bid tabulation or after receipt of the notice of the agency decision or intended decision and shall file a formal written protest within 10 days after filing the notice of protest. " It is concluded that this case would fit the common law exception and allow the protest to proceed on behalf of the joint venture, FSDC.

177. Under Section 120.57(3)(b), Florida Statutes, FSDC has standing if it is "adversely affected" by TBW's procurement decisions. As pointed out by Respondent and Intervenor, the courts have observed that the fourth lowest out of twelve bidders "probably" has standing as being "adversely affected" but have questioned whether the seventh lowest out of seven bidders would have standing. Compare Capeletti Brothers, Inc. v. State Department of General Services, 432 So. 2d 1359 (Fla. 1st DCA 1983), with *Brasfield & Gorrie, supra, at 1203, fn.1.*

178. **[*87]** As pointed out by Respondent and Intervenor, to have the highest-ranked BAFO, FSDC would have to eliminate not only the BAFO of the selected developer (S&W), but also the other Big Bend BAFO (second-ranked FWP) and the other Anclote BAFO (third-ranked PEIP). And although the Formal Protest raised a number

of issues and alleges a variety of "irregularities" with respect to the PEIP and S&W BAFO's (as well as their Binding Offers), Petitioner has not alleged or proved any deficiency or "irregularity" in the FWP proposals. But the Formal Protest alleges not only that S&W and PEIP should be disqualified but also that TBW should not be allowed to select from the remaining BAFOs but should be required to employ the services of an independent consultant (i.e., not PB Water) to choose between Petitioner's and FWP's Binding Offers. It is concluded that Petitioner has standing to prosecute its Formal Protest to attempt to achieve these results.

179. Respondent and Intervenor also contend that Petitioner has no standing because its various proposals were non-responsive in material respects. It is concluded that none of these allegations destroy Petitioner's standing to prosecute its Formal **[*88]** Protest.

180. One reason alleged for Petitioner's disqualification is that Petitioner's site option agreement between U.S. Water and the Anclote River Industrial Park, expired on January 2, 1999, and that Petitioner did not present any evidence that the site option agreement had been renewed or extended beyond that date, or that it had any other site "legally available" to it for use in connection with this Project. But evidence was that PB Water assumed that Petitioner would have been able to use the FPC Anclote Plant site if awarded the contract. There also was evidence that Petitioner still could get access to the Anclote Road Industrial Park site and that a third site was available to Petitioner, if necessary. See Finding 136, supra.

181. Another reason alleged for Petitioner's disqualification is that Petitioner participated in and then concealed from TBW a contingent fee agreement that was expressly prohibited by the terms of the RFQ, the RFP, and the other procurement documents. But the evidence did not establish a violation of the procurement requirements. Section 1.5.6 of the RFP required each developer to represent that: "[T]he Developer has not paid or agreed **[*89]** to pay any person, company, corporation, individual, or firm other than a bona fide employee working solely for the Developer, any fee, commission, percentage, gift, or any other consideration, contingent upon or resulting from the award of or the making of this Agreement." The same requirement appeared in the earlier RFQ and later in both the RFBO and the RFBAFO. Petitioner represented compliance with these provisions.

182. The Agreement for Consulting Services between Enpower and Dupont provided for the payment to Enpower of a "development fee" of between $ 250,000 and $ 500,000, contingent upon Dupont being awarded a contract for a desalination project. It was not an agreement by the Developer, FSDC. It pre-existed the formation of the development team for this Project.

183. If construed to be an agreement by Petitioner, The Agreement for Consulting Services was in favor of Enpower, which was a member of the development team at least as of the time of Petitioner's response to the RFP. It is concluded that, as a member of the development team, Enpower would come within the meaning of the "bona fide employee working solely for the Developer" exception. Alternatively, **[*90]** the Agreement for Consulting Services between Enpower and Dupont, as members of the development team, could be viewed as part of the agreement among team members as their respective financial contributions and obligations to the team.

184. If there were any violation, it was a violation of the RFQ, which preceded Enpower's becoming part of the development team. It is concluded that such a temporary violation should not disqualify Petitioner as it was cured by the time of the response to the RFP. Similarly, as a result of the Adjustment Agreement waiving Enpower's right to a "success fee," there was no violation as to the RFBAFO.

Burden and Standard of Proof

185. In Florida, there is no common law requiring public agencies to let contracts through competitive procurement. In the absence of some specific statutory or constitutional requirement, a public agency has no obligation to establish a bidding procedure and may contract in any manner that is not arbitrary or capricious. *Brown v. City of St. Petersburg, 153 So. 140 (Fla. 1933); Eggart v. Westmark, 45 So. 2d 505 (Fla. 1950); Volume Services Division of Interstate United Corp. v. Canteen Corp., 369 So. 2d 391 (Fla. 2d DCA 1979);* **[*91]** *William A. Berbusse, Jr., Inc. v. North Broward Hospital District, 117 So. 2d 550 (Fla. 2d DCA 1960);* Ops. Att'y Gen. 98-04, 96-28, 96-16, 93-83, 93-28, 90-44 and 84-29.

186. Section 120.57(3)(f), Florida Statutes, provides in pertinent part:

In a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

187. Petitioner contends that TBW violated the first sentence of Section 120.57(3)(f) with respect to PEIP's response to the RFP. But to the extent that there were any **[*92]** such violations (i.e., with respect to life-cycle cost and pro forma information), they were cured when the procurement process proceeded to the next successive stages--simultaneous negotiations with all four developers, the RFBO, and the RFBAFO--and S&W was selected for exclusive final contract negotiations. They were also waived. See Conclusion 210, infra.

A. Governing Statutes

188. TBW is a regional water supply authority governed by Sections 373.1962 and 373.1963, Florida Statutes. Section 373.1962(3) authorizes TBW "to develop, construct, operate, maintain, or contract for alternative sources of potable water, including desalinated water," and provides further that "such alternative potable water sources . . . may also be privately developed, constructed, owned, operated and maintained . . . ." This statute, however, does not specify or require any particular procedure for the procurement of a desalinated water supply. Neither Section 373.1962 nor Section 373.1963, contains any provision for competitive procurement by a regional water supply authority.

189. There is no other general procurement statute that applies to this Project. Petitioner contends that Section [*93] 287.057, Florida Statutes, governing the procurement of "commodities" by state agencies, applies to this procurement. But Section 287.057 only applies to state agencies.

190. Section 287.012(1), Florida Statutes, defines an "agency" for purposes of Section 287.057 as "any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government." TBW is a regional water supply authority created and existing pursuant to Sections 373.1962 and 373.1963, Florida Statutes, and is an independent special district pursuant to Section 189.403(3), Florida Statutes. It is not assigned to the executive branch of state government by Chapter 20, Florida Statutes, or any other statute. The Attorney General has consistently opined that a special district such as TBW is not an "agency" within the meaning of Section 287.012(1). See Op. Att'y Gen. 93-28 (Ocean Highway and Port Authority); Op. Att'y Gen. 83-20 (Florida State Fair Authority); Op. Att'y Gen. 078-39 (St. Augustine Airport Authority); Op. Att'y Gen. 078-19 (Broward County Housing Authority); Op. Att'y Gen. 075-56 **[*94]** (Sarasota-Manatee Airport Authority); Op. Att'y Gen. 074-7 (Captiva Erosion Prevention District)("special districts and other separate entities are not considered to be agencies of the state" for purposes of Chapter 287). In the absence of any judicial authority, the opinions of the Attorney General are persuasive. It is concluded that TBW is

not "a unit of organization of the executive branch of state government" for purposes of Section 287.057.

191. Even if TBW were an "agency" within the meaning of Section 287.012(1), it is not procuring a "commodity" for purposes of Chapter 287. The definition of "commodity" in Section 287.012(4), Florida Statutes, expressly provides that "commodities purchased for resale are excluded from this definition." The facts are clear that TBW operates exclusively as a wholesale supplier of potable water to its member-governments, and any desalinated water purchased pursuant to the WPA is purchased solely for purposes of resale, at wholesale, to the member-governments under the terms of the Master Water Supply Contract. For these reasons, it is concluded that Section 287.057, Florida Statutes, does not apply to this Project.

B. TBW's Rules

[*95] 192. Petitioner contends that *Florida Administrative Code Rule 49B-3.004* applies to the Project. But Rule 49B-3.004 is TBW's administrative provision for the award of design-build contracts, as defined in Subsection (1)(c) of the rule. The WPA is not a "design-build" contract, as defined in the rule; it is a DBOOT contract. Rule 49B-3.004 does not apply.

193. Even if Rule 49B-3.004 applied, its pertinent provisions, found in section (3) are simply:

(c) Tampa Bay Water staff shall solicit competitive design-build contract proposals or bids from those firms the Board has determined to be the most qualified for the public construction project under consideration. The evaluation of the proposals or bids submitted by those firms shall be based on evaluation criteria and procedures established prior to the solicitation of competitive proposals. Tampa Bay Water staff shall evaluate the proposals or bids in consultation with the employed or retained design criteria professional.

(d) The award of the design-build contract shall be based upon the evaluation criteria established by Tampa Bay Water for the public construction project under consideration. The General Manager or Tampa **[*96]** Bay Water staff shall recommend to the Board a design-build bid or proposal for the award of a design-build contract.

Essentially, the rule would require TBW to follow the evaluation criteria of the RFP, RFBO, and RFBAFO.

C. Proposal Specifications

194. It is well-settled that an agency may not accept a bid or proposal that is materially at variance with the specifications set forth in an RFP. See *Air Support Services International, Inc. v. Metropolitan Dade County, 614 So. 2d 583 (Fla. 3d DCA 1993).* It is equally well-settled that not every deviation from the bid or proposal specifications is material. A deviation is only material if it gives a proposer a substantial advantage over the other proposers and thereby restricts or stifles competition. *Tropabest Foods, Inc. v. Department of General Services, 493 So. 2d 50 (Fla. 1st DCA 1986).* If a deviation does not provide a proposer with such a palpable competitive advantage, it constitutes a minor irregularity that should be waived by the agency. See *Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3d DCA 1992)* **[*97]** ("There is a very strong public interest in favor of saving tax dollars in awarding public contracts. There is no public interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, where the low bidder did not derive any unfair competitive advantage by reason of the technical omission.")

195. By its express terms, the RFP clearly contemplated a process of simultaneous negotiations as the means of selecting the developer for the Project. TBW commenced those simultaneous negotiations with all four developers after the initial proposals had been evaluated. It utilized the RFBO and the subsequent RFBAFO as mechanisms to narrow and focus the negotiations with the developers. As it made policy decisions on certain aspects of the desalination project (by ultimately opting in November 1998 for a 25 mgd plant, for example), TBW was able to provide the developers with more specific requirements, and it did so. Even if there were minor errors made during this lengthy procurement process, it has not been demonstrated that any error was made that impaired either the fairness of the process or the correctness of TBW's ultimate decision. **[*98]** See Recommended Order, Gibbons and Company, Inc. v. State of Florida, State Board of Regents, (DOAH Case No. 99-0697BID, entered September 17, 1999, at pp. 169-170).

196. Moreover, the process must be considered and evaluated in the context of TBW's organizational restructuring (which at times caused the Board to delay making an ultimate decision) and the development of its Master Water Plan, a lengthy process that did not culminate until November 1998. TBW could not have made a final selection of a desalination developer prior to that time, because until November 1998 it had not even decided whether its Master Water Plan was going to include any desalination facility. All of the developers undertook their participation in this procurement mindful of the risk that it could be for naught if desalination were not ultimately selected as a part of the Master Water Plan. The RFP contemplated this, and even provided for an incentive award to the top-ranked developer in the event this occurred. TBW's negotiations with all four developers up to and beyond the time that it actually decided to adopt the desalination project was not contrary to the RFP.

197. It is concluded that **[*99]** this procurement process, considered in its entirety, was not contrary to the specifications of the RFP, the RFBO, or the RFBAFO.

D. Statutory "Standards" of Proof

198. A decision is "clearly erroneous" when it is unsupported by substantial evidence, or contrary to the clear weight of the evidence, or induced by an erroneous view of the law. See Assessment Systems, Inc. v. Department of Business and Professional Regulation, 1998 WL 866224 (Fla. Div. Admin. Hrgs.) (pertinent part adopted in in Final Order entered August 17, 1998).

199. An act is "contrary to competition" when it offends or subverts the fundamental policies underlying competitive procurement. Id. Those policies, generally, are: to protect the public against collusive contracts; to secure fair competition on equal terms for all bidders or proposers; to remove not only collusion, but the temptation for collusion and the opportunity for private gain at public expense; to close all avenues to favoritism and fraud in whatever form; to secure the best value for the public at the lowest possible expense; and to afford an equal advantage to all persons desiring to do business with the government. **[*100]** *Wester v. Belote, 103 Fla. 976, 138 So. 721 (1931).*

200. An "arbitrary" decision is one not supported by facts or logic. See *Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks, 721 So. 2d 317 (Fla. 1st DCA 1998); Board of Trustees, Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359 (Fla. 1st DCA 1995); Dravo Basic Materials Co. v. State Department of Transportation, 602 So. 2d 632 (Fla. 2d DCA 1992); Agrico Chemical Co. v. State Department of Environmental Regulation, 365 So. 2d 759 (Fla. 1st DCA 1978),* cert. denied sub nom., *Askew v. Agrico Chemical Co., 376 So. 2d 74 (Fla. 1979).*

201. A "capricious" action is one that is taken without thought or reason, or irrationally. Id.

202. The inquiry to be made in determining whether an agency has acted arbitrarily or capriciously is "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from **[*101]** consideration of those factors to its final decision." *Adam Smith Enterprises, Inc. v. State Department of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989);* Santa Fe Technologies, Inc. v. Department of Transportation, 1998 WL 930111 (Fla. Div. Admin. Hrgs.)(adopted in Final Order entered January 5, 1999).

203. If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, then it is neither arbitrary nor capricious. *Dravo Basic Materials Co. v. State Department of Transportation, 602 So. 2d 632, 635 n.3 (Fla. 2d DCA 1992).*

204. As long as TBW acted in a manner that is not arbitrary, capricious, fraudulent or dishonest, it had wide discretion in the solicitation and acceptance of competitive proposals. See *Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988); Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So. 2d 505 (Fla. 1982).*

205. TBW relied in this procurement process on the expertise **[*102]** and professional judgment of its staff, consultant engineers, system engineer, financial consultants, insurance consultants, other consultants, and legal counsel. As reflected in the Findings, it has not been demonstrated that any of these persons involved in this procurement process, and upon whom TBW relied in its decisionmaking, did anything other than render advice based upon his or her best professional judgment.

206. It has not been demonstrated that the decisions made in the course of the procurement process were decisions not supported by fact or logic, or decisions taken irrationally or without thought or reason. To the contrary, TBW throughout this procurement process considered all relevant factors, gave actual, good faith consideration to those factors, and used reason (as opposed to whim) to progress from consideration of those factors to a decision.

207. Not only did TBW not act in a manner contrary to competition, it went out of its way to ensure that its decisions, at each step in the procurement process, enhanced and furthered competition. When the staff and consultants recommended reducing the field from four to two developers after the evaluation of **[*103]** the RFP

responses, TBW's Board elected to retain all four developers in the competition. All four developers were permitted to correct irregularities in their proposals, and the Board directed that the evaluations should not turn on minor or technical distinctions, but only on significant differences in the proposals. As the Board refined its goals and identified its specific needs through the RFBO and the RFBAFO, it maintained all four developers in the process. Although staff recommended that fewer than all four developers be advanced to the simultaneous negotiations, the Board again elected to include all four developers. Such conduct is not contrary to competition. See Gibbons and Company, supra, at p. 163):

Had it been Dr. Healy's desire to narrow the field of proposers . . . he had the opportunity to do so. This, however, was not his desire. Rather, he wanted to have as many proposers to choose from as possible. Instead of eliminating from further consideration the proposers . . . who had submitted technical proposals with irregularities, he allowed these proposers to remedy these irregularities, which they all did, and have their technical proposals evaluated . . . .")

[*104] 208. The extent to which this procurement process enhanced rather than frustrated competition is borne out by the ultimate price of desalinated water realized by TBW. Free and fair competition is generally expected to produce a lower price for the agency, not a higher price. Had the this process frustrated or stifled competition in any way, it is unlikely that TBW would have been able to secure a binding contract to purchase desalinated water at such a low price.

209. Among the many allegations made by Petitioner in this case were claims that various individuals manipulated the procurement process to the point of corruption. In the same vein, Petitioner alleged that TBW's principal consultant, PB Water, was improperly motivated by some conflict of interest arising out of a contractual relationship it had for a desalination project in Trinidad. These are serious allegations that call into question the integrity of not only the procurement process, but of staff personnel of TBW and PB Water. Any determination that these individuals engaged in such intentional wrongdoing must be based on "hard facts," not mere "suspicion or innuendo." See Gibbons and Company, supra; *CACI, Inc.-Federal v. United States, 719 F.2d 1567, 1581 (Fed. Cir. 1983)* **[*105]** (court will not ascribe evil motives to agency staff in handling of bids without a hard factual basis). Suffice to say, as reflected in the Findings, that Petitioner's proof on these claims was lacking. See Finding 138, supra.

Waiver and Estoppel

210. The evidence reflects that Petitioner fully participated in all steps of this procurement process, including the RFBO and RFBAFO. It participated in the clarification meetings that were held and in the simultaneous negotiations that were conducted through December 1998. Through March 15, 1999, Petitioner filed no challenge to the RFBO or RFBAFO, and it is concluded that Petitioner has waived its right to attack those aspects of the process. *Section 120.57(3)(b), Florida Statutes.* See also *Optiplan, Inc. v. School Board of Broward County, 710 So. 2d 569 (Fla. 4th DCA 1998)*(constitutional challenge to RFP specifications waived by failure to timely file formal protest) ; *Capeletti Brothers, Inc. v. Department of Transportation, 499 So. 2d 855 (Fla. 1st DCA 1987)*(failure to file a timely protest is waiver of right to contest plans and specifications) ; Foodservice, Inc. v. School Board of Hillsborough County, 1998 WL 930094 **[*106]** (Fla. Div. Admin. Hrgs.)(Final Order unavailable); Advantage Services of South Florida, Inc. v. Department of Management Services, 1996 WL 1060082 (Fla. Div. Admin. Hrgs.)(Final Order unavailable); Great Atlantic Boiler Services, Inc. v. Department of Corrections, 1992 WL 881152 (Fla. Div. Admin. Hrgs.)(adopted in Final Order entered March 16, 1992); Winchester Properties v. Department of Transportation, 1990 WL 749626 (Fla. Div. Admin. Hrgs.)(adopted in Final Order entered March 2, 1990)(challenge to weighting of evaluation criteria waived by failure to timely file a written protest) .

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that TBW enter a Final Order denying Petitioner's Formal Protest.

Jurisdiction is reserved for consideration of S&W's request for a determination of improper purpose under *Section 120.595(1), Florida Statutes*, if such request is made by motion within 10 days from the issuance of this Recommended Order.

DONE AND ENTERED this 25th day of October, 1999, in Tallahassee, Leon County, **[*107]** Florida.

End of Document

Department of Transp. v. Groves-Watkins Constructors

Supreme Court of Florida

August 18, 1988

No. 71,081

Reporter
530 So. 2d 912 *; 1988 Fla. LEXIS 886 **; 13 Fla. L. Weekly 462

DEPARTMENT OF TRANSPORTATION, Petitioner, v. GROVES-WATKINS CONSTRUCTORS, Respondent

Subsequent History: [1]** Rehearing Denied October 6, 1988.

Prior History: Application for Review of the Decision of the District Court of Appeal - Class of Constitutional Officers, First District - Case No. BR-163.

Case Summary

Procedural Posture
Petitioner, the Florida Department of Transportation, sought review of a decision of District Court of Appeal, First District (Florida) that directed petitioner to enter an order accepting respondent contractor's low bid after petitioner rejected the bid and directed a project rebid.

Overview

Petitioner, the Florida Department of Transportation, accepted bids for a highway construction project. Respondent contractor submitted the lowest of three bids received. Respondent's bid was still 29 percent higher than petitioner's prebid estimate. Petitioner notified respondent that it intended to reject its bid as too high and readvertise the project. Respondent filed a formal complaint and the lower court on review, ultimately, directed petitioner to enter an order accepting respondent contractor's low bid. The court quashed the ruling holding that a public body has wide discretion in soliciting and accepting bids for public improvements; and only a showing of clear illegality would entitle an aggrieved bidder to judicial relief. Under *Fla. Stat. ch. 337.11(3)*, petitioner was authorized either to award the contract to the lowest responsible bidder or reject all of the bids.

Outcome
The court quashed the order to petitioner to accepted respondent's bid. The court held that petitioner was authorized either to award the contract to the lowest responsible bidder or reject all of the bids; and only a showing of clear illegality would entitle an aggrieved bidder to judicial relief.

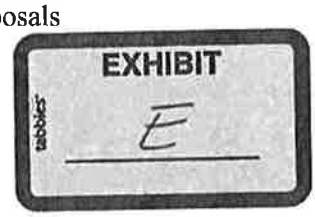
LexisNexis® Headnotes

Public Contracts Law > Bids & Formation > Competitive Proposals

HN1[⬇] **Bids & Formation, Competitive Proposals**

Fla. Stat. ch. 120.53(5) establishes the procedure for resolving protests arising from the contract bidding process. *Fla. Stat. ch. 120.57* governs all proceedings in which the substantial interests of a party are determined by an agency.

Public Contracts Law > Bids & Formation > Competitive Proposals



HN2[⬇] **Bids & Formation, Competitive Proposals**

Although not required by common law, competitive bidding has been statutorily mandated for the protection of the public.

Administrative Law > Agency Adjudication > Hearings > General Overview

Public Contracts Law > Bids & Formation > Competitive Proposals

HN3[⬇] **Agency Adjudication, Hearings**

Fla. Stat. ch. 337.11(3) (1985) gives the Florida Department of Transportation (DOT) broad discretion to reject all bids on competitively bid construction projects: The department may award the proposed work to the lowest responsible bidder, or it may reject all bids and proceed to readvertise the work or otherwise perform the work. At the same time, the public bidding process is governed by the Florida Administrative Procedure Act (APA), Fla. Stat. ch. 120 (1985), which provides a mechanism by which aggrieved parties may challenge agency decisions. Under *Fla. Stat. ch. 120.57(1)(b)*9 of the APA, an agency must accept the factual determinations of a hearing officer unless those findings are not based upon competent substantial evidence.

Administrative Law > Judicial Review > Standards of Review > General Overview

Public Contracts Law > Bids & Formation > Competitive Proposals

HN4[⬇] **Judicial Review, Standards of Review**

There is a strong judicial deference accorded an agency's decision in competitive bidding situations.

Administrative Law > Judicial Review > Standards of Review > General Overview

Public Contracts Law > Bids & Formation > Competitive Proposals

HN5[⬇] **Judicial Review, Standards of Review**

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 and even if reasonable persons may disagree.

Administrative Law > Judicial Review > Standards of Review > General Overview

Public Contracts Law > Bids & Formation > Competitive Proposals

HN6[⬇] **Judicial Review, Standards of Review**

An agency's decision based upon an honest exercise of this discretion cannot be overturned absent a finding of illegality, fraud, oppression or misconduct.

Administrative Law > Judicial Review > Standards of Review > General Overview

Public Contracts Law > Bids & Formation > Competitive Proposals

HN7[⬇] **Judicial Review, Standards of Review**

Where an agency is authorized to reject all bids, 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.

Administrative Law > Judicial Review > Standards of Review > General Overview

Public Contracts Law > Bids & Formation > Competitive Proposals

HN8[⬇] **Judicial Review, Standards of Review**

Only a showing of clear illegality will entitle an aggrieved bidder to judicial relief.

Administrative Law > Judicial Review > Standards of Review > General Overview

Public Contracts Law > Bids & Formation > Competitive Proposals

HN9[⬇] **Judicial Review, Standards of Review**

Judicial intervention in an agency's decision to reject all bids is limited to those few occasions where fraud or corruption have influenced the conduct of the officials.

Public Contracts Law > Bids & Formation > Competitive Proposals

HN10[⬇] **Bids & Formation, Competitive Proposals**

If a municipality, in connection with competitive bidding, is empowered to do so, it may reject any and all bids in the absence of fraud, collusion, bad faith or arbitrary action.

Governments > Legislation > Statutory Remedies & Rights

Public Contracts Law > Bids & Formation > Competitive Proposals

HN11[⬇] **Legislation, Statutory Remedies & Rights**

Under *Fla. Stat. ch. 337.11(3)*, the Florida department of Transportation (DOT) is authorized either to award the contract to the lowest responsible bidder or reject all of the bids. If DOT rejects all bids, no statutory right exists in any bidder to have its bid accepted.

Administrative Law > Agency Adjudication > Presiding Officers > Duties & Powers

Public Contracts Law > Bids & Formation > Competitive Proposals

Administrative Law > Judicial Review > Standards of Review > General Overview

HN12[⬇] **Presiding Officers, Duties & Powers**

Although the Florida Administrative Procedure Act provides the procedural mechanism for challenging an agency's decision to award or reject all bids, the scope of the inquiry is limited to whether the purpose of competitive bidding has been subverted. In short, the hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.

Counsel: Robert I. Scanlan, Appellate Attorney and Thomas H. Bateman, III, General Counsel, Tallahassee, Florida, for Petitioner.

Alan C. Sundberg, David S. Dee and F. Townsend Hawkes of Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, P.A., Tallahassee, Florida, for Respondent.

Robert A. Ginsburg, Dade County Attorney and Deborah Bovarnick Mastin, Assistant County Attorney, Miami, Florida, for Dade County, Amicus Curiae.

Judges: Barkett, J. Ehrlich, C.J., and Overton, McDonald, Shaw, Grimes and Kogan, JJ., concur.

Opinion by: BARKETT

Opinion

[*912] We review *Groves-Watkins Constructors v. Department of Transportation, 511 So.2d 323 (Fla. 1st DCA 1987)*, because of asserted conflict with our decision in *Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d 505 (Fla. 1982)*. We have jurisdiction. *Art. V, § 3(b)(3), Fla. Const.*

The issue before us is whether the Department of Transportation ("DOT") lawfully rejected all bids submitted on a highway construction project as too high and properly directed that the project be rebid. We conclude that it did **[**2]** and quash the decision below.

Respondent, Groves-Watkins Constructors ("G-W"), submitted the lowest of three bids received by DOT for the construction of a complex highway interchange in Broward County. Although G-W submitted the lowest bid, it was still 29% higher than DOT's prebid estimate. [1] DOT notified G-W that it intended to reject its bid as too high and readvertise the project.

G-W filed a formal complaint and the matter was referred to a hearing officer pursuant to *sections 120.53(5)* and *120.57(1), Florida Statutes* (1985). [2] Based upon the figures provided by G-W, [3] the hearing **[*913]** officer determined that DOT's estimate was erroneous and G-W's cost estimate was correct. On that basis, the hearing officer concluded that G-W was entitled to the award of the contract. DOT declined to adopt the hearing officer's recommended order and denied the award. [4] DOT's Final Order disputed the hearing officer's conclusion that DOT's estimate was unreasonable and **[**3]** erroneous and gave four reasons for rejecting all bids: (1) the low bid exceeded the estimate by $ 12 million and thus was too high; (2) G-W failed to show it had the requisite federal concurrence in the award; (3) DOT sought increased competition; (4) the hearing officer's recommendation, by requiring DOT to compare the bids with a "corrected estimate," was contrary to existing DOT policy.

On appeal, the First District reversed, finding there was competent substantial evidence to support the hearing officer's findings and conclusions, and directed DOT to enter an order **[**4]** accepting G-W's bid. We quash the opinion below because the hearing officer and the First District applied an incorrect standard of review to DOT's action.

HN2[↑] Although not required by common law, competitive bidding has been statutorily mandated for the protection of the public. In addition to providing a means by which goods or services required by public authorities may be acquired at the lowest possible cost, *Hotel China & Glassware Co. v. Board of Public Instruction, 130 So.2d 78, 81 (Fla. 1st DCA 1961)*, the system of competitive bidding protects against collusion, favoritism, and fraud in the award of public contracts. *Liberty County, 421 So.2d at 507; Wester v. Belote, 103 Fla. 976, 981-82, 138 So. 721, 723-24 (1931).*

To provide needed flexibility, *HN3*[↑] *section 337.11(3), Florida Statutes* (1985), gives DOT broad discretion to reject all bids on competitively bid construction projects:

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[1] DOT's policy is that it may reject all bids if the lowest bid is greater than 7% above DOT's official estimate of the cost of the project. The invitation to submit bids on this project informed the bidders of this policy.

[2] *HN1*[↑] *Section 120.53(5)* establishes the procedure for resolving protests arising from the contract bidding process. *Section 120.57* governs all proceedings in which the substantial interests of a party are determined by an agency.

[3] DOT's estimate was not introduced into evidence. DOT employees testified as to how the estimate was put together but did not explain the actual figures because of the confidentiality of the estimate. *See § 337.168, Fla. Stat.* (1985) (exempting the official cost estimate from inspection as a public record).

[4] The project was rebid and has since been awarded to another bidder.

> The department may award the proposed work to the lowest responsible bidder, *or it may reject all bids and proceed to readvertise the work or otherwise perform the work.* (Emphasis added).

At the same time, the public bidding process is governed by the Florida Administrative Procedure Act **[**5]** ("APA"), chapter 120, Florida Statutes (1985), which provides a mechanism by which aggrieved parties may challenge agency decisions. Under section 120.57(1)(b)9 of the APA, an agency must accept the factual determinations of a hearing officer unless those findings are not based upon competent substantial evidence. Although these provisions may appear to be at odds, we believe they are harmonious.

Initially, we note HN4[↑] the strong judicial deference accorded an agency's decision in competitive bidding situations:

> [HN5[↑] 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 and even if reasonable persons may disagree.

Liberty County, 421 So.2d at 507 (emphasis added). *See also* Culpepper v. Moore, 40 So.2d 366 (Fla. 1949); William A. Berbusse, Jr., Inc. v. North Broward Hospital Dist., 117 So.2d 550 (Fla. 2d DCA 1960).

In *Liberty County*, we recognized the broad discretion legislatively accorded public agencies and held that HN6[↑] an agency's decision based upon an honest exercise of this discretion cannot **[**6]** be overturned absent a finding of "illegality, fraud, oppression or misconduct." *421 So.2d at 507*. *Liberty County* thus established the standard by which an agency's decision on competitive bids for a public contract should be measured.

This standard conforms to the majority view that, HN7[↑] where the agency is authorized to reject all bids, 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. 10 E. McQuillin, *Municipal Corporations* § 29.77 (3d ed. 1981); *Sea-Land Service, Inc. v. Brown, 600 F.2d 429 (3d Cir. 1979)* (HN8[↑] only showing of clear illegality will entitle an aggrieved bidder to judicial relief); *John J. Brennan [*914] Const. Corp. v. City of Shelton, 187 Conn. 695, 448 A.2d 180 (1982)* (HN9[↑] judicial intervention in an agency's decision to reject all bids is limited to those few occasions where fraud or corruption have influenced the conduct of the officials); *Law Brothers Contracting Corp. v. O'Shea, 79 A.D.2d 1075, 435 N.Y.S.2d 812 (1981)* (decision to reject all bids because of budgetary, financial, and planning factors had rational basis and should **[**7]** not be disturbed); *Weber v. Philadelphia, 437 Pa. 179, 262 A.2d 297 (1970)* (HN10[↑] if municipality, in connection with competitive bidding, is empowered to do so, it may reject any and all bids in the absence of fraud, collusion, bad faith or arbitrary action).

HN11[↑] Under *section 337.11(3)*, DOT is authorized *either* to award the contract to the lowest responsible bidder *or* reject all of the bids. If DOT rejects all bids, no statutory right exists in any bidder to have its bid accepted. *See* E. McQuillin, *supra; Charles L. Harney, Inc. v. Durkee, 107 Cal.App.2d 570, 580, 237 P.2d 561, 567-68 (1951)*; *Hotel China & Glassware Co., 130 So.2d at 81*.

Thus, HN12[↑] although the APA provides the procedural mechanism for challenging an agency's decision to award or reject all bids, the scope of the inquiry is limited to whether the purpose of competitive bidding has been subverted. In short, the hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.

The facts here do not justify such a finding. There was not the slightest evidence of fraud or collusion in the rejection of these bids. Nor was the rejection shown to be [**8] a means of avoiding competition. At most, the hearing officer found that DOT had made an honest mistake in its prebid estimate. Respondent presses upon us, however, that DOT's decision not to accept the hearing officer's "reconstructed" estimate and award the contract to G-W was arbitrary and capricious. We cannot agree.

Indeed, respondent concedes that had DOT rejected or deferred the project as "too costly" in light of the bids submitted, it would have been acting within its discretion. In our view, this is exactly what DOT did. We see no significant distinction between deferring the project as "too costly" and rejecting the low bid because it was "too high." Obviously, the anticipated cost of the project approximated the prebid estimate. When the bids revealed the large discrepancy between DOT's estimate and the amounts bid, DOT was entitled to regroup, reevaluate, redesign, or reject the project. Such a decision, absent bad faith, cannot be deemed arbitrary or capricious.

The procedure adopted by the hearing officer circumvented the very purpose of DOT's prebid estimate. As one court has noted, there are sound practical and public policy reasons for the preparation of prebid estimates [**9] by the agency involved. *Durkee, 107 Cal.App.2d at 577, 237 P.2d at 565*. In addition to providing a means by which the agency can decide whether adequate funds are available and the project desirable at the estimated cost, the estimate provides a yardstick by which to measure the accuracy and fairness of the bids. *107 Cal.App.2d at 577, 237 P.2d at 565-66*. This purpose is totally thwarted when the agency's prebid estimate is replaced by the low bidder's after-the-fact estimate. As the court in *Durkee* noted:

> When [the director] knows that a fair and accurate estimate has been prepared by the engineers of his staff before submitting the project to bids, he can then determine whether the bid is or is not fair in comparison with that estimate. But when he has no estimate at all, or has an estimate that is admittedly erroneous in major respects, or has an estimate that has been prepared after the bids have been submitted and after his engineers have consulted the work sheets of the bidder, the director has been deprived of the very yardstick given him by law and intended to protect him and the public.
>
> *107 Cal.App.2d at 577, 237 P.2d at 566*.

In *Durkee*, the low bidder sought [**10] a writ of mandamus to compel the award of a highway construction contract after the highway department rejected all bids. As [*915] in this case, the low bid substantially exceeded the prebid estimate and all bids therefore were rejected. As in this case, the estimate was determined to be in error. In *Durkee*, notwithstanding that his own engineers conceded their estimate was erroneous, the director of public works ordered a new estimate and rebid the project. In rejecting the low bidder's challenge, the California court found that the director had acted in accordance with his duty.

We likewise find that DOT did not abuse its discretion in rejecting all bids. Accordingly, we quash the decision of the district court and remand for proceedings consistent with this opinion.

It is so ordered.

End of Document

Intercontinental Properties, Inc. v. State Dep't of Health & Rehabilitative Services

Court of Appeal of Florida, Third District

September 1, 1992, Filed

CASE NO. 91-873

Reporter
606 So. 2d 380 *; 1992 Fla. App. LEXIS 9280 **; 17 Fla. L. Weekly D 2030

INTERCONTINENTAL PROPERTIES, INC., Appellant, vs. STATE OF FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and COLISEUM LANES, INC., Appellees.

Subsequent History: [1]** Released for Publication September 17, 1992.

Prior History: An Appeal from the Florida Department of Health and Rehabilitative Services.

Disposition: Affirmed.

Case Summary

Procedural Posture
Appellant property management company sought review of the decision of appellee Florida Department of Health and Rehabilitative Services, which rejected appellant's bid to lease office space to appellee.

Overview
Appellee Florida Department of Health and Rehabilitative Services accepted the lowest bidder's bid for a nine-year lease with options to renew. Appellant property management company, which was the highest bidder, filed a protest in which it contended that the lowest bidder's bid was unresponsive and therefore should not have been considered. After an administrative hearing, the hearing officer determined that both appellant's and the lowest bidder's bids were unresponsive. Appellant challenged the hearing officer's decision, while the lowest bidder did not. The court agreed with appellee that appellant's bid was unresponsive, in part, because it was signed by an agent without proof of agent's authority to act on appellant's behalf as required by appellee. Furthermore, the court noted that there was a strong public interest in favor of saving tax dollars by awarding public contracts to the lowest bidder. Therefore, because appellant submitted the highest bid, which was technically unresponsive, and because appellee articulated sufficient reasons for rejecting appellant's bid, appellee's decision was affirmed.

Outcome
Because appellant property management company's bid was the highest bid received by appellee Florida Department of Health and Rehabilitative Services, the hearing officer properly rejected appellant's challenge to appellee's decision to reject appellant's bid. Moreover, while appellant succeeded in showing that lowest bidder's bid was unresponsive, it failed to prove that its bid did not suffer from the same deficiency.

LexisNexis® Headnotes

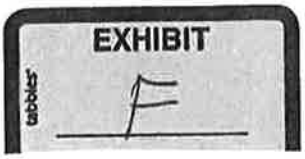
Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN1 See *Fla. Stat. ch. 120.68(10)* (1989).

Public Contracts Law > Bids & Formation > Offer & Acceptance > Acceptances & Awards

Public Contracts Law > Dispute Resolution > Bid Protests

Public Contracts Law > Types of Contracts > State



Government Contracts

HN2 At the least, a party protesting an award of a state contract to the low bidder must be prepared to show not only that the low bid was deficient, but must also show that the protestor's own bid does not suffer from the same deficiency.

Business & Corporate Law > ... > Authority to Act > Contracts & Conveyances > General Overview

HN3 It is fundamental that when an individual signs a document in a specifically delineated capacity, the person is signing in that capacity and not in another capacity.

Governments > Public Improvements > General Overview

Public Contracts Law > Types of Contracts > State Government Contracts

HN4 In Florida, 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 and even if reasonable persons may disagree.

Public Contracts Law > Bids & Formation > Sealed Bids > Invitations for Bids

Public Contracts Law > Types of Contracts > State Government Contracts

HN5 *Fla. Admin. Code Ann. r. 10-13.012* provides that a Florida State Department (Department) shall reserve the right to reject any or all bids and proposals. The Department shall reserve the right to waive minor irregularities in an otherwise valid bid or proposal. A minor irregularity is a variation from the bid invitation or proposal terms and conditions which does not affect the price of the bid, or give the bidder an advantage or benefit not enjoyed by other bidders, or does not adversely impact the interests of the Department.

Counsel: Sweetapple, Broeker and Varkas and Robert Sweetapple, for appellant.

Morton Laitner, for appellees.

Judges: Before SCHWARTZ, C.J., and NESBITT and COPE, JJ.

Opinion by: COPE

Opinion

[*381] COPE, Judge.

Intercontinental Properties, Inc. appeals an order by the Florida Department of Health and Rehabilitative Services (HRS) rejecting Intercontinental's bid to lease office space to HRS. We affirm.

I

HRS was in need of 29,600 square feet of office space. It issued an Invitation to Bid for a nine-year lease with options to renew. When the bids were opened, Coliseum Lanes, Inc., was the low bidder and was awarded the contract. The high bidder, Intercontinental Properties, Inc., filed a protest, saying that the low bidder's bid was unresponsive. [1] An administrative hearing officer conducted an evidentiary proceeding and concluded that both bids were unresponsive. The hearing officer recommended that both bids be rejected and HRS did so. The high bidder has appealed.

[2]** Shortly after HRS rejected both bids, the low bidder (Coliseum) dropped out and rented its building to other tenants. The practical issue now remaining is whether the Department erred in rejecting the Intercontinental bid.

II

Under the Administrative Procedure Act, this court's role in reviewing administrative action is a limited one. "*HN1* If the agency's action depends on any fact found by the agency in a proceeding

[1] A third bid was found by HRS to be unresponsive.

meeting the requirements of s. 120.57, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record." *§ 120.68(10), Fla. Stat.* (1989); *see also Koehler v. Florida Real Estate Commission, 390 So. 2d 711, 712-13 (Fla. 1980).*

III

In this case it is essential to understand what is a "responsive" bid, as opposed to the "lowest and best" bid.

Under the Invitation to Bid, "responsive" refers only to matters of form. A responsive bid means that a bid is submitted on the **[**3]** correct forms, and contains all required information, signatures, and notarizations. (R. 203).

Upon opening, each bid was reviewed for responsiveness. Each responsive (technically complete) bid was then forwarded to a bid evaluation committee in order to obtain a recommendation for which bid should be accepted. (R. 203-04). [2]

Under the Invitation to Bid, the award was to be made to the "Lowest and Best Bid," i.e., the lowest cost and best quality. (R. 198). "'Lowest' refers to least present value cost over term of the lease and options, while 'best' refers to results of total evaluation score." (R. 198). The evaluation score was obtained from a numerical scale set forth in the Invitation to Bid. Thus, both cost and quality of the facility were to be rated in deciding which would be the successful bid.

In the present case Coliseum was much better on both criteria. Coliseum's bid was $ 1,200,000 lower than that of Intercontinental. When **[**4]** rated on the numerical scale, Coliseum received 923 points out of a possible 1,000, while Intercontinental received 653. The evaluative comments about Intercontinental's bid were uniformly negative:

-- Not conducive for ES business.

-- Not safe for client and staff.

-- History of poor maintenance.

-- Not recommended as a Service Center.

-- **[*382]** Owner will charge clients for parking.

-- Office space offered on multiple floors.

. . .

Major obstacles.

1. At present, there is no provision for space at the ground floor. This is critical since FS issuance will be there. Bidder stated that she could make arrangements with Miami Community College to negotiate for space in the ground floor.

2. Building owner emphatically stated that she would not provide for free parking to our clients. To charge our indigent client population for parking to pick up their checks or receive our services was found to be at least immoral, if not insensitive, by the leasing group. With that in mind, parking for our clients becomes an issue of grave proportions. There is no free parking in the vicinity of this building.

3. The installation of FLORIDA equipment will be severely hampered, if not more **[**5]** expensive, since the HRS sites are not located on adjacent floors.

4. Metro-Dade Code violations. Under separate cover, the code violations of this building have been highlighted. This building must be up-to-code, prior to HRS locating a major service center here.

R. 191-92. HRS personnel testified that

[2] Non-responsive bids were to be withdrawn from further consideration.

Intercontinental was clearly unsuitable for HRS' needs.

By contrast the comments on the low bidder, Coliseum, were all positive and did not have the drawbacks identified for the Intercontinental building. The only negative factor was a need to negotiate regarding priority on move-in since the building was undergoing renovation. (R. 192).

Since Coliseum was the low bidder and also offered the much better facility, HRS awarded the bid to Coliseum. HRS treated both the Coliseum bid and the Intercontinental bid as having passed muster for "technical responsiveness" as defined in the invitation for bids, but found Coliseum to have submitted the "lowest and best bid."

IV

The initial question considered below was whether the bidders had submitted adequate proof of authority to enter into the state lease. The hearing officer heard testimony from the Department of General Services' **[**6]** Property Management Chief, who explained that the State has, in the past, experienced circumstances in which a bid would be submitted by a person purportedly acting on behalf of the owner, when in fact the agent had no authority to submit the bid. Upon acceptance of the low bid, the State was then unable to conclude the transaction because the property owner was not bound by the bid submission.

Consequently, the Invitation to Bid requires bidders to submit documentation reflecting their authority. The Invitation to Bid spelled out the nature of the documentation which was required. As applied to the present case, the Invitation to Bid stated, *"If the Bid Submittal is signed by an Agent, written evidence from the owner of record of his/her authority must accompany the proposal."* (R. 202) (emphasis in original).

Intercontinental's protest contended that Coliseum's low bid was unresponsive, because it was signed by an agent without attaching proof of the agent's authority to act on behalf of the property owner. Intercontinental affirmatively asserted that its own bid was responsive and it pled that "Intercontinental Properties, Inc. was the lowest and best responsive bidder **[**7]** and was entitled to the award of the bid pursuant to applicable law." (R. 17).

Coliseum intervened, contending that its low bid was responsive and that if the bid was not responsive, any deviation was a minor irregularity which would not eliminate it from consideration for the contract award. Additionally, Coliseum also raised the question whether Intercontinental's bid "contains irregularities which are not minor so as to render [Intercontinental's] bid ineligible for contract award consideration." (R. 26). The matter proceeded to **[*383]** hearing with Coliseum, Intercontinental, and HRS as parties.

The hearing officer found that Coliseum's low bid had been signed by Pamela Stewart, who used the title, "Property Coordinator, Coliseum Lanes, Inc." No documentation was attached to the bid which identified Ms. Stewart as an agent and set forth her authority to act for Coliseum Lanes.

After the bids were opened, HRS requested a letter from Ms. Stewart clarifying her relationship with Coliseum, and Ms. Stewart provided a letter which HRS considered sufficient, even though not signed by an officer of Coliseum. At the evidentiary hearing the president of Coliseum Lanes testified that Ms. Stewart **[**8]** had a long-standing agency relationship with Coliseum and that Ms. Stewart had full authority to act on behalf of Coliseum in submitting the bid to HRS.

The hearing officer ruled that the Coliseum bid was unresponsive. The hearing officer reasoned that since Ms. Stewart was an agent, and the bid had not included the necessary statement regarding her authority to act for Coliseum, the Coliseum bid was in technical noncompliance with the Invitation to Bid and therefore was unresponsive.

The hearing officer also found that Intercontinental's bid was unresponsive. The office

building in question is owned by Royal Trust Tower, Ltd., a Florida limited partnership. The bid was submitted by Intercontinental (a property management company), as agent for Royal Trust Tower, Ltd. Intercontinental's bid was signed by Ms. Caroline Weiss in her capacity as President of Intercontinental Properties, Inc. [3]

It is undisputed that Intercontinental was acting in **[**9]** an agency capacity when it submitted the bid on behalf of Royal Trust Tower, Ltd. Ms. Weiss attached the property management agreement to the bid, and relied on that document as proof of her authority to act on behalf of the limited partnership.

The hearing officer found that on its face the property management agreement did not contain sufficient authorization to allow Intercontinental to act as Royal Trust Tower's agent for purposes of entering into this particular lease. There were two Ms. Weiss is also a general partner in Royal Trust Tower, Ltd. specific insufficiencies. First, the hearing officer found that this particular lease was going to require the landlord to perform $ 450,000 in building modifications at the Royal Trust Tower property. (R. 114). The hearing officer found that "the Management Agreement prohibits Intercontinental Properties, Inc., from incurring expenses in excess of $ 500 for structural changes and major alterations without the prior written consent of the owner [Royal Trust Tower, Ltd.]. . . . *Weiss did not include, as part of her bid submittal, written authorization from the owner to incur such expenses* on behalf of the owner related to this **[**10]** bid submittal, and no evidence was offered that any such prior written consent exists." (R. 114) (emphasis added).

Second, the hearing officer went on to find that the Management Agreement gave Intercontinental authority to execute "only the specific lease form previously approved by the owner. Yet, the [State's] Invitation to Bid requires that the bidder will execute a lease form utilized by the Department, which will also incorporate the bid submittal form. *No prior written approval of the owner authorizing Intercontinental Properties, Inc. to execute the Department's required lease* or to change the terms of the lease approved by Royal Trust Tower, Ltd., *was submitted* by Weiss as part of her bid submittal package." (R. 114-15) (emphasis added). The relevant portions of the Management Agreement are set out in the margin. [4]

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[3] Ms. Weiss is also a general partner in Royal Trust Tower, Ltd.

[4] The Management Agreement provides, in part:

5 -- It is further mutually agreed that:

* * *

(c) The owner expressly withholds from the AGENT, any power or authority to make any structural changes in any building or to make any other major alterations or additions in or to any such building or equipment therein or to incur any expense exceeding $ 500.00, chargeable to the OWNER other than expenses related to the exercising of the expressed powers stated herein, without the prior written consent of the OWNER, except such emergency repairs as may be required because of danger to life or property or which are immediately necessary for the preservation and safety of the premises or the safety of the tenants and occupants thereof, or are required to avoid the suspension of any necessary services to the premises.

* * *

6 -- The OWNER hereby expressly gives authority to the AGENT to sign and execute leases on behalf of the OWNER for the rental of space to tenants in the subject premises. Said authority, given by the OWNER to the AGENT, is limited to the execution of form leases substantially similar to the form that is attached to this Agreement and which has been previously approved by the OWNER. Said authority is further limited with regard to the minimum amount of rent and with regard to the duration of the lease which said minimum amount of rent and minimum duration of lease are attached hereto and have been previously approved by the OWNER. In addition to the foregoing, the AGENT'S authority to sign leases on behalf of the OWNER, where said leases require the OWNER to expend certain sums to finish the premises for the tenant, is limited to those expenses as attached to this Agreement and have been [sic] previously approved by the OWNER. In the event that a lease is presented to the AGENT for signature on form that is not substantially similar to the form attached to this Agreement, or at a rate per square foot that is less than the minimum specified on the attachments to this Agreement, or for a duration of time that is less than that specified herein or which obligates the OWNER to finish the premises for the tenant at a cost which exceeds that of previously approved [sic] herein, then, in that event, prior written approval of the OWNER is necessary before the AGENT has the authority to execute any such lease.

[11]** **[*384]** Thus, although a document was attached to the "bid which indicated that Intercontinental had the power to act as the rental agent for Royal Trust Tower, Ltd., the document showed on its face that Intercontinental did not have the authority to bind the owner in two critical respects.

On that basis, the hearing officer found that the Intercontinental bid was unresponsive. [5]

V

Intercontinental argues that the responsiveness of Intercontinental's bid was an unpled issue and that the hearing officer erred by considering it. To the contrary, Intercontinental's protest asserted that "Intercontinental Properties, Inc. was the lowest and best responsive bidder and was entitled to the bid pursuant to applicable law." (R. 17). When Coliseum intervened in the proceedings below, one of the issues it immediately raised was the **[**12]** question of the responsiveness of the Intercontinental bid. (R. 26). Both the hearing officer and the Department took the entirely correct position that Intercontinental "had the burden to prove, one, that the department's decision to award the lease to the Intervenor [Coliseum] was arbitrary or capricious and two, that petitioner's [Intercontinental's] bid was responsive." (R. 137). [6]

HN2

At the least, a party protesting an award to the low bidder must be prepared to show not only that the low bid was deficient, but must also show that the protestor's own bid does not suffer from the same deficiency. To rule otherwise is to require the State to spend more money for a higher bid which suffers from the same deficiency as the lower bid.

We conclude that the responsiveness of Intercontinental's bid was properly before the hearing officer and the hearing officer was correct in considering that issue.

VI

Intercontinental **[**13]** next argues that its bid was, in fact, responsive. It urges that Ms. Weiss was a general partner of Royal Trust Tower, Ltd. and therefore had the authority to bind Royal Trust Tower, Ltd. to make the necessary renovations and to **[*385]** sign the State's lease. It contends that she should be deemed to have signed in both capacities, and alternatively that the proof at hearing showed that Ms. Weiss had full authority to act for Royal Trust Tower, Ltd.

First, Royal Trust Tower, Ltd., is the entity which owns the building, while Intercontinental is a property management company, a separate entity with distinct ownership. The bid submittal form was submitted by Intercontinental, with Ms. Weiss signing as President. The documentation attached to the bid indicates that she was acting under the authority of Intercontinental's Management Agreement with Royal Trust Tower, Ltd. (R. 295). It is clear, therefore, that Ms. Weiss proceeded in this matter solely in her capacity as President of the property management company. (R. 288).

HN3 It is fundamental that when an individual signs a document in a specifically delineated capacity, the person is signing in that capacity and not in another capacity. **[**14]** While it is true that Ms. Weiss is a general partner of the Royal Trust Tower, Ltd. limited partnership, it is also undisputed that she did not sign the bid submittal form in that capacity.

Intercontinental argues, however, that Ms. Weiss' testimony at the hearing demonstrated that she had all necessary authority to submit the bid. In essence this argument is based on the doctrine of ratification. Ms. Weiss testified that she is a

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R. 113-14.

[5] The hearing officer also found that there was doubt about Intercontinental's ability to perform because foreclosure proceedings were pending against the Royal Trust Tower, Ltd. property. (R. 115).

[6] In so ruling, the hearing officer did no more than hold that Intercontinental must prove what it had pled.

general partner of Royal Trust Tower, Ltd., and that Intercontinental had full authority to submit the bid on behalf of Royal Trust Tower, Ltd. Intercontinental urges that through this testimony, Royal Trust Tower, Ltd. ratified Intercontinental's actions and added the missing statement of authorization to Intercontinental's bid. Intercontinental argues that this testimony cured the deficiency in the Intercontinental bid.

The problem with this approach is that the same logic also qualifies Coliseum Lanes as a responsive bidder. As stated previously, the President of Coliseum testified at the hearing below. (Tr. 184-211). The Coliseum President confirmed that Ms. Stewart had a long-standing agency relationship as property manager for Coliseum. **[**15]** (Tr. 184). He further testified that Coliseum was fully aware of the Coliseum bid and that Ms. Stewart had full authority to submit it. (Tr. 185, 189).

The rules must be consistently applied. If Ms. Weiss is to be allowed to retroactively confirm that Intercontinental had authority to submit the bid on behalf of Royal Trust Tower, Ltd., then by the same standard, the Coliseum President's testimony is equally satisfactory to demonstrate that Ms. Stewart was acting with full authority on behalf of Coliseum.

VII

We next consider the standards to be followed in competitive bidding cases where there is a claim that the low bid was technically unresponsive. The hearing officer erred on this point, but now that Coliseum has dropped out, the error is harmless.

The principles applicable to competitive bidding have been set forth in Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982). In that case the Invitation to Bid required bidders to bid on Alternate A and Alternate B. The low bidder misunderstood the instructions and only bid on Alternate B. The county commission waived the irregularity and awarded the contract on the basis of Alternate **[**16]** B. Like the present case, *Baxter's Asphalt* involved a situation in which the successful bid was not complete -- because the bidder had not bid at all on Alternate A -- and therefore was not a "responsive" bid. The district court of appeal disqualified the low bid on the theory that the county's action in waiving the irregularity was illegal. Id. at 506.

In quashing the decision of the district court of appeal, the supreme court emphasized the public policy considerations pertaining to public contracts:

HN4 In Florida . . . 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 **[*386]** a court even if it may appear erroneous and even if reasonable persons may disagree. . . . *Gulf [the low bidder] was put in no position superior to that of Baxter's [the second lowest bidder]* or the other high bidders by its failure to submit a bid on Alternate A. . . .

. . . .

Baxter's further argues and the district court agreed that the waiving of the bid irregularity was unlawful since Gulf's failure to comply with the specifications was material. [**17] We disagree. . . . The instant case is a situation of a relatively minor irregularity in the technical bidding requirements. Liberty County in the Advertisement for Bids reserved the right to waive irregularities in any bid and we find under the facts of the present case (with trial court findings of *no fraud or misconduct* on Liberty County's part and with *no competitive advantage* accruing to Gulf), that there was substantial compliance with the bidding statute.

Id. at 507 (citations omitted; emphasis added); *accord* Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913-14 (Fla. 1988). *See generally* The Florida Bar, *Florida Administrative Practice,* ch. 6-F (3d ed. 1990).

HRS has codified the *Baxter's* standard by rule:

HN5 The Department shall reserve the right to reject any or all bids and proposals. The Department shall reserve the right to waive minor irregularities in an otherwise valid bid or proposal. *A minor irregularity* is a variation from the bid invitation or proposal terms and conditions *which does not affect the price of the bid, or give the bidder an advantage or benefit* **[**18]** *not enjoyed by other bidders, or does not adversely impact the interests of the Department.*

Rule *10-13.012, Fla. Admin. Code* (emphasis added). In addition, the Invitation to Bid specifically provided that *"The department reserves the right to reject any and all bids when such rejection is in the interest of the State of Florida.* Such rejection shall not be arbitrary, but be based on strong justification which shall be communicated to each rejected bidder by certified mail." (R. 207) (emphasis in original); (R. 197).

In the present case the Department had already awarded the contract to Coliseum. It did so in the belief that the Coliseum bid was responsive, that is, technically complete. Once the hearing officer determined that there was a technical deficiency -- failure to attach the rehired statement of authority -- the next question was whether the Coliseum bid should be disqualified.

Although the hearing before the hearing officer was a *de novo* proceeding, that simply means that there was an evidentiary hearing during which each party had a full and fair opportunity to develop an evidentiary record for administrative review purposes. It does not mean, as the hearing **[**19]** officer apparently thought, that the hearing officer sits as a substitute for the Department and makes a determination whether to award the bid *de novo.* Instead, the hearing officer sits in a review capacity, and must determine whether the bid review criteria set forth in *Baxter's Asphalt* have been satisfied.

There is a very strong public interest in favor of saving tax dollars in awarding public contracts. There is no public interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, where the low bidder did not derive any unfair competitive advantage by reason of the technical omission.

In the present case there was no sound reason for the hearing officer to override the judgment of the Department in awarding this contract to Coliseum. The evidentiary record developed before the hearing officer revealed that both bids were submitted with the full authority of the owner. While the failure to attach proof of the agent's authority rendered each of the two bids technically nonconforming, both deficiencies were easily remedied. This is plainly the sort of deficiency which a public **[*387]** agency can, in its discretion, allow **[**20]** a bidder to cure after the fact. [7]

The standards set forth in *Baxter's Asphalt* are fully applicable to a hearing officer's review of agency decisions in bidding contests. That is so regardless of whether the agency has expressly waived a condition in the Invitation to Bid, as was true in *Baxter's Asphalt,* or whether, as here, the agency believed that the bid was fully conforming and awarded the contract on that basis. In either event, there is a strong public policy in favor of awarding contracts to the low bidder, and an equally strong public policy against disqualifying the low bidder for technical deficiencies which do not confer an economic advantage on one bidder over another.

If at the present time there were still an active contest between Coliseum and Intercontinental, then the correct result in this case would be to reverse the Department's order on the theory that the original award to **[**21]** Coliseum was correct. However, once the Department disqualified both bids, Coliseum dropped out and has now rented its premises to other tenants. The only remaining contestant is Intercontinental, whose building was rated unsatisfactory and whose rental was $

[7] In this case the Department did obtain a letter from Ms. Stewart clarifying her status with the project

1,200,000 higher than the low bid. Since Intercontinental has failed the objective performance criteria, and since Coliseum has dropped out, the Department's order rejecting both bids now stands as being right for the wrong reason. The order under review is therefore

Affirmed.

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Show search results for minne...
RR-1
AU
SR
RES-1
BU
Kings Way

Sec. 62-1572. - Government managed lands, GML.

The purpose of the GML government managed lands zoning classification is to recognize the presence of lands and facilities which are managed by federal, state and local government, special districts, nongovernmental organizations (NGOs) providing economic, environmental and/or quality of life benefits to the county, electric, natural gas, water and wastewater utilities that are either publicly owned or regulated by the Public Service Commission, and related entities. Activities encompassed within this classification include but are not limited to aviation, education and public services. Emphasis is on protecting existing and future public and private investments, as well as ensuring that such activities are managed in accordance with the comprehensive plan and any regulations or ordinances relating to such activity. A concept plan may be required.

(1) *Permitted uses.* Each application for government managed lands zoning shall designate the intended use of the property as either Parks and Conservation (P), Institutional (I), Utility (U), or High-Intensity (H). The parks and conservation designation shall include active and passive recreational uses as well as permanent or temporary conservation uses. The institutional use designation shall include offices, schools, meeting rooms, parking garages, police and fire stations, and hospitals. The utility designation shall include electric, natural gas, water and wastewater utilities that are either publicly owned or regulated by the Public Service Commission. The high-intensity designation includes industrial activities, correctional facilities, ports, airports or other transportation hubs and other high-intensity activities which are not considered institutional uses. Proposed conversions of any property zoned GML but not containing the (P), (I), (U), or (H) suffix designation to a more intense use will require a rezoning.

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b. The following uses require the high-intensity use designation and are permitted subject to development standards set forth for the light industrial zoning classification as delineated in section 62-1543:

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c. Within the high intensity use designation, permitted uses with conditions are as follows (see division 5, subdivision II of this article):

Dredged material management areas.

Sec. 62-1834.5. - Dredged material management areas.

(1) Dredged material management areas (DMMAs) are areas set aside for the settling, processing, removal or disposal of dredged material by public or quasi-public agencies responsible for the maintenance of public water bodies such as canals, rivers, lagoons, and intracoastal waterways.

(2) All DMMAs shall meet the following conditions:

a. Only materials from projects managed by public or quasi-public agencies responsible for the maintenance of dredging of public water bodies shall be deposited into approved DMMAs.

b. A vegetated berm that is at least six feet in height and at least 25 feet in width shall be constructed along the entire perimeter of the DMMA.

c. The water's edge of the DMMA shall be no closer than 400 feet from the lot line of any existing residence.

d. The DMMA shall be subject to performance standards in sections 62-2251—62-2272.

(Ord. No. 03-18, § 2, 4-29-03)

Sec. 62-2251. - Generally.

The following performance standards apply to all residential, commercial, and industrial uses. These standards address a series of potential nuisances or possible sources of pollution or other public health and safety concerns. All measurements shall be enforced at the property lines, unless otherwise specified. No part of any zone and no improvement thereon shall be used or allowed to be used at any time for the manufacture, storage, distribution or sale of any product or the furnishing of any service, in a manner which is unreasonably noxious or offensive or an unreasonable annoyance or a nuisance to other tenants because of odors, heat, fumes, smoke, noise, glare, vibration, soot or dust. No activity shall be carried on which may be or may become dangerous to public health and safety, which increases the fire insurance rate for adjoining or adjacent property, or which is illegal.

Sec. 62-2256. - Odor.

(a) *Performance requirements.* All uses shall be controlled to prevent the emission of odorous gases or other matter in such quantities as to be readily detectable or to produce a public nuisance or hazard at any point as measured along the lot lines. Detailed plans for the elimination of odorous matter may be required before the issuance of a building permit.

All uses shall meet the odor standards in this section during site plan approval. Site plans must include documentation assuring that odor standards will not be exceeded by the intended use. The odor shall be measured by determining in parts per million (ppm) the chemicals present. This shall then be compared to data in Tables 5.1 or 5.3, Odor Thresholds: for Chemicals with Established Occupational Health Standards, published by the American Industrial Hygiene Association (1989) or

the latest reprint or revision. All measurements shall follow American Society of Testing Materials (ASTM) procedures.

(1) Where Table 5.1, Odor Thresholds: for Chemicals with Established Occupational Health Standards; Range of Acceptable Values, referenced above contains several levels cited, the lowest value shall be used as the standard.

(2) Where the chemical is not listed in Table 5.1, Odor Thresholds: for Chemicals with Established Occupational Health Standards, then Table 5.3, Odor Thresholds: for Chemicals with Established Occupational Health Standards shall be reviewed. Where data is found in Table 5.3, Odor Thresholds: for Chemicals with Established Occupational Health the lowest accepted value of all reported odor threshold measurements shall be used.

Sec. 62-2264. - Waste disposal.

No waste material or refuse shall be dumped upon or permitted to remain upon any part of any property outside of the buildings constructed thereon. All sewage and industrial waste shall be treated and disposed of in such manner so as to comply with the standards of the county health department and state and federal regulations. All plans for waste disposal facilities shall be required before the issuance of any building permit.

(Code 1979, § 14-20.42(D)(12); Ord. No. 2000-07, § 7, 1-25-00)

Sec. 62-2269. - Hazardous materials.

All uses shall comply with state and federal standards. Any use that is required to submit a federal risk management plan (RMP) shall submit the same to the county at the time of site plan approval. The county shall review the site plan in light of minimizing risk to neighbors, the county, or the environment. The county may impose design conditions to maximize protection of the health and safety. Any use which requires a RMP shall not be permitted in the BU-1 or BU-2 Districts.

(Ord. No. 2000-07, § 8, 1-25-00)

Sec. 62-1255. - Establishment of zoning classifications and consistency with comprehensive plan.

(a) *Zoning classifications established.* Within the unincorporated areas of the county, the following zoning classifications are hereby established, such zoning classifications being created under this article or being zoning classifications incorporated by reference under this article:

(1) Unimproved, agricultural and residential zoning classifications:

a. General use zoning classification, GU.

b. Productive agricultural zoning classification, PA.

c. Agricultural zoning classification, AGR.

d. Agricultural residential zoning classification, AU.

e. Rural estate use residential zoning classification, REU.

f. Rural residential zoning classification, RR-1.

g. Suburban estate residential use zoning classification, SEU.

h. Suburban residential zoning classification, SR.

i. Estate use residential zoning classifications, EU, EU-1 and EU-2.

j. Single-family residential zoning classifications, RU-1-13 and RU-1-11.

k. Single-family residential zoning classification, RU-1-9.

l. Single-family residential zoning classification, RU-1-7.

m. Single-family attached residential zoning classifications, RA-2-4, RA-2-6, RA-2-8 and RA-2-10.

n. Residential-professional zoning classification, RP.

(2) Multiple-family residential zoning classifications:

a. Low-density multiple-family residential zoning classifications, RU-2-4, RU-2-6 and RU-2-8.

b. Medium-density multiple-family residential zoning classifications, RU-2-10, RU-2-12 and RU-2-15.

c. High-density multiple-family residential zoning classification, RU-2-30.

(3) Mobile home residential and recreational vehicle park zoning classifications:

a. Rural residential mobile home zoning classifications, RRMH-1, RRMH-2.5 and RRMH-5.

b. Single-family mobile home zoning classifications, TR-1 and TR-1-A.

c. Single-family mobile home zoning classification, TR-2.

d. Mobile home park zoning classification, TR-3.

e. Single-family mobile home cooperative zoning classification, TRC-1.

f. Recreational vehicle park zoning classification, RVP.

(4) Planned unit development zoning classifications:

a. Planned unit development zoning classification, PUD.

b. Residential planned unit development zoning classification, RPUD.

(5) Commercial zoning classifications:

a. Restricted neighborhood retail commercial zoning classification, BU-1-A.

b. General retail commercial zoning classification, BU-1.

c. Retail, warehousing and wholesale commercial zoning classification, BU-2.

(6) Tourist commercial and transient commercial zoning classifications:

a. General tourist commercial zoning classification, TU-1.

b. Transient tourist commercial zoning classification, TU-2.

(7) Industrial zoning classifications:

a. Planned business park zoning classification, PBP.

b. Planned industrial park zoning classification, PIP.

c. Light industrial zoning classification, IU.

d. Heavy industrial zoning classification, IU-1.

(8) Special zoning classifications:

a. Environmental area zoning classification, EA.

b. Government managed land zoning classification, GML.

c. Institutional zoning classification, IN.

(b) *Consistency of zoning classifications with comprehensive plan.* The 1988 county comprehensive plan establishes specific future land use designations, which are depicted on the future land use map within the future land use element. The future land use element also has policies and criteria which delineate how the various designations shall be applied. The zoning classifications depicted on the official zoning map of the county shall be consistent with the future land use map and the policies and criteria relating to the application of future land use designations on the future land use map.

(1) *Future land use designations.*

a. *Residential.* Residential uses include single-family detached, single-family attached, multiple-family, recreational vehicle park and mobile home developments.

1. Residential 30:

A. Maximum, unless otherwise provide herein: 30 units per acre.

B. Merritt Island redevelopment area: Development containing a mixture of uses: 50 units per acre per policy 1.3(B)(2) of the Future Land Use Element.

C. Redevelopment district: 37.5 units per acre per policies 1.3(B)(1) and 11.2(F) of the Future Land Use Element.

D. Planned unit development: 37.5 units per acre per policy 1.3(C) of the Future Land Use Element.

2. Residential 15:

A. Maximum, unless otherwise provide herein: 15 units per acre.

B. Redevelopment district: 18.75 units per acre per policy 11.2(F) of the Future Land Use Element.

C. Planned unit development: 18.75 units per acre per policy 1.4(E) of the Future Land Use Element.

3. Residential 10:

A. Maximum, unless otherwise provide herein: 10 units per acre.

B. Redevelopment district: 12.5 units per acre per policy 11.2(F) of the Future Land Use Element.

C. Planned unit development: 12.5 units per acre per policy 1.5(E) of the Future Land Use Element.

4. Residential 6:

A. Maximum, unless otherwise provide herein: 6 units per acre.

B. Redevelopment district: 7.5 units per acre per policy 11.2(F) of the Future Land Use Element.

C. Planned unit development: 7.5 units per acre per policy 1.6(D) of the Future Land Use Element.

5. Residential 4:

A. Maximum, unless otherwise provide herein: 4 units per acre.

B. Redevelopment district: 5 units per acre per policy 11.2(F) of the Future Land Use Element.

C. Planned unit development: 5 units per acre per policy 1.7(D) of the Future Land Use Element.

6. Residential 2:

A. Maximum, unless otherwise provide herein: 2 units per acre.

B. Redevelopment district: 2.5 units per acre per policy 11.2(F) of the Future Land Use Element.

C. Planned unit development: 2.5 units per acre per policy 1.8(D) of the Future Land Use Element.

7. Residential 1:
   A. Maximum, unless otherwise provide herein: 1 unit per acre.
   B. Redevelopment district: 1.25 units per acre per policy 11.2(F) of the Future Land Use Element.
   C. Planned unit development: 1.25 units per acre per policy 1.9(D) of the Future Land Use Element.
8. Residential 1:2.5: 1 unit per 2.5 acres.

b. *Neighborhood commercial.* Appropriate uses within the neighborhood commercial designation are specified in the Future Land Use Element. Residential densities shall be subject to the conditions set forth in the Future Land Use Element.

c. *Community commercial.* Appropriate uses within the community commercial designation are specified in the Future Land Use Element. Residential densities shall be subject to the conditions set forth in the Future Land Use Element.

d. *Planned industrial.* Appropriate uses within the planned industrial designation are specified in the Future Land Use Element.

e. *Heavy/light industrial.* Appropriate uses within the heavy/light industrial designation are specified in the Future Land Use Element.

f. *Agricultural.* Appropriate uses within the agricultural designation are specified in the Future Land Use Element. Residential densities shall not exceed one dwelling unit per five acres.

g. *Public facilities.* Appropriate uses within the public facilities designation are specified in the Future Land Use Element.

h. *Recreation.* Recreation uses include all public parks and recreational facilities.

i. *Public conservation.* Conservation land uses include lands under the ownership of the county, the St. Johns River Water Management District or other such agencies for the purpose of environmental protection and lands within the environmental area (EA) zoning classification. Residential densities shall not exceed one unit per 50 acres.

j. *Private conservation.* Conservation land uses include lands under private ownership and are zoned (EA) zoning classification. Residential densities shall not exceed one unit per ten acres.

k. *Developments of Regional Impact (DRI).* DRI land uses include lands that have an adopted Development Order pursuant to the requirements of Chapter 380, Florida Statutes, Chapters 9J-12 and 28-24 Florida Administrative Code and applicable local ordinances.

(2) *Consistency with future land use map.* The following table depicts where the various zoning classifications can be considered based upon the geographic delineation of future land uses on the future land use map and locational criteria defined in the policies of the future land use element of the 1988 county comprehensive plan. Where an application for a change of residential zoning classification is not consistent with the residential future land use map designation as depicted on the following table, the rezoning may be considered if the applicant limits the project to a density equal to or less than the maximum density threshold for the subject property.

EXHIBIT A. CONSISTENCY OF ZONING CLASSIFICATIONS WITH FUTURE LAND USE MAP SERIES

	Land Use Designations																
Zoning Classifications	Agric	Res 1:2.5	Res 1	Res 2	Res 4	Res 6	Res 10	Res 15	Res 30	NC	CC	PI	H/L	PUB	REC	PR CON	PUB CON

GU, PA, AGR, RRMH-5, PUD, RPUD, RVP	Y									Y*		N	N
AU, REU, RRMH-2.5	N	Y								Y*		N	N
ARR, RR-1, SEU, RRMH-1	N		Y							Y*		N	N
SR, TR-2	N			Y						Y*		N	N
EU, EU-1, EU-2, RU-1-13, RU-1-11, TR-1, RA-2-4, RU-2-4	N				Y					Y*		N	N
RU-1-7, RU-1-9, TR-1-A, TR-3, TRC-1, RU-2-6, RA-2-6	N					Y				Y*		N	N
RU-2-8, RA-2-8 RA-2-10, RU-2-10	N						Y			Y*		N	N
RU-2-12, RU-2-15	N							Y		Y*		N	N
RU-2-30	N								Y	Y*		N	N
BU-1-A, IN	Y**									Y**		N	N
RP	N				Y**					Y		N	N
BU-1, TU-1, TU-2	N									N	Y	N	N
BU-2	N									N	Y	Y**	N
PBP	N									N	Y	Y	N
PIP	N									N		Y	N

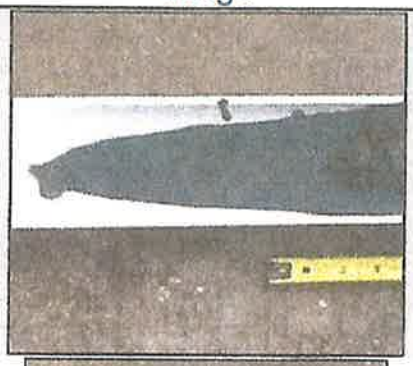
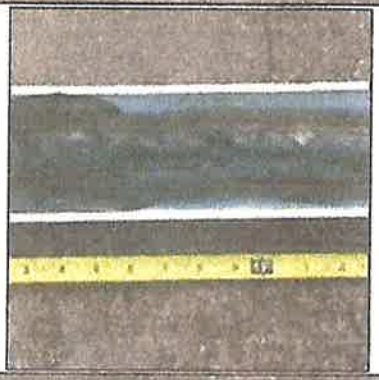
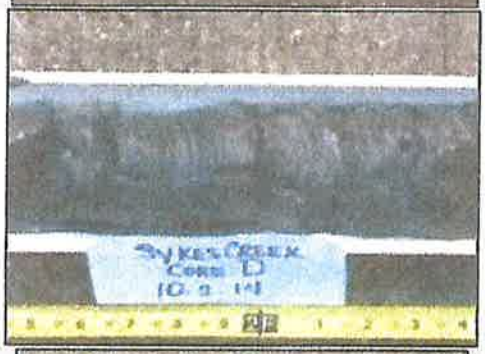
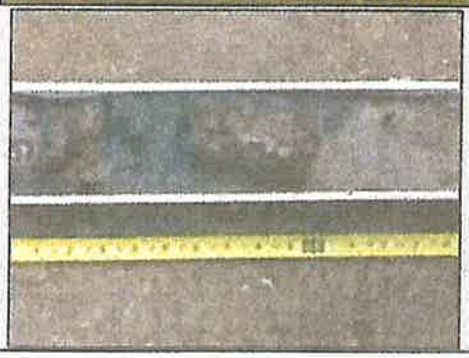
IU, IU-1	N	N	N	Y	N
EA, GML	Y	Y	Y		Y

Land Use Designations	
Agric—Agriculture	NC—Neighborhood Commercial
Res 1:2.5—Residential (one unit per 2.5 acres)	CC —Community Commercial
Res 1—Residential (one unit per acre)	PI—Planned Industrial
Res 2—Residential (two units per acre)	H/L—Heavy/Light Industrial
Res 4—Residential (four units per acre)	PUB—Public Facilities
Res 6—Residential (six units per acre)	REC—Recreation
Res 10—Residential (ten units per acre)	PR CON—Private Conservation
Res 15—Residential (fifteen units per acre)	PUB CON—Public Conservation
Res 30—Residential (thirty units per acre)	

Explanation of Symbols
Y—Yes, classification may be considered.
Y*—Yes, classification may be considered, if permitted by Policy 2.13 of the Future Land Use Element.
Y**—Yes, classification may be considered if use is transitional, per Policy 2.14 or if permitted by Policy 2.17 of the Future Land Use Element, as applicable.
N—No, classification may not be considered.

(Code 1979, § 14-20.07; Ord. No. 99-07, § 8, 1-28-99; Ord. No. 2000-38, § 1, 8-1-00; Ord. No. 2002-01, § 4, 1-8-02; Ord. No. 04-29, § 2, 8-5-04)

From 942 pg Dol docs

Core Length (ft.)	Image	Remarks
0.0'-0.3'		Black (Munsell 2.5Y 2.5/1), silt, wet, semi-formed, very soft, strong odor, no organics seen.
0.3'-0.5'		Black (Munsell 2.5Y 2.5/1), silt, wet, semi-formed, very soft, strong odor, no organics seen.
0.5'-1.8'		Very dark grayish brown (Munsell 2.5Y 3/2), clay, soft, slightly sticky, strong odor, no organics seen.
1.8'-2.0'		Black (Munsell 2.5YR 2.5/1), silty clay, firm, sticky, strong odor, no organics.
2.0'-4.5'		Very dark gray (Munsell 2.5Y 3/1), sand, medium-fine, few small shells, moderate odor. At 3.6'-3.8' there is a small pocket of organics.

7

FLORIDA DREDGE & DOCK LLC

LIST OF CURRENT CONTRACTS

for

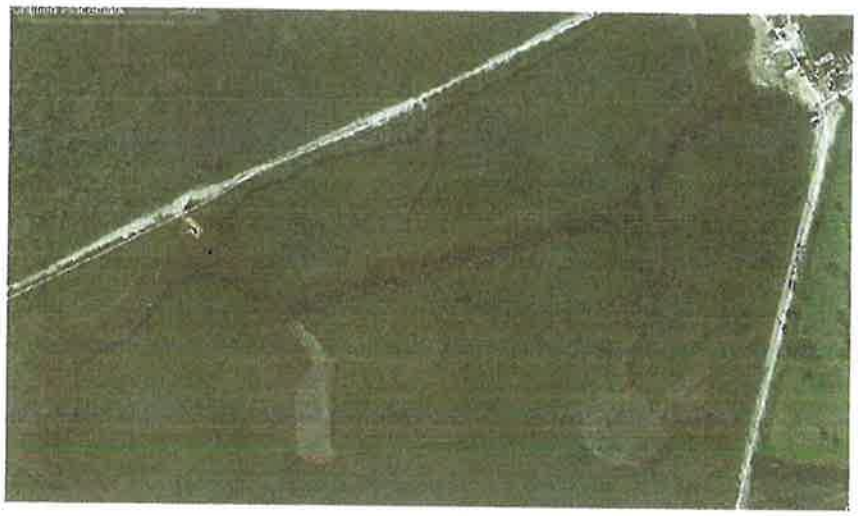
SYKES CREEK DREDGING MUCK REMOVAL PROJECT BID NO. 3-18-04

Project Name: Mims Boat Ramp Muck Dredging
Owner: Brevard County BOCC
Engineer: Kenneth Good
Contract Amount: $1,798,867.42
Percent Complete: 5%
Scheduled Completion Date: August 31th, 2018

Project Name: Dredging #2 Cooling Pond
Owner:PCS Phosphate, Aurora, NC
Engineer: T. Eston Herring
Contract Amount: $1,950,000.00
Percent Complete: 20%
Scheduled Completion Date: April 30th, 2018

Project Name: Eau Gallie River Restoration Project
Owner: St. Johns River Water Management District/Prime Contractor Blue Goose Const.
Engineer: Taylor Engineering Inc.
Contract Amount: $7,881,522.80
Percent Complete: 45%
Scheduled Completion Date: December 2018

Project Name: Dredging of phosphatic clays in the Four Corners F-2D Clay Settling Area Return Water Ditch
Owner: Mosaic LLC
Engineer: Jonathan Tugwell
Contract Amount: $386,630.00
Percent Complete: 90%
Scheduled Completion Date: December 2017



AFTER

Eau Gallie River Restoration
Project Location: Eau Gallie River, Melbourne, FL
Name of Owner: St. Johns River Water Management District
Engineer: Jon Armbruster – Taylor Engineering - jarmbruster@taylorengineering.com
Telephone Number: (904) 731-7040
Project Value: $7,881,522.80
Dates of Construction: May 2016 - Ongoing
This project consists of removing approximately 625,000 cubic yards of organic muck from the Eau Gallie River and Elbow Creek. Florida Dredge and Dock has been subcontracted by Blue Goose Construction and is responsible for the dredging portion of the project. The project is challenging in several ways. There are large open waterways that require a large dredge that can swing wide and move high volumes of material, while there are also narrow waterways and areas between docks and other structures that require a smaller swinging-ladder dredge. Additionally, the finished profile reflects the natural hard bottom. As such, the operator must be able to follow the contours of the bottom closely as they continuously vary. For this project we have utilized two dredges. Both have identical hypack software and hardware to accurately track the location of the cutterhead. We are able to share data between these two dredges so we know exactly where the dredge has been at all times.

8

RANKING SHEET for - PROPOSAL # P-3-18-04

Sykes Creek Ecosystem Restoration Dredging Project

MEETING DATE: January 17, 2018

Posting Date: 1/18/18 through 1/25/18 @ 5:00 p.m.

POSTED BY: Leslie Rothering - Purchasing

	NRMO	NRMO	Utilities	NRMO	Construction Mgr		
Proposers	**Mike McGarry**	**Matt Culver**	**Mark Reagan**	**Walker Dawson**	**Bruce Black**	TOTAL	RANK
	Selection Committee Member						
Central Sand	1	2	3	2	1	9	2
Florida Dredge & Dock	2	1	1	1	3	8	1
Gator Dredging	3	3	2	3	2	13	3

The Selection Committee completed the review and evaluation of the proposal submittals for the above referenced solicitation. The Purchasing Services Office hereby provides notification the ranking of firms based on the decision of the Selection Committee.

#1 Ranked Firm: Florida Dredge and Dock

Brevard County encourages prompt and fair handling of all complaints and disputes with the business community. Filing of any disputes and appeals shall be in accordance with procedures specified in bid documents.

SYKES CREEK ECOSYSTEM RESTORATION DREDGING PROJECT

TECHNICAL APPROACH REQUIREMENTS AND CONTRACTOR SELECTION CRITERIA

General

The Sykes Creek Ecosystem Restoration Dredging project entails dredging a maximum of 642,000 cubic yards of muck sediment (recently deposited fine-grained surface sediments), de-watering, and disposal of the muck. The initial contract value is not to exceed $18 million. The total project has been divided into zones, with different volumes of sediment targeted for dredging, as shown in the table below:

Approx. Dredge Volume Summary by Zones			
Zone	Sub-Zone	Volume (Cubic Yards)	
1			175,900
2			50,900
3			415,200
	3A	161,000	
	3B	165,000	
	3C	23,800	
	3D	9,700	
	3E	3,500	
	3F	5,700	
	3G	7,000	
	3H	5,300	
	3I	2,500	
	3J	31,700	
		Total:	642,000

The project requires hydraulic dredging only. The permit and state statutes identify standards for water discharged from the project to ambient waters. It does not include the use of flocculants and coagulants and does not permit offloading of dewatered muck from the island DMMA site. A successful project will require the use of flocculants/coagulants to meet contract-specified nutrient targets for water decanted from the muck and will require a method to periodically remove dewatered muck from the island identified in the permit for dredged material management. The Owner's engineer anticipates the Contractor will need to modify the existing environmental permit including but not limited to all other approvals (e.g. land use agreements, easements, rights of way, etc.) to obtain authorization for these activities.

The bidders for this project and the successful contractor have the sole responsibility to understand all permit terms and conditions. The proposed project means and methods should avoid environmental impacts in addition to those already permitted. Any additional (currently unpermitted) environmental impacts, proposed, planned, unanticipated, and associated mitigation for those additional impacts, are the sole responsibility of the selected contractor.

Dredged effluent nutrient removal is also required for this project. Nutrients, phosphorus and nitrogen, must be removed or reduced to concentration levels specified in the technical specifications. The County requests that bidders provide a nutrient removal lump sum price for phosphorus and three separate nitrogen concentration levels shown in the bid form. The lump sum price must include nutrient removal for

dewatering an equal volume of dredge material that is included in the cost proposal. Proposals will be evaluated on basis of unit price assigned to nitrogen level 2 concentration of 2000 ppb or less; however, the County has the right to require any of the three concentration levels under the construction contract.

CONTRACTOR SELECTION CRITERIA

The Owner will select the Contractor based on a grading system that scores proposals on bid price, unit price for the maximum dredge volume, and technical approach. The ranking system will be based on a maximum number of points (100). Bidders will receive 1 – 35 points of the available 100 points based on lowest Bulk Project Unit Price. Bidders will receive 0 – 65 points of the available 100 points for the Technical Approach sections. The total number of sections and possible ranking points for each section will be as follows.

Section	Potential Points
Low Bulk Project Unit Price	35
Technical Approach	
Dewatering of Dredged Material	20
Effluent Nutrient Removal	15
Offloading and Handling	10
Transport and Disposal	10
Dredging	5
Schedule	5
Total:	**100**

Low Bulk Project Unit Price

Bidders/proposers must provide cost proposal for the maximum number of zones and subzones that may be completed for a contract value not to exceed $18 million. Note that the zones must be bid sequentially in numerical order, starting with Zone 1, then proceeding to Zone 2 and so on. Zone 3 consists of 10 sub-zones (3A thru 3J) which must also be bid in sequential order (start at subzone 3A) and reflected accordingly in the cost proposal. The Contractor shall only include dredging zones (to be performed in sequential order) that can be accomplished within the contract value. Costs for the completion of partial zones will not be accepted. The Contractor must bid each zone entirely before proceeding to the next zone or sub-zone. The Contractor must be able to dredge all of the volume associated with each zone and sub-zones included in the Bid Form. The County/Owner will award the most Bulk Project Unit Price points to the bidder/proposer who can dredge the most zones (cubic yards) for the lowest Total Base Bid. Note that additional zones not included in the initial contract award may be negotiated with the successful Contractor and authorized under a future contract amendment. Proposals must include only one cost under the base bid for various mobilization and demobilization activities. However, the Owner makes no guarantee or other assurance that under this contract the successful bidder/proposer will be contracted to dredge more than the volumes included in the initial cost proposal.

The proposal shall be assigned points based on the following percentage of the low unit price:

100% Low Bulk Unit Price	35 points	170%	16 points
110%	33 points	180%	12 points
120%	30 points	190%	8 points
130%	28 points	200%	4 points
140%	26 points	220%	3 points
150%	24 points	240%	2 points
160%	20 points	260% or more	1 point

Technical Approach

Bidders will receive 0 – 65 of the available 100 points based on their technical approach. The technical approach section grades the individual bidders on the following:

1. Soundness of technical approach
2. Experience and proven track record of proposed technical approach
3. Qualifications and experience of Contractor and the Contractor's technical team
4. Experience of the Contractor with similar work
5. Ability to demonstrate that the technical approach can produce production rates that will allow the project to be completed within the project schedule

The Contractor shall divide his/her technical approach into sections as described below. The following sections describe some of the information the reviewer will consider when assess the technical approach. The bidder, however, is encouraged to add information and to elaborate on proposed methods not specifically mentioned herein that the bidder considers important to the work. The Contractor should demonstrate how he/she will balance the production rates of dredging, dewatering, nutrient removal, offloading, and transport to meet the project schedule.

For each of the sections listed below, technical approach methods based on past performance and on sound and proven engineering principles will generally be scored higher. Methods not backed up by sound engineering principles or not having a proven track record will be scored lower. When proprietary methods are proposed and the Contractor or sub-contractor cannot disclose engineering and other technical details for those methods, the Contractor should provide data collected by others to demonstrate successful past performance using those proprietary methods on similar projects. Proposed methods showing the following features would be awarded points as follows. The technical approach provided for each section has a page limitation. However, any additional supplementary information which demonstrates experience, laboratory data, references, or technical descriptions may be included in Appendices. The appendices will be reviewed and considered as part of the scoring for each section. The appendices must not exceed a total of 50 pages (single-sided).

Methods used on similar past projects with well documented successful results	Highest score
Methods using sound and proven engineer techniques	High score
Methods using many engineering assumptions and/or un-proven techniques	Low score
Proprietary methods with little or no documentation of successful past performance	Lowest score

Dewatering of Dredged Material (5-page limit)

The Contractor should provide a detailed description of the dewatering system with sketches, pictures and/or engineering drawings to display concepts and technical feasibility. The Contractor should provide calculations, test data, past performance data, and other information to provide assurance that the dewatering system will dewater the dredged material as planned at the production rates necessary to meet the project schedule. The Contractor should submit the qualifications of the engineering and environmental team demonstrating experience with similar projects.

Offloading and Handling (3-page limit)

The Contractor should provide detailed descriptions and schematic drawings of a material offloading and handling plan. This information should include proposed areas to be used for dredged material management and proposed area(s) used for material handling and offloading. Proposed offloading plan should include sketches of proposed structures such as sheet pile, bulkheads, ramps, docks, platforms, conveyor belts, etc. The Contractor should also show production rates, past experience and qualifications of technical team.

Transport and Disposal of Dredged Material (3-page limit)

The Contractor should provide information on the transport and final disposal of dredged material such as number and size of equipment, truck route, barge size, barge route, name of disposal facility, estimated production rate, experience, qualifications, etc. The Contractor shall provide a letter or correspondence from disposal facilities providing assurance they can accept the type and quantity of dredged material to be disposed of. Contractor shall comply with all applicable federal, state, and local permit requirements.

Effluent Nutrient Removal (5-page limit)

The Contractor should provide detailed descriptions, data, and schematic drawings of the nutrient removal system including the technical aspects, chemicals used, production rates, quality control testing plan, and proposed equipment. The Contractor should demonstrate past experience with similar materials and methods, and clear and precise laboratory testing showing the percentage of nutrient removal obtained using the proposed method. The Contractor should specifically describe how the proposed method would match varying production rates for dredging and the proven maximum and minimum treatment rates of the proposed system. The Contractor should submit the qualifications of the engineering and environmental team demonstrating experience with similar projects.

Dredging (3-page limit)

The Contractor shall describe the type of dredging, dredging equipment, likely dredge size, number and size of booster pumps, noise abatement methods, method of following the dredge template, means and methods of ensuring the dredge will stay within the dredging limits, pipeline type and estimated size, etc. The Contractor should demonstrate experience, track record, personal qualifications, similar work experience, and estimated production rates.

Schedule (1-page limit)

The contractor shall complete all construction activities and associated closeout (including invoicing) No later than December 31, 2022. Points shall be provided for processes that allow for expedited construction schedule.

RANKING EXAMPLE

Bidder	Bid Bulk Unit Price/Points Awarded	Dewatering of Dredged Material	Effluent Nutrient Removal	Offloading and Handling	Transport and Disposal	Dredging	Total Points	Rank
A	$42 / 35 Points	5	1	10	10	3	64	2
B	$55 / 28 Points	15	7	8	7	5	70	1
C	$76 / 12 Points	20	10	1	1	5	49	4
D	$101 / 2 Points	20	15	10	10	5	62	3

II C(1) 4/24/18

Brevard County Bid Protest Meeting

February 26, 2018

- PRESENTED ON BEHALF OF -

Central Sand, Inc.

Restoration Project P-3-18-04

KIMBERLY BONDER REZANKA, ESQ.
Cantwell & Goldman, P.A.
96 Willard Street, Suite 302
Cocoa, FL 32922

1

December 19, 2017

TO: BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS

RE: NOTICE REGARDING BID SUBMITTED BY FLORIDA DREDGE & DOCK LL FOR THE SYKES CREEK RESTORATION PROJECT **P-3-18-04**

FD&D's obligations to perform the scope of services set forth in this Proposal is expressly conditioned upon the following conditions:

1. FD&D will decline the use of the spoil area provided or suggested by Brevard County, and all spoil material will be discharged upon private lands owned or leased by FD&D (the "FD&D Spoil Lands"); and

2. FD&D must be successful in obtaining all necessary governmental approvals of every nature whatsoever from all federal, state, county, municipal or other governmental agencies having jurisdiction over the FD&D Spoil Lands and associated pipeline route to allow it to deposit the spoil material on said lands, failing which FD&D shall be relieved of all further obligations under this Proposal or any contract granted in connection therewith.

Sincerely,

William D. Fletcher Jr – Manager, Florida Dredge & Dock LLC

BREVARD County
BOARD OF COUNTY COMMISSIONERS

POLICY

TITLE: PROCUREMENT

NUMBER: BCC-25
AMENDS: May 26, 2015
APPROVED: December 15, 2015
ORIGINATOR: Purchasing Services
REVIEW: December 15, 2018

I. OBJECTIVE

To specify Board directives for procurement activities. The intent of this policy is to clearly identify the authority levels for approval, award and payment and provide accountability for procurements.

II. DEFINITIONS AND REFERENCES

A. **Bid:** A formal written and sealed response to a formal advertisement for specified requirements of $50,000 or above in value. (R)

B. **Open/Framework Purchase Order:** A purchase order under which a vendor agrees to provide goods or services to a purchaser on a demand or as needed basis; the purchase order generally establishes a maximum dollar limit, prices, terms, conditions, and the period covered, with no specified quantities; shipments are to be made as required by the purchaser. An open-end purchase order may be used as a release and encumbrance document to authorize an agency to order any predetermined amount from an open-end contract on an as-needed basis.

P. **Qualified Bidder or Proposer:** The best bidder or proposer who has the capability in all respects to fully perform the bid or RFP requirements, and has the financial stability, honesty, integrity, skill, business judgment, experience, facilities, and reliability necessary to assure good faith performance of the contract, as determined by reference to the Contractor's Qualification Statement, evaluations by County staff of the bidder or proposer or its subcontractors' past performance for the Board, and any other information required by Board policies and Administrative Orders.

III DIRECTIVES

K. Should the lowest formal bidder or quoter prove to be non-responsive to the bid specifications or non-qualified in any manner, such as financial stability, honesty, integrity, skill, business judgment, experience, facilities, and reliability, which are all necessary to insure good faith performance, the Purchasing Manager, in conjunction with the user agency recommendation, shall reject the bid or quote and award to the next lowest responsive and qualified bidder or quoter. Appropriate documentation will be maintained in the official record. Any bidder, with standing to protest such a rejection, shall be afforded the right to appear before the Board of County Commissioners, as per the protest procedures outlined in the Purchasing Manual. Formal reporting to the Board or County Manager, as applicable, of rejected bids or quotes will be made on an annual basis.

L. Should less than three formal bids or quotes be obtained, the County Manager the Purchasing Manager and user agency shall determine the reason for lack of competition and maintain documentation in the official record. Formal reporting to the Board or the County Manager, as applicable, will be made on an annual basis.

2

Licensing Regulation & Enforcement
2725 Judge Fran Jamieson Way
Building A, Room 114
Viera, Florida 32940

BOARD OF COUNTY COMMISSIONERS

September 25, 2015

Brad Blais
Quentin L Hampton Associates Inc
4401 Eastport Park Way
Port Orange, FL 32127

Dear Mr. Blais,

Our agency was contacted by Dale Morris of Central Sand Inc inquiring if dredging is a licensed regulated trade. Brevard County does not regulate this specific classification. Mr. Morris holds an Excavating Contractor's license. He certified as an Excavating Contractor on February 15, 2002 with Brevard County and his license is in good standing.

The trade definition of Excavating Contractor, defined in Brevard County Code of Ordinance Chapter 22, Article VI, Section 477, is as follows:

Excavating contractor means any person or firm qualified and certified by the board whose scope of work is to excavate or remove materials such as rock, gravel, and sand to construct or excavate canals, lakes, levees, including the clearing of land of surface debris and vegetation, the grubbing of roots, the removal of debris, and leveling of the surface lands incidental thereto.

It is our view Central Sand Inc has the qualifications to perform dredging.

Feel free to contact me if you have any questions or need additional information.

Sincere regards,

Denise Campagna, Manager
Brevard County Licensing Regulation and Enforcement
321-633-2058, ext. 52769

Brevard COUNTY
Central Services

Florida's Space Coast

CENTRAL SERVICES GROUP
PURCHASING SERVICES
Brevard County Government Center
2725 Judge Fran Jamieson Way,
Bldg. C, Suite C-303
Viera, FL 32940

Telephone (321) 617-7390
Fax (321) 617-7391

ADDENDUM 5
SYKES CREEK DREDGING MUCK REMOVAL PROJECT
PROPOSAL # P-3-18-04
December 13, 2017

TO ALL PROSPECTIVE PROPOSERS

This is an Addendum to and shall be considered as part of the original Proposal package for the above mentioned Proposal. Proposers are requested to acknowledge receipt of this Addendum with their submittal.

Q1: Does the County have "baseline" nutrient levels of dredge effluent from Sykes Creek, similar dredging projects, or studies where nutrients, specifically phosphorus and nitrogen are being removed? Please provide the data.

Response: The County does not have baseline dredge effluent nutrient information for the Sykes Creek Project area. Attached for reference is dredge effluent nutrient information acquired during the Turkey Creek Dredging project. This information was gathered by the Florida Institute of Technology (Dr. John Trefry et al.) and presented to Brevard County as project status update in July 2016. This information is for reference only and may not be indicative of the conditions at the Sykes Creek project area. Those effluent conditions result from various processes employed by the contractor that may include, among other actions, addition of chemical amendments.

If so, have the nutrients been reduced to levels near what is required by the county for the Sykes Creek Muck Removal? If so please provide the means and methods. ie chemical treatment, polymer and dosage rates, non chemical, etc.....

Response: The recently completed Turkey Creek Dredging Project had the same phosphorus removal requirements required here. That project consistently met those requirements. Nitrogen removal was not a requirement of that project.

The injected polymer/chemical mix used for phosphorus treatment at the Turkey Creek Project was a proprietary blend used by the project contractor and is not available for distribution.

Q2: I'd like for the county to confirm that the liquidated damages for this project are based on F.D.O.T. Road and Bridge construction to the tune of $4,698 per day for a project budget of 15,000,000.00 but less than 20,000,000.00 (Section 8-10.2 of F.D.O.T. Standard Specifications for Road and Bridge Construction). This project shares zero similarities with road and or bridge construction. Will the county amend the liquidated damages to better reflect the scope of work and take into account the nutrient removal requirements as a somewhat new technology on a project of this scale?

Response: The liquidated damages are as stated in the bid and contract documents. The liquidated damages are to be applied should the project not be completed by the designated

completion date of January 2023. Delays or temporary project shut-downs related to non-compliance with the nutrient removal requirements (Section 35 23 20 Dredge Effluent Nutrient Removal) will not be subject to the liquidated damages provision, unless such delays are long-term and result in the project not meeting the completion date requirement.

Separate calculations specifying the penalties for noncompliance with the Nitrogen and Phosphorus nutrient removal requirements over a rolling average timeframe are included in Section 01 29 00, Measurement and Payment.

Q3: Pursuant to Questions 20 and 27 of Addendum No. 4 dated 12-1-2017, definitions of temporary use appears to restrict contractors to minimal use of the Kiwanis Park staging area in the parking lot. Does this temporary use include offloading of dewatered sediment from barges throughout the entire contract period? Also does it include dewatering and nutrient removal materials staging, construction trailers, and loading equipment storage?

Response: In this instance the phrase "temporary use" refers to work intervals of 4-5 months, intervals may be reoccurring over the project period and must meet requirements of the Brevard County Parks Department. Use of Kiwanis Park does not presently include offloading of dewatered sediment from barges. Given the volume of dewatered sediment this project will generate, the county considers offloading dewatered sediment a regular, frequent activity not within allowable uses of Kiwanis Park. Appropriate uses do include the temporary staging of pipeline and heavy equipment, along with temporary dewatering and nutrient removal materials staging. Long-term equipment storage is not an acceptable use of the site. The park will be available for the staging of a construction trailer for the project duration. All materials and equipment stored at the site must be fenced. This is a busy park site with frequent children's sports activities and events on weekends. The use of heavy equipment within the park on Saturdays and Sundays will be limited.

If this is not authorized at Kiwanis Park, where has the County designated for these activities?

Response: Kiwanis Island is available for Contractors use for duration of project. Otherwise, the contractor is solely responsible for the identification of an appropriate area or areas for long-term storage and execution of activities that will occur on a regular and/or frequent basis.

Q4: Please be more specific as it relates to contractor licensing requirements for this project. As I understand dredging is not a regulated trade in Brevard County but any other work that is regulated will require special contractor licensing?

Response: The contractor, or their sub, must meet all Federal, State and Local contracting and licensing requirements as required to implement all components of the project. Contact Brevard County Licensing Regulation and Enforcement, (321) 633-2058, with specific licensing questions.

Q5: Where should the contractor include the cost of transporting and disposing of the dredged material? The cost proposal form has no line item for either.

Response: The bid form has been revised to include a line item for Transport and Disposal of Dredged Material, which will be paid on a Lump Sum basis. See line item 23 on the bid form.

Q6: If the work is completed earlier than December 31 2022, will Brevard County allow this from a funding standpoint? Do you have the funds in place to accelerate payment?

Response: The full project funding is presently available. The Technical Approach instructions indicate that points shall be provided for processes that allow for an expedited construction schedule.

Please note the Bid due date and time **remains December 20, 2017 no later than 2:00 p.m.**

END OF ADDENDUM 5

Sincerely,

Leslie Rothering
Purchasing Services

Attachments: Water and Sediment Quality in Palm Bay DMMA Powerpoint
Revised Bid Form

Brevard County Code of Ordinances, Chapter 22, Article VI, Section 477

Sec. 22-477. - Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

***

Excavating contractor means any person or firm qualified and certified by the board whose scope of work is to excavate or remove materials such as rock, gravel, and sand to construct or excavate canals, lakes, levees, including the clearing of land of surface debris and vegetation, the grubbing of roots, the removal of debris, and leveling of the surface lands incidental thereto.

***

Marine contractor I means any person or firm qualified and certified by the board to perform any work involving the construction, repair, alteration, extension and excavation for docks, seawalls, bulkheads, piers, wharfs, boatlifts and other marine structures, including pile driving, wood framing, and roofing in conjunction with the erection of wood structures being constructed consistent with the marine work that is being done. This wood structure is not to be used for habitation or office space. He may do such concrete work as may be necessary and incidental to his work in compliance with the building code and other applicable codes and regulations.

***

Marine contractor II means any person or firm qualified and certified by the board to perform any work involving the construction, repair, alteration, extension and excavation for docks, seawalls, bulkheads, piers, wharfs, boat lifts and other marine structures, including pile driving. He may do such concrete work as may be necessary and incidental to his work in compliance with the building code and other applicable codes and regulations.

SECTION 01 11 00

SUMMARY OF WORK

PART 1 GENERAL

1.01 WORK COVERED BY CONTRACT DOCUMENTS

A. Project Description

1. This project generally entails hydraulic or mechanical muck dredging within Sykes Creek, located just north of the East Merritt Island Causeway and West of Cocoa Beach, in Brevard County, Florida. The work includes specialized dewatering of the dredged slurry and nutrient removal of the effluent.

2. The major categories of work include, but are not limited to, the following:

   a. Hydraulically or mechanically dredging muck

   b. Designing, constructing, and implementing a dewatering facility and nutrient removal system

   c. Providing transport and disposal of dredged material into a licensed landfill or other authorized facility

   d. Restoring the dewatering facility to a condition commensurate with the technical specifications

B. Schedule

1. Contractor must complete all work by the date or number of days specified in the Contract.

PART 2 PRODUCTS (NOT APPLICABLE)

PART 3 EXECUTION (NOT APPLICABLE)

-- End of Section --

3

Space Coast Airport Business Center, Inc.

6855 Tico Road

Titusville, Florida 32780

December 18, 2017

Attention: Brevard County Board of County Commissioners,

Let this letter confirm that Dale L. Morris is the owner of Central Sand, Inc. and the Space Coast Airport Business Center, Inc. the property owner of the described Central Sand dredged spoils recycled facility site located on Grissom Pkwy, in the drawing's provided by Central Sand, Inc for the RFP proposal # P-3-18-04, the "Sykes Creek Dredging and Muck Removal Project. I authorize the disposal of the estimated dredge spoils (muck) of 640,000 yards to the property identified by Brevard County Tax Parcel Id # 24-35- 12-00-1

Regards,

Dale L. Morris

Dale L. Morris

President

Community Services Department
Planning & Zoning Division
65 Stone Street I Cocoa, FL 32922
Phone: (321) 433-8535 I Fax: (321) 433-8543

November 13, 2017

Ms. Lori L. Morris, Director and
Mr. Dale L. Morris, Director
Space Coast Airport Business Center, Inc.
4756 Merlot Drive
Rockledge, Florida 32955

RE: Proposed Industrial Project - Grissom Parkway
Tax Account # 2404106; Parcel ID 24-35-12-00-1

Dear Ms. & Mr. Morris:

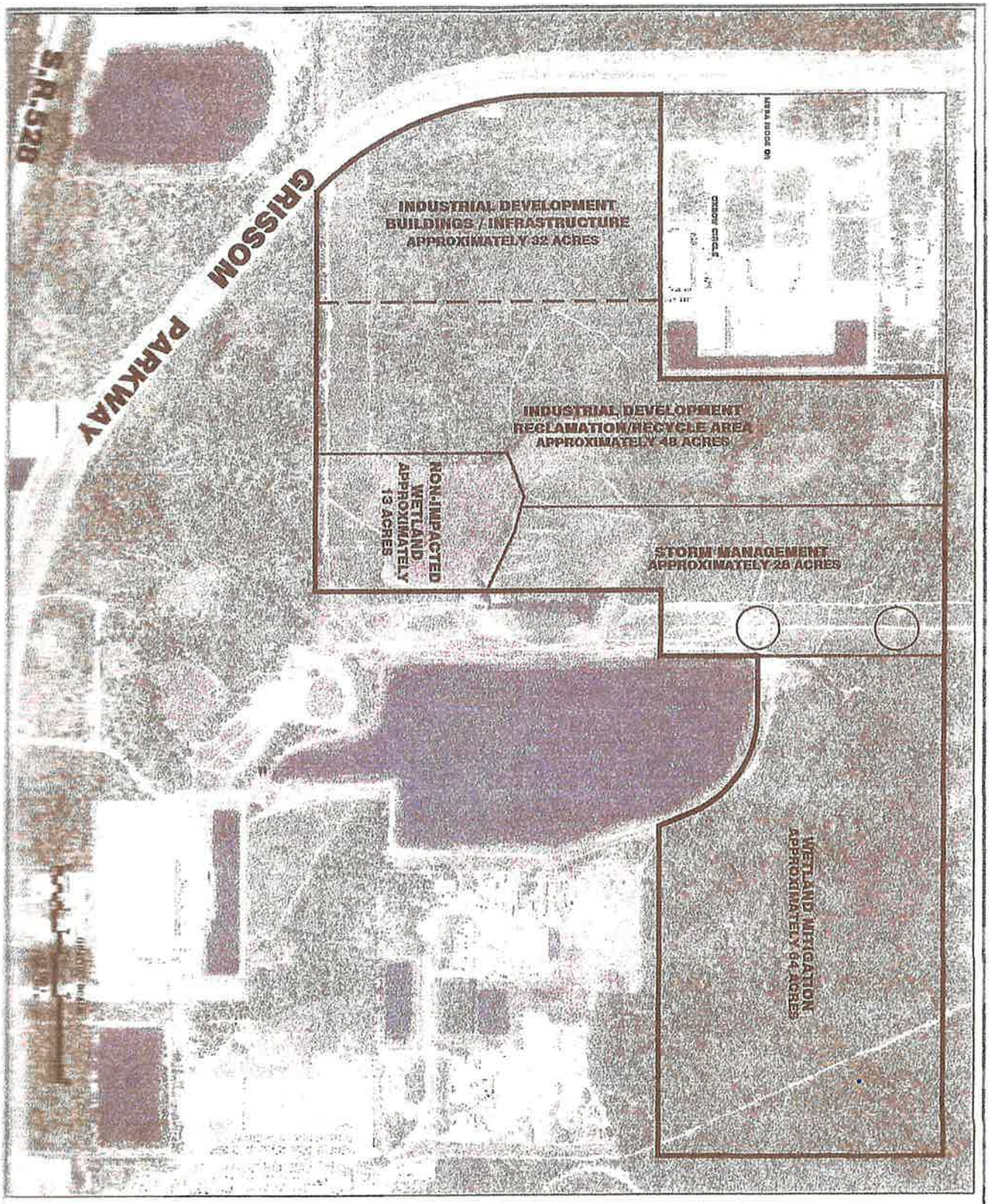
Please find as attachment A, a copy of your Proposed Development Plan of the property located on Grissom Parkway. We have reviewed the Proposed Development Plan and find that the proposed uses as shown on the plan are acceptable to the City of Cocoa.

A formal site plan meeting the City of Cocoa's regulations will need to be submitted and approved prior to the start of construction. You are also responsible for other governmental agency permits as are necessary for construction.

Yours Truly,

Cindy Thurman

Cindy Thurman,
Planning & Zoning Manager



PROPOSED DEVELOPMENT PLAN

GRISSOM PARKWAY DEVELOPMENT PLAN

FOR

CENTRAL SAND INC.

BREVARD COUNTY FLORIDA

Honeycutt & Associates, Inc.

ENGINEERS • SURVEYORS • PLANNERS

3700 South Washington Avenue
Titusville, Florida 32780
(321) 267-0233 Fax (321) 269-7847
Certificate of Authorization EB-0007025

DATE

DATE

Honeycutt & Associates, Inc.
ENGINEERS • SURVEYORS • PLANNERS
3700 S. Washington Avenue, Titusville FL 32780
email : mail@honeycutt.cc Phone : 321-267-6233 Fax : 321-269-7847

September 28, 2017

City of Cocoa
Planning and Zoning Department
65 Stone Street
Cocoa, Florida 32922

ATTN: Ms. Cindy Thurman

RE: Proposed Industrial Project
Located on Grissom Road

Dear Ms. Thurman:

Space Coast Airport Business Center, Incorporated is proposing to develop a 185+/- acre site located south and east of Grissom Ridge Industrial Park on Grissom Parkway in the City of Cocoa. A description of the proposed uses are shown on the attached conceptual plan and described below.

The proposed development will include an industrial building and development area fronting on Grissom Parkway of 32+/- acres and a reclamation/recycling area of 48+/- acres. The site will also include a stormwater management basin of 28+/- acres and an area of approximately 64 acres for mitigating wetlands impacted by the above uses. There are several acres of the site encumbered by a high voltage power line and there are some wetlands in the development area that will remain undisturbed.

The development area fronting on Grissom Parkway is planned for multiple structures and related infrastructure including warehousing, offices and other industrial uses. A spec building is planned in the future for lease or sale to attract industrial users. In the meantime, this area will be listed for sale to attract industrial users similar to those in the adjacent Grissom Ridge Industrial Park.

The area east of the industrial building development area is planned for recycling and reclamation of concrete, dredge spoils, bio-solids and other recyclable materials. The area will include stockpiling of materials, materials for sale and materials for future use by the owner. An industrial building will be constructed in this area in the first phase of development.

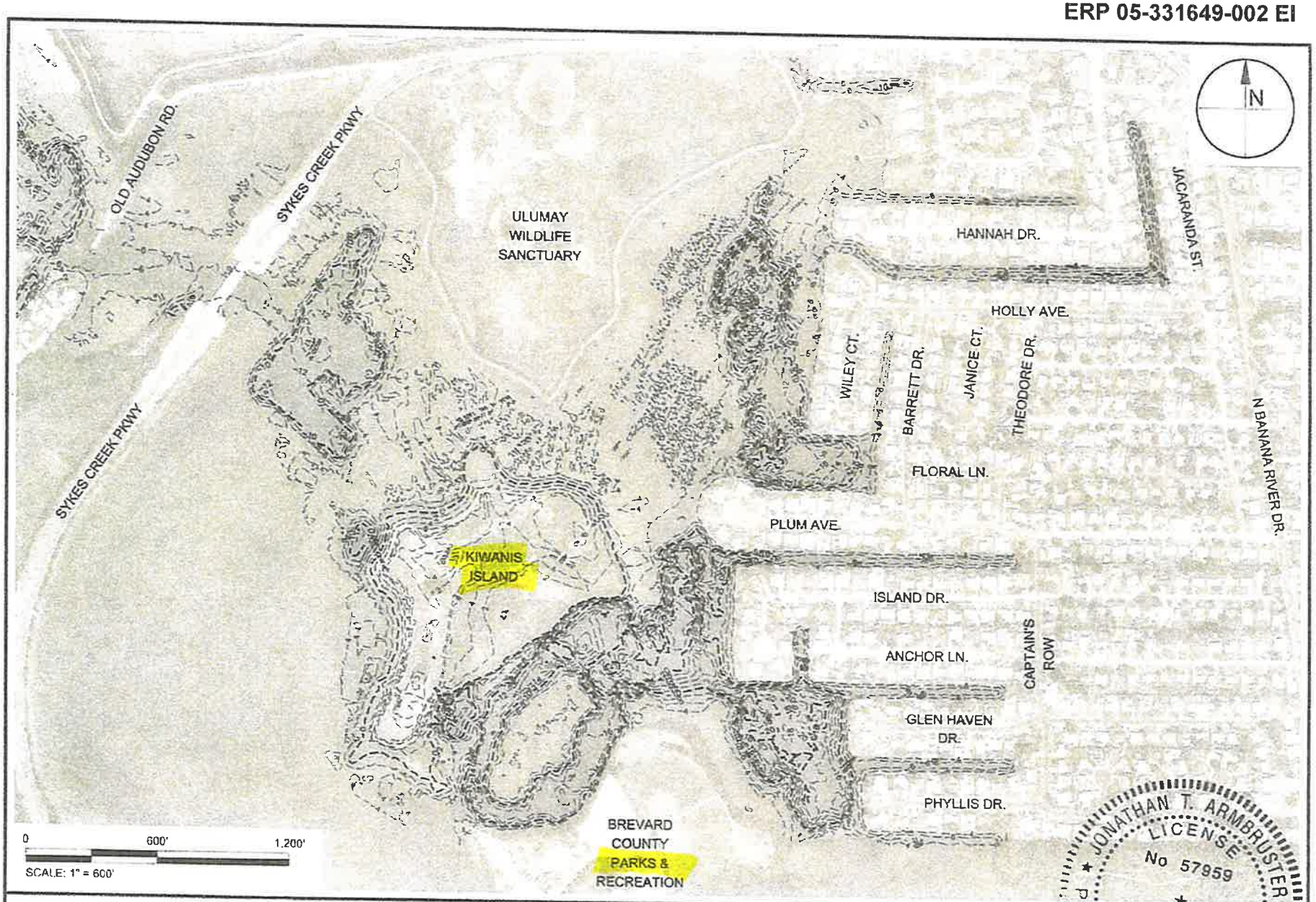
Space Coast Airport Business Center, Inc. looks forward to developing this site in the City of Cocoa and is requesting that the City provide a letter that acknowledges the proposed uses described above are allowed on this site as it is currently zoned. The time and effort provided by staff to assist in moving this project forward is greatly appreciated.

Yours Truly,

Rodney M Honeycutt, PE
President

cc: Space Coast Airport Business Center, Inc

4



TAYLOR ENGINEERING INC.
10151 DEERWOOD PARK BLVD.
BLDG. 300, SUITE 300
JACKSONVILLE, FL 32256
CERTIFICATE OF AUTHORIZATION # 4815

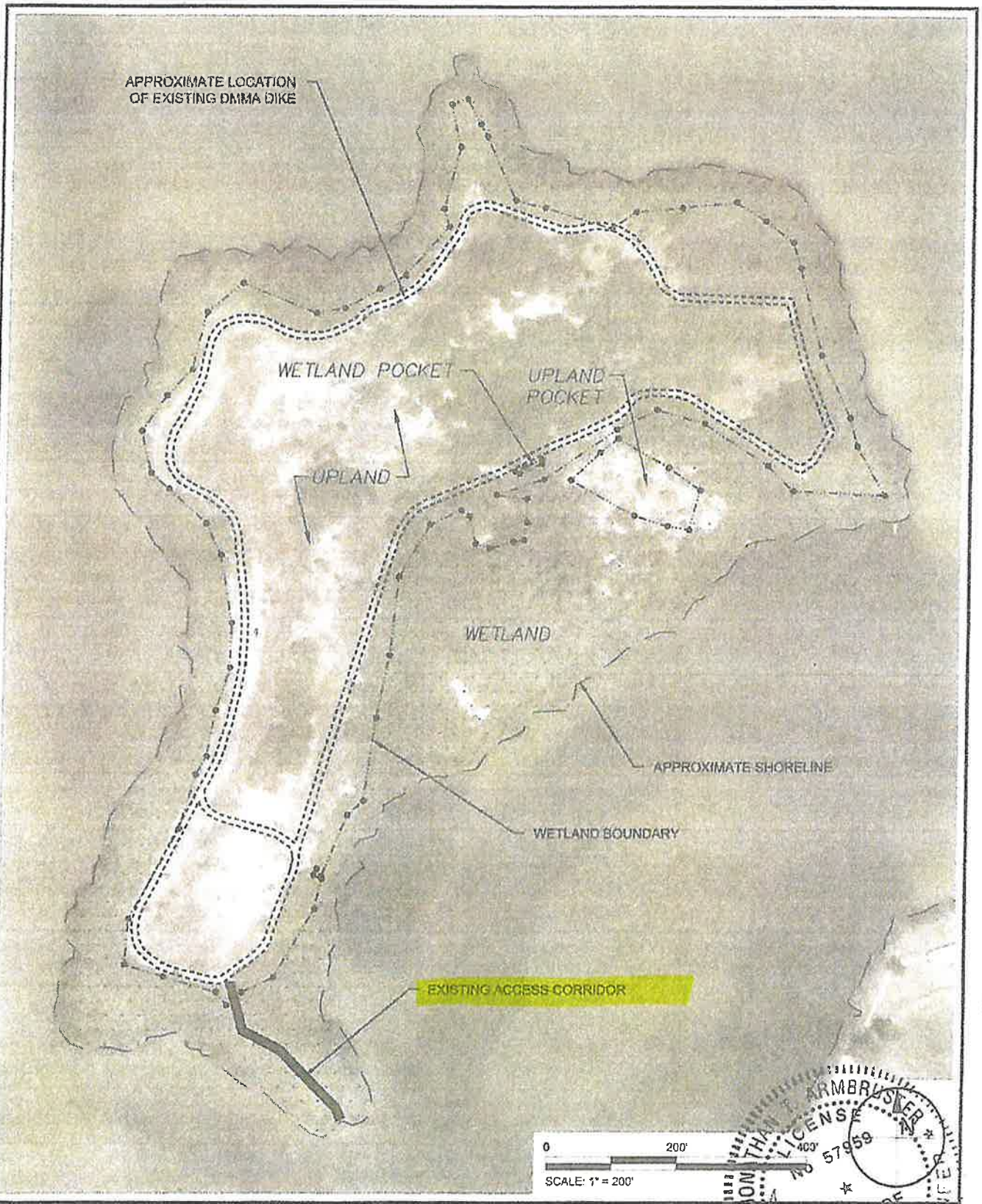
FIGURE 7
EXISTING BATHYMETRY - EAST
SYKES CREEK DREDGING PROJECT
BREVARD COUNTY, FLORIDA

PROJECT	
DRAWN BY	
SHEET	7 of 30
DATE	

JONATHAN T. ARMBRUSTER
LICENSE
No 57959
PROFESSIONAL ENGINEER
STATE OF FLORIDA
DATE 1/6/2016

PRELIMINARY DRAWINGS: THESE DRAWINGS ARE NOT IN FINAL FORM, BUT ARE BEING TRANSMITTED FOR AGENCY REVIEW.

REBECCA.JOHNSON X:\SYS\PROJECTS\2014\0531-SYKES CREEK PERMITTING\2014 05 SP-BATHY.DWG 3/31/2016 9:26:17 AM



TAYLOR ENGINEERING INC.
10151 DEERWOOD PARK BLVD.
BLDG. 300, SUITE 300
JACKSONVILLE, FL 32256
CERTIFICATE OF AUTHORIZATION # 4815

FIGURE 20
KIWANIS ISLAND WETLAND LINE
SYKES CREEK DREDGING PROJECT
BREVARD COUNTY, FLORIDA

PROJECT	DRAWN BY	SHEET	DATE
C2014-068	RLJ	20 of 30	MARCH 2016

JONATHAN THARMBRUSTER LICENSE NO. 57959 STATE OF FLORIDA PROFESSIONAL ENGINEER
SEAL
DATE

PRELIMINARY DRAWINGS: THESE DRAWINGS ARE NOT IN FINAL FORM, BUT ARE BEING TRANSMITTED FOR AGENCY REVIEW.

5

TRANSPORT AND DISPOSAL OF DREDGED MATERIAL

For

SYKES CREEK ECOSYSTEM RESTORATION DREDGING PROJECT

INTRODUCTION

Florida Dredge & Dock (FDD) proposes to make no use of the Kiwanis Island DMMA site and instead use a parcel of land that has been secured by the contractor (see below).

The parcel of land is located approximately 7.3 miles North of Zone 1. Total acreage for this property is approximately 125 acres. FDD estimates we will need 65 acres to construct a DMMA capable of containing all the dredged material for the Sykes Creek project without the need for rapid dewatering or trucking offsite at multiple intervals during the project. Because FDD will purchase the parcel the dredged material can remain indefinitely. It is the intention of FDD for the material to remain at the DMMA.

PIPELINE ROUTE

The pipeline route will start in Zone 1 and will go generally North-Westward, under the Sykes Creek Parkway bridge. Just North of the bridge will be our first floating booster pump. The pipeline will be weighted to the bottom in the deeper sections of Sykes Creek, travel under 528, and out to the barge canal. The pipeline will go East in the barge canal until it gets to Canal Spoil Bank Rd, which is a county-controlled dirt road with no public access. Here the pipeline will turn Northward again, and a second floating booster pump will be installed. The pipeline will continue along this road until it gets to East Hall Road. The third booster pump will be at this intersection. The pipeline will travel Westward along E Hall Rd. until it reached the George Hamilton Trail. At this point there are two possible routes depending on permitting. The first option would be to follow an in-water route within the confines

OFFLOADING AND HANDLING

For

SYKES CREEK ECOSYSTEM RESTORATION DREDGING PROJECT

As stated previously in this proposal, Florida Dredge & Dock (FDD) does not intend to use the Kiwanis Island spoil site at all. Instead, FDD has proposed to use an alternate parcel located to the North of the Sykes Creek project.

Upon being selected the successful bidder for this project, FDD will complete the purchase of this parcel and permit it to be used as the DMMA (Dredged Material Management Area).

In the Sykes Creek Technical Specs Package, Section 3.07 SITE RESTORATION AND FINAL CLEANUP, it states:

"Should the Contractor utilize a site owned by his/herself, the site shall be restored at Contractors discretion"

Therefore, it is FDDs intention to store the dredged material indefinitely.

- Habitat Characterization
- Listed Species Surveys
- State/Federal Permitting

Seagrass is a concern for the pipeline route as it makes its way from Zone 1 up through the barge channel. A route will need to be chosen that makes use of the deeper sections and avoids seagrass in the shallower sections in the most efficient way possible. Once the pipeline route turns North past the barge canal, mangroves become a greater concern for portions of the route that remain in waterways and areas where the pipeline leaves the water and travels over land. However, during our visual inspection of the route it was clear that if any transitions needed to be made from water to land and vice versa there are areas of Brazilian pepper that could be removed without impact to nearby mangroves. Beyond these concerns, the use of established waterways versus dry land for traversing the pipeline will be largely decided by whichever means is more efficient and easier to permit. If need arises, Florida Dredge & Dock has experience in wetland rehabilitation (see Riverview NRDA Restoration Project, under "Construction Experience" in the bid package).

As previously stated, the property owned by Florida Dredge & Dock that is the proposed DMMA is roughly 125 acres. An environmental assessment will be required to ascertain what portion of this is usable for the DMMA, and what portion is designated wetland. In order to get a rough estimation, we looked at the 1999 image from Google Earth of the proposed DMMA. See below.

In 1999, a large portion of this property was orange groves. A safe assumption is that oranges would not grow in wetlands. The border in red is the property line. The green border is an approximation of the area covered by oranges in 1999. The area in green is 67.0 acres. As stated before, we estimate we would need 65 acres to completely contain the dredged material. Therefore, regarding wetlands we are confident the proposed DMMA site will be acceptable. For any other hurdles that may arise in permitting this project, FDD has full confidence in Stantec's ability.

KENT RUNNELLS, P.A.
ATTORNEY AT LAW

1040 MAIN STREET, SUITE C
SAFETY HARBOR, FL 34695
VOICE (727) 726-2928 • FAX (727) 231-1197

December 20, 2017

Board of County Commissioners of Brevard County
Brevard County Government Center
2725 Fran Jamieson Way, Building C
Viera, FL 32940

Re: Sykes Creek Dredging Muck Removal Project: RFP No. P-3-18-04 (the "Project")

Honorable Commissioners:

This office represents Florida Dredge and Dock, LLC, ("FD&D") a party that has submitted a proposal ("Proposal") for the completion of the Project. As you know, the Project will require a spoil area to accept the approximately 642,000 cubic yards of material that will be removed in the dredging process. FD&D would note that although the RFP provides that the BOCC will provide a suitable spoil area for the Project, FD&D's proposal is based upon not using the spoil area proposed by the BOCC. Instead, FD&D has made its proposal based upon the use of private lands to accept the spoil material, as this allow a more cost effective manner in which to complete the Project.

The purpose of this letter is to advise you that FD&D currently is under binding, enforceable contracts to purchase real property consisting of over 125 acres situated very near the Project site. This property is sufficient in size and suitable in location to accommodate the spoil material produced by the Project. You will please note that their Proposal specifically references their innovative approach to completing the Project with these alternative lands. If granted the Project they will move forward with obtaining all governmental consents to allow the use of these lands to complete the Project, and will close on these lands at the appropriate time.

Please feel free to contact me if I may be of further assistance.

Sincerely,

Kent Runnells

cc: Don Fletcher, FD&D

6

QLH FLORIDA CERTIFICATE OF AUTHORIZATION NO 26730 P.O. BOX 280247, PORT ORANGE, FL 32129-0247	BREVARD STATE OF FLORIDA	WEST CRISAFULLI STORMWATER IMPROVEMENTS PROJECT No. BC22	CONCEPTUAL PLAN C DRAWN BY: ADK	DAVID A. KING, P.E. FLORIDA REGISTRATION #50509	SHEET No. 1 OF 1

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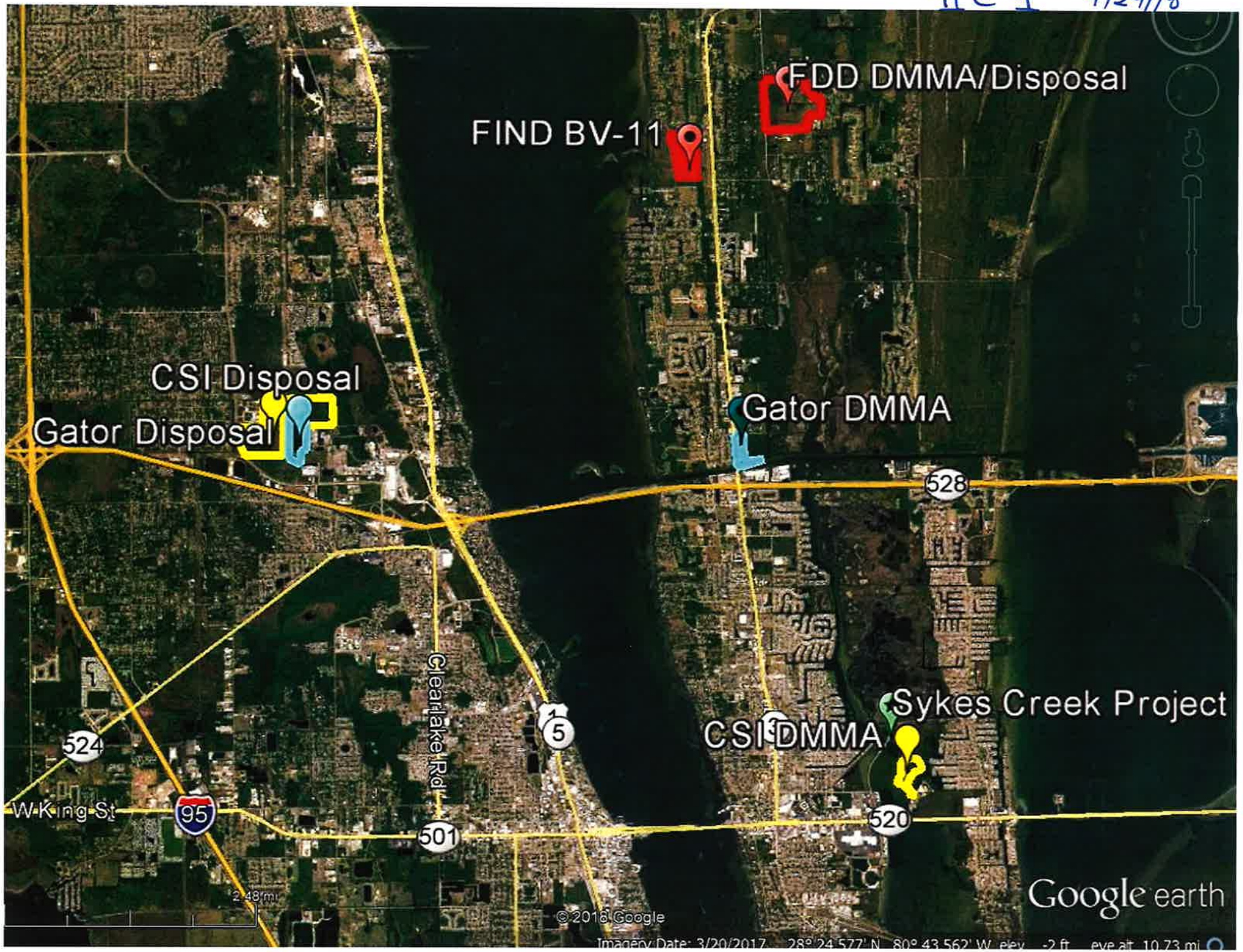
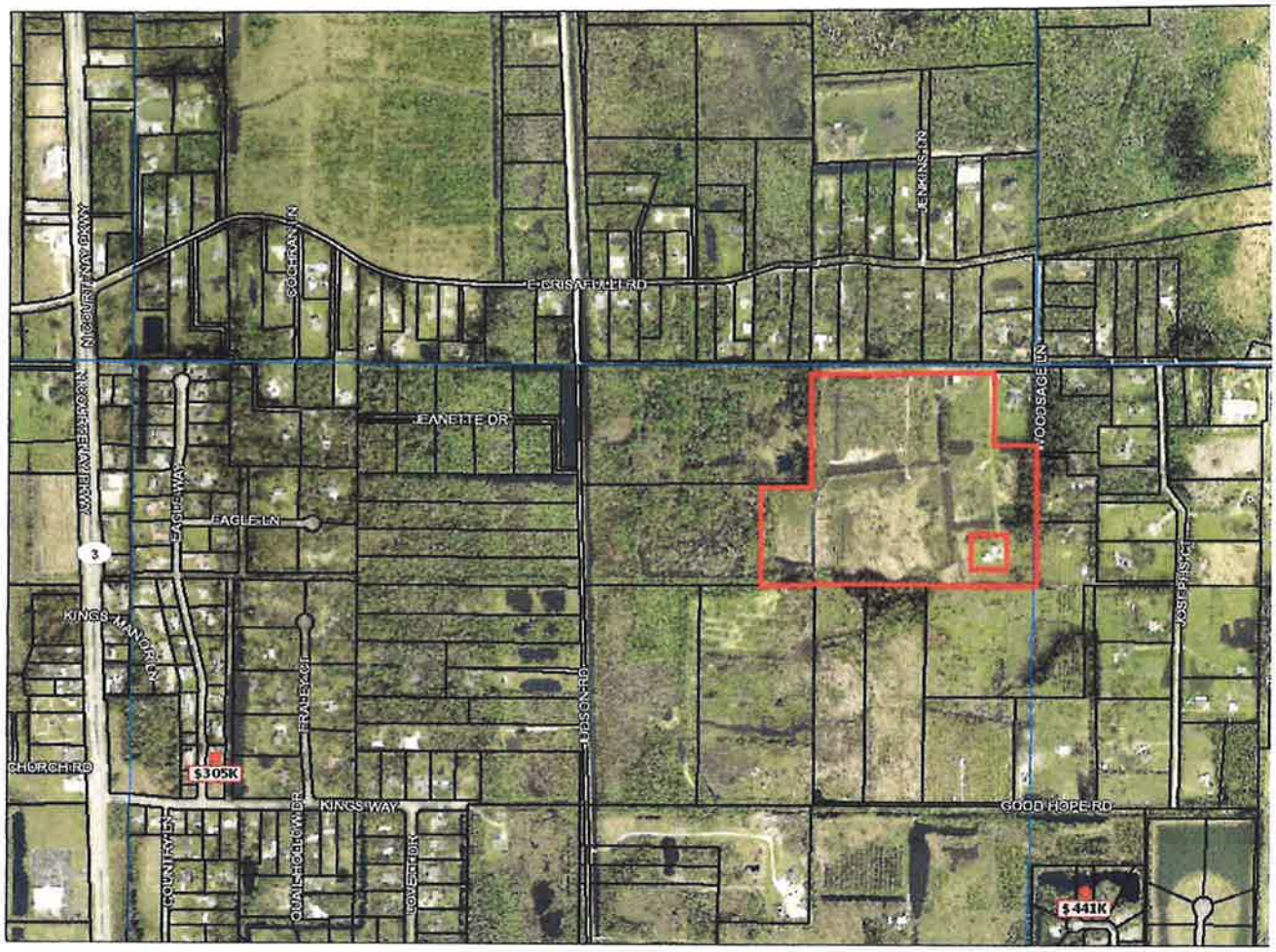
8/24/18


FDD DMMA/Disposal
FIND BV-11
CSI Disposal
Gator Disposal
Gator DMMA
528
Clearlake Rd
5
524
CSI DMMA
Sykes Creek Project
W King St
95
501
520
2.48 mi
© 2018 Google
Imagery Date: 3/20/2017 28° 24' 57.77" N 80° 43' 56.21" W elev -2 ft eye alt 10.73 mi
Google earth

II A(1) 4/24/18
John Chanson's presentation

Brevard County Property Appraiser



April 24, 2018