

**BROWARD COUNTY
BOARD OF COUNTY COMMISSIONERS**

S. DAVIS & ASSOCIATES, P.A.,

Petitioner,

v.

RE: RFP 2112554P2

BROWARD COUNTY,

External Audit Services

Respondent.

FINAL ORDER

THIS MATTER came before the Hearing Officer Christopher Narducci, for an evidentiary hearing on September 22, 2017 and continued on September 27, 2017, on Petitioner S. Davis & Associates, P.A.'s Appeal of the Purchasing Director's July 25, 2017 denial of Petitioner's Protest relative to Broward County's Solicitation No.: R2112554P2 for External Audit Services. Based on the record, including the testimony of witnesses and the exhibits entered into evidence, considering the argument of counsel, and being otherwise fully advised in the premises, the undersigned makes the following findings of fact and conclusions of law.

S. Davis & Associates was represented at hearing by:

Shutts & Bowen, LLP
Joseph M. Goldstein, Esq.
200 East Broward Boulevard, Suite 2100
Fort Lauderdale, Florida 33301

Intervenor RSM US LLP was represented at hearing by:

Becker & Poliakoff
Mark J. Stempler, Esq.
625 North Flagler Drive, Seventh Floor
West Palm Beach, Florida 33401

The County was represented at hearing by:

Daphne Jones, Assistant County Attorney
Neil Sharma, Assistant County Attorney
115 South Andrews Avenue, Suite 423
Fort Lauderdale, Florida 33301

FINDINGS OF FACT

1. Request for Proposals R2112554PS (the "RFP") was issued on or about March 31, 2017.
2. The RFP sought an external auditor to perform financial and compliance audits and render opinions on the financial statements and accounts of the County for fiscal years ending September 30, 2017, 2018, 2019, 2020 and 2021.
3. Broward County (the "County") created an Audit Committee consistent with Florida Statutes section 218.391, which served as the Evaluation Committee ("EC") for this RFP.
4. In response to the RFP, the County received four submittals, from RSM US LLP ("RSM"); BCA Watson Rice LLP; Cherry Bekaert LLP; and S. Davis & Associates ("Davis").
5. In accordance with Section (A) of the Standard Instructions for Vendors section of the RFP, and Section 21.83(d) of the Broward County Procurement Code ("Code"), the EC must determine whether a vendor is responsive to the RFP.
6. In accordance with Section (B) of the Standard Instructions for Vendors section of the RFP, the EC must determine whether a vendor is responsible in accordance with the RFP.

7. As part of the "responsibility criteria," the RFP required vendors to submit its "Litigation History," as set forth in Section B(1) of the RFP. The RFP states that failure to disclose any material case, or to provide all requested information in connection with each such case, "may" result in a Vendor being deemed non-responsive (emphasis added).

8. Further, Section 21.41(a) of the Code states that the unreasonable failure of an offeror to supply information in connection with an inquiry into responsibility "may" be grounds for a determination of non-responsibility of a proposer (emphasis added).

9. Neither the RFP, nor the Code, require the EC to determine a proposer is non-responsive or non-responsive for failing to disclose litigation history in accordance with an RFP.

10. On May 30, 2017, the EC convened to evaluate and rank the proposers. The EC was specifically instructed that it was to determine whether proposers were responsive and responsible. The EC determined all four proposers were both responsive and responsible.

11. The EC scored and ranked the firms in the following order:

- | | |
|-------------------------|----------------------------|
| i. RSM | 476.85 points |
| ii. Davis | 445.05 points |
| iii. Cherry Bekaert LLP | 437.50 points |
| iv. BCA Watson Rice LLP | 376.00 points ¹ |

All five EC members ranked RSM first, and ahead of every other proposer, based on weighted evaluation criteria focused on the qualifications of the proposers.

¹ Davis was originally ranked third. After the evaluation, staff recognized it failed to correctly include points for the location of the firms. Five additional scoring points for principal place of business were subsequently added to Davis's score per evaluator. The additional 25 points increased its score to 445.05 points, which allowed it to jump the originally second-ranked proposer Cherry Bekaert LLP, which had 437.50 total points. The first-ranked vendor, RSM, with 476.85 total points remained the first-ranked vendor.

12. On June 20, 2017, Davis filed a protest. Among its allegations were that RSM did not disclose in the Litigation History section of its proposal two out-of-state lawsuits pending against RSM. The Complaints filed in the respective lawsuits were attached to the protest.

13. On June 26, 2017, the Purchasing Division asked RSM to address the two lawsuits identified by Davis.

14. On June 29, 2017, RSM responded to the Purchasing Division's request with a letter explaining the two lawsuits identified by Davis, and by providing additional information about the cases including motions and affidavits filed by RSM attacking the allegations in each lawsuit. In its response, RSM explained that it had believed these cases were immaterial to its response to the RFP because the cases did not involve auditing services for a governmental agency, did not involve anyone from the government auditing division of RSM, and did not involve any RSM personnel that would be providing services for County. Further, RSM had never been involved in any litigation related to the audits of government agencies, nor had any of the proposed personnel for this RFP.

15. Section 21.84(g) of the Code provides that if new significant information is provided to the Purchasing Director, the Purchasing Director shall present such information to the EC for consideration in order to either ratify the ranking/evaluation or to reorder the list.² In accordance with that Code provision, on July 10, 2017 the Purchasing Director provided Davis's protest, along with RSM's response to the two litigation matters identified, to the EC members and advised them and all proposers that the EC would reconvene to consider the new information.

² Neither section 21.84(g) nor section 21.118(a) of the Code provides the opportunity for the reconvened EC to reconsider the issue of responsiveness.

16. On July 19, 2017, the EC reconvened to evaluate the new information and its effect, if any, on the ranking of proposers. During the reconvened EC meeting, the EC posed a question to Glenn Miller from the County Attorney's Office, who explained a change in the County Attorney's Office review of all vendor litigation history which went into effect before proposals for this RFP were received and before the EC conducted its initial evaluation. At the reconvened EC meeting, Assistant County Attorney Glenn Miller read to the EC in its entirety an April 17, 2017 memorandum from the County Attorney to the Board of County Commissioners, which explained this change in procedure. Mr. Miller concluded his response by stating:

"...it's still not the obligation of the County Attorney's Office to really determine what materiality is... You have the discretion to deem somebody non responsible for their litigation. I have a responsibility to defend that decision and all I can say is that in order for us to be able to defend a decision of the EC it cannot be arbitrary and arbitrary means there must be a fact basis wit[sic] decision you're going to make today."

17. The EC also sought further explanation from RSM, and a representative from RSM provided a response similar to its written response to the Purchasing Division sent June 29, 2017.

18. Following consideration of the new information, and the answers in response to the questions posed by the EC, the EC unanimously ratified the initial ranking with RSM remaining as the top-ranked proposer. During that EC meeting, EC member Kathie-Ann Ulett stated on the record that the fact that the pending lawsuits had not been adjudicated factored into her analysis.³

³ At the time of the reconvened EC meeting, RSM had contested the allegations in both lawsuits by filing a Motion to Dismiss in each lawsuit. At the outset of the protest appeal hearing, a Stipulation was submitted by the parties indicating that one of the lawsuits at issue had since been dismissed with prejudice. In the other lawsuit, the Motion to Dismiss had not been adjudicated, but had been withdraw by RSM by order of the Court without prejudice, pending discovery on the issue privity.

19. On July 25, 2017, the Purchasing Director denied Davis's protest and thoroughly described the bases for doing so.

20. On August 3, 2017, Davis appealed the Purchasing Director's denial of the protest.

21. The appeal was based on several different grounds, but at the outset of the appeal hearing Davis stated it was only challenging RSM's failure to disclose its litigation history and was withdrawing all other allegations.

22. Shaun Davis, as corporate representative of Davis, testified that he understood the requirements of the RFP as it relates to litigation history and that he believed RSM's failure to disclose the two cases in question was a misrepresentation on the part of RSM.

23. Brenda Billingsley, Director of Purchasing for County testified that pursuant to the Code, any allegations of misconduct or misrepresentation on the part of a competing vendor would not be considered a protest but rather would be reviewed in County's sole discretion for the purposes of evaluating the vendor, pursuant to Section 21.118 of the Code, which was done in this case. Ms. Billingsley testified that whether material cases had been disclosed or not disclosed, the EC has discretion to determine whether the vendor is responsive and responsible. Ms. Billingsley testified that the County's procedures in handling new information and this protest were consistent with prior solicitations and protests.

24. EC member Kathie-Ann Ulett, who holds an MBA degree and is a Certified Public Accountant, testified that before the initial EC meeting, she and the other members of the EC were provided a copy of the RFP as well as all proposals, which she reviewed thoroughly. Ms. Ulett testified as to her reasoning behind her initial ranking and why she

believed RSM to be the top-ranked proposer for this RFP, and more qualified than Davis.

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25. In addition, Ms. Ulett testified that she received all materials from Ms. Billingsley's July 10, 2017 memorandum, performed a comprehensive review of the information, and understood what the new information was before the reconvened EC meeting. Ms. Ulett also considered the explanation provided by Glenn Miller, and the statements made by RSM's representative, at the reconvened EC meeting. Ms. Ulett confirmed her following statement which she made at the reconvened EC meeting:

"I want to make a statement. Based on the legal interpretation and based on our Broward County. The cases that were disclosed were not in Broward County. They have not been adjudicated and they were not relevant to government auditing. I believe that it is not material for the purposes of this RFP and therefore I don't know if at this time I can say RSM continues to be responsible and I recommend keeping the ranking as RSM number one and S. Davis as number 2."

During the protest appeal hearing, Ms. Ulett further explained that statement and testified that at the reconvened meeting she wanted to clarify if it was appropriate at that time to make the statement that she determined that RSM was still responsible after considering the new information provided. Upon clarification from the purchasing division of the options outlined per Code section 21.84(g), Ms. Ulett made a motion to ratify the firms, which was unanimously approved by the EC.

26. Ms. Ulett understood the claims against RSM but did not believe the lawsuits rendered RSM non-responsible. Ms. Ulett testified that even if these cases had been disclosed before the initial EC meeting, Ms. Ulett would not have changed her ranking of RSM as the top-ranked proposer. After being read the definition of a responsible bidder,⁵

⁴ Pursuant to a Stipulation by the parties, Ms. Ulett (along with EC member Helena James-Rendleman who was not called by any party to testify) was to testify to avoid the repetitiveness and inefficiency of having all five EC members testify.

⁵ "An offeror who has the capability in all respects to fully perform the contract requirements, and the

Ms. Ulett testified that given all information she had received, she had no doubt that RSM is a responsible bidder.

27. Former County Commissioner Ilene Lieberman testified as both an expert and a fact witness on behalf of Davis. Commissioner Lieberman is being paid by Davis to testify, at a rate of \$400 per hour. In addition, Commissioner Lieberman was also hired to serve as a lobbyist for Davis, and has already engaged in lobbying activities on behalf of Davis in conjunction with this RFP and protest, including meeting with at least one County Commissioner.

28. Commissioner Lieberman has not been a Broward County Commissioner since 2012, was not involved with the drafting of this RFP, and was not involved with the County's evaluation of the proposals. She did not know what information the EC members had read or actually considered in any part of their evaluation of proposers.

29. Further, at the time she was a commissioner, Litigation History was a matter of responsiveness, not responsibility as it is now. Similarly, changes to the Litigation History evaluation that are in effect now were not in existence when she was a commissioner. Commissioner Lieberman also testified that in her opinion, it was important for the EC to evaluate lawsuits against a proposer pursuant to the Litigation History sections of RFPs.

CONCLUSIONS OF LAW

30. In accordance with Section 21.120 of the Code, it is the Hearing Officer's responsibility to uphold or reverse the July 25, 2017 decision of the Purchasing Director. The scope of the review is limited as follows:

"the hearing officer shall only determine whether procedural due

integrity and reliability which will assure good faith performance." Code Section 21.8b.64

process has been afforded, whether essential requirements of law have been observed, and whether the Director of Purchasing's findings are arbitrary, capricious, or an abuse of discretion, or whether such findings are in accordance with the law or are unsupported by substantial evidence as a whole."

31. All procedural matters outlined in the Code for any protest and appeal were followed, and Davis was permitted to present all of its witnesses and exhibits. As such, procedural due process has been afforded to Davis in this appeal process.

32. In the context of a public procurement in Florida, a public agency has wide discretion in soliciting and selecting bids, and when based on an honest exercise of discretion, will not be overturned even if it may appear erroneous and even if reasonable persons may disagree. Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982). As a result of this wide discretion, the Florida Supreme Court has declared that a hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly. See Dep't of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988). This threshold for a bidder challenging the public agency's decision has been described as a "very high bar." See Sutran Corp. v. Lake County Water Authority, 870 So. 2d 930 (Fla. 5th DCA 2004). Further, the County is also entitled to wide deference with respect to constructing its own rules and requirements. See State Contracting and Eng'g Corporation v. Dep't of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1988).

33. An arbitrary decision is one not supported by facts or logic. See Board of Clinical Laboratory Personnel v. Florida Ass'n of Blood Banks, 721 So. 2d 317 (Fla. 1st DCA 1998). A capricious action is one taken without thought or reason or irrationally. See Agrico Chemical Co. v. Dep't of Env't'l. Regulation, 365 So. 2d 759 (Fla. 1st DCA 1978). Arbitrary and capricious has also been defined to include acts taken with improper motive,

without reason, or for a reason which is merely pretextual. See City of Sweetwater v. Solo Constr. Corp., 823 So. 2d 798 (Fla. 3d DCA 2002).

34. Additionally, it is also well established that a hearing officer sits in a review capacity, and not to sit as a substitute for the public agency and to determine whether to award the bid de novo. See Inter Continental Properties, Inc. v. State Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3d DCA 1992).

35. In this matter, the Purchasing Director's denial of Davis's protest was not arbitrary, capricious, or an abuse of discretion. Further, the Purchasing Director acted in accordance with law and her decision is supported by substantial evidence as a whole. The EC did not act arbitrarily or capriciously given all of the information they were provided prior the reconvened EC meeting. The EC's unanimous decision was supported by facts and logic and was made after a thorough review and thoughtful discussion at the reconvened meeting.

36. Pursuant to Section 21.118 of the Code, "protests arising from the decisions and votes of Selection and Evaluation Committees shall be limited to protests based upon alleged deviation(s) from established Committee procedures set forth in this Code and existing Broward County written Guidelines." Based on the facts, the County has not deviated from established procedures or guidelines.

37. First, the RFP specifications that pertain to litigation history state a proposer's "failure to disclose any material case, or to provide all requested information in connection with each such case, may result in the Vendor being deemed non-responsive" (emphasis added). Further, Section 21.41(a) of the Code provides that if a proposer unreasonably fails to supply information in connection with an inquiry may be grounds for a determination of non-responsibility. These provisions

are clearly permissive and give the County discretion in determining whether a vendor is non-responsive or non-responsible based on an alleged or actual failure to disclose litigation history. It is within the wide discretion of the EC to make determinations of responsibility and responsiveness, and the EC is not required to find a proposer non-responsive or non-responsible even if it fails to disclose its litigation history. Further, while the parties dispute the materiality of the cases at issue, even if the cases were to be deemed material, the EC and the County still have discretion to find RSM responsible and responsive. In this case, it was within the EC's discretion to find RSM responsible and responsive.

38. Second, to the extent Davis relied on alleged misrepresentations by RSM, a competing vendor, that reliance was misplaced. Section 21.118 of the Code specifically and clearly states that such an allegation is not a proper protest ground. There is a mechanism in the same provision of the Code to address such allegations. Section 21.118 states that such allegations of misrepresentations will be reviewed by the County, **and in its sole discretion**, can be used for evaluating "the responsibility or qualifications of the vendor" (emphasis added).⁶

39. This underlies the third basis for concluding the County did not deviate from its established procedure or guidelines. In this regard the County has acted in strict accordance with 21.118. It reviewed Davis's allegations of misrepresentation against RSM, and immediately used them to evaluate RSM's responsibility and qualifications. The County, under section 21.84(g) of the Code, provided those allegations, including the Complaints filed in the two out-of-state lawsuits at issue,

⁶ Section 21.118 of the Code only references the evaluation of "responsibility or qualifications" of the vendor and does not reference responsiveness.

along with RSM's response to same that included additional information about the two out-of-state lawsuits, to the EC for its review. The County then reconvened the EC at an open, public, and noticed meeting, and provided the EC the opportunity to ask any additional questions about the new information identified by Davis. The EC did take that opportunity to ask additional questions and received answers to them. After considering all of the information, the EC ratified the ranking of RSM as the top-ranked proposer, all in accordance with the RFP, Code and guidelines.

40. The reevaluation of RSM also renders Davis's allegations in this regard moot, because the County and the EC have considered all the information Davis alleges was misrepresented or omitted. RSM gained no unfair advantage in this evaluation.

41. The County's change in litigation history evaluation procedure in April, 2017 was in accordance with and did not violate or alter the RFP specifications. Further, this change was in place before proposals were submitted or evaluated.

42. The Purchasing Director's denial of Davis's protest was based on a reasonable reliance on the actions and determinations of the EC, and based on the County and EC's strict adherence with the RFP specifications, the Code and established procedures and guidelines.

43. Although Davis criticizes the EC and the County's handling of the litigation history evaluation, its decisions, and in turn the Purchasing Director's denial of the protest, is afforded wide discretion. The County's interpretation of the litigation history requirements, and its procedures and guidelines is entitled to "great weight." See State Contracting and Eng'g, 709 So. 2d 607.

44. Davis has not proven any facts to suggest that the Purchasing Director

or the EC acted in an arbitrary and capricious manner, or outside the law.

45. Subsection 21.120(a)(7) of the Procurement Code provides, in part, that the County is entitled to "payment of all costs and fees, excluding attorney's fees unless allowed for in this Subsection, incurred by the County in the appeal and which shall be included in the final order if the hearing officer denies the appeal." If the hearing officer determines the County's arguments are meritorious, the County is seeking payment of all of its costs and fees. At this time the County does not have any taxable costs and fees.

46. Based on the foregoing, it is the decision of the undersigned Hearing Officer that the July 25, 2017 decision of the Purchasing Director denying Davis's protest was in accordance with the law, and is hereby upheld. Costs and fees shall be awarded pursuant to Code subsection 21.120(a)(7).

DONE AND ORDERED this 28 day of September, 2017 in Fort Lauderdale,
Broward County, Florida.


Christopher Narducci, Hearing Officer

Copies Furnished to:

Shutts & Bowen, LLP
Joseph M. Goldstein
200 East Broward Boulevard, Suite 2100
Fort Lauderdale, Florida 33301

Becker & Poliakoff
Mark J. Stempler, Esq.
625 North Flagler Drive, Seventh Floor
West Palm Beach, Florida 33401

Daphne Jones, Assistant County Attorney
Neil Sharma, Assistant County Attorney
115 South Andrews Avenue, Suite 423
Fort Lauderdale, Florida 33301